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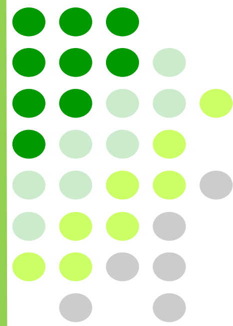
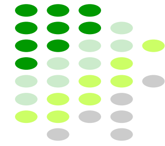


Premiums & Problems

Article Edition Nr. 124

January 2022



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Contributions and enquires are welcomed and must be sent to:

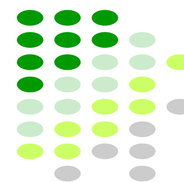
The Editor
Premiums & Problems
Personal Finance (Legal)
Old Mutual, 1st Floor, E Block
PO Box 66
Cape Town
8000

Editors

Soré Cloete: CFP® BCom LLB H Dip Tax
Carl Muller: CFP® LLB, LLM (Tax Law), Adv PG Dip in Fin Plan
Samantha Starling: CFP® LLB, Adv PG Dip in Fin Plan
Tristan Naidoo: CFP® LLB Adv PG Dip in Fin Plan

Design & Layout

Fazlin Tambay



Premiums & Problems Literary Award

The recipients of the

Premiums & Problems Article Edition Literary Award

for **2022** are

Natalie Dillon-van Acker

For her contribution entitled

Important Considerations for GEPF members approaching retirement

and

Nevetha Maharaj

For her contribution entitled

Has democracy failed a spouse in a customary or religious marriage?

A look at whether true equality under South Africa's marriage laws is possible

In reaching their decision, the judges have taken into account the technical correctness, how informative the article is, learning potential for the reader, method and effectiveness of transfer of relevant information, originality, practical applicability and potential for marketing opportunities.

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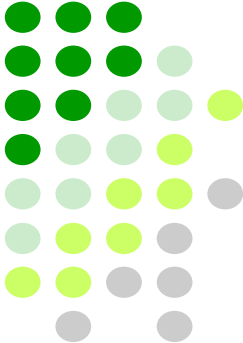

Estate Planning

Testamentary Trusts simplified

CJ Le Roux CFP®

LLB, LLM, Adv. PG Dip in Fin. Plan

Legal Advisor Specialist

Personal Finance: Free State

Daleen Harris CFP®

B.Iur, LLB, Adv. PG Dip in Fin. Plan, LLM, Dip Insolvency, Fiduciary Practitioner.

Legal Advisor Advanced

Personal Finance: Northern Region

Introduction

There is a well know saying by Jackie Joyner-Kersee that states, "*It is better to look ahead and prepare than to look back and regret*". This has never been truer than in the context of estate planning and the use of testamentary trusts.

One of the most important documents that a person will set up and sign in their life is a will.

Testamentary trusts are often used in estate planning for various reasons, a few of which are listed below:

- ☐ To hold property for the benefit of minors and other persons who are incapable of managing their own affairs;
- ☐ Protection for heirs/beneficiaries against creditors;
- ☐ Protection for heirs/beneficiaries against their own conduct;
- ☐ Possibly achieving a better tax structure;
- ☐ Obviating the creation of an estate that is too complex for the surviving spouse to manage;
- ☐ For holding property such as farms or mineral rights which cannot be held in undivided shares.[1]

Whatever the reason, the application of a testamentary trust is an integral part of estate planning and is used on a regular basis by estate planners.

The use of a testamentary trust as an estate planning tool can however be hazardous and fraught with pitfalls. It is therefore pertinent to prepare the clauses in the will that relate to the testamentary trust with accuracy to avoid this from happening.

This article will focus on testamentary trusts and related issues that advisers needs to consider when using a testamentary trust in a holistic estate plan.

What is a testamentary trust?

A trust is defined in section1 of the Trust Property Control Act[2] as an arrangement by which the ownership in property of one person is, by way of a trust instrument (e.g. the will of a person), made over to another person/s (the trustee/s) to be administered or disposed of for the benefit of the person or class of persons (the beneficiaries) as stipulated in the trust instrument.

[1] PA Olivier, S Strydom, GPJ van den Berg, Trust Law and Practice at 8-5 (Service Issue 5 2017)
[2] Act No 57 of 1998

There is more than one way to create a trust in South Africa. One of these methods is to create a trust in a will, the so-called trust *mortis causa*. A testamentary trust is created during a testator's lifetime in his/her will, but only become effective on his/her death[3]. This is because the testator has the right to revoke or amend the will at any time whilst still alive[4]. The testator bequeaths assets to the trustees of the trust instructing the trustees to control and administer these assets for the benefit of the beneficiaries as nominated in the will.[5] The trust becomes irrevocable after the testator dies[6].

There are essential elements of a testamentary trust at the moment of creation[7] in the will that need to be adhered to.

The moment a testamentary trust comes into being

In practice it is important to understand when a testamentary trust comes into effect, as there are different views on this topic.

One view is that a testamentary trust comes into effect once the trustees receive the trust property or acquire a valid claim thereto[8]. Another view, which is more widely accepted, is that the trust comes into effect at the death of the testator. This view is also supported by *S Strydom et al* for the following reasons:

- ☐ *all* beneficiaries *who stand to benefit under the will of the testator must be alive and in existence at the moment of death;*
- ☐ *a* disposition *under a will is valid only if the bequeathed asset and the beneficiary are properly defined*[9]*;*
- ☐ *the testator bequeaths assets to the trustees for the benefit of named or ascertainable* beneficiaries *when a testamentary trust is created;*
- ☐ *the trustee requires a rightful claim against the executor from the date of death for the transfer of the* bequeathed *assets, to enable such trustee to administer the trust;*

[3] PA Olivier, S Strydom, GPJ van den Berg, Trust Law and Practice at 2-5 (Service Issue 5 2017)
[4] The testator can revoke or amend his will at any time provided he adheres to the formalities for the execution of valid wills. Theses formalities falls beyond the scope of this article and will not be discussed.
[5] DM Davis, C Beneke & RD Jooste, Estate Planning at 5-6(6A) (Service Issue 51 2018)
[6] PA Olivier, S Strydom, GPJ van den Berg, Trust Law and Practice at 2-5 (Service Issue 5 2017)
[7] PA Olivier, S Strydom, GPJ van den Berg, Trust Law and Practice at 2-13 (Service Issue 5 2017)
[8] PA Olivier, S Strydom, GPJ van den Berg, Trust Law and Practice at 2-6 (Service Issue 5 2017)
[9] If a beneficiary is not clearly identifiable, the bequest cannot be implemented.

- ☐ *a bequest upon a trust in a testament will have the effect that someone has a rightful claim to the trust property as from the date of death*[10].

From an income tax perspective, it is important to know when the trust comes into effect as income earned after date of death could either be taxed in the hands of the executor, the trust itself or the relevant beneficiary. The second viewpoint makes more sense as this would allow a trustee to participate in the practical issues of administering an estate.

Amending a testamentary trust

The drafting of wills should be treated with utmost care and not as a mere clinical document where certain standard clauses are added and deleted as part of a copy-and-paste exercise. Most testators do not have the knowledge to evaluate the testamentary trust clauses and in some instances, the will is drafted in isolation without any preceding financial or estate planning done. Many testamentary trusts continue for decades after the demise of the testator. Therefore, the needs, expectations and circumstances of the beneficiaries can be different from what the testator could reasonably have anticipated[11].

When dealing with a testamentary trust, the last will and testament is regarded as the trust deed[12]. The trustees and beneficiaries can thus not amend the terms of a testamentary trust without the court's permission[13].

If a trust instrument contains any provision which brings about consequences which, in the opinion of the court, the founder of a trust did not contemplate or foresee and which –
(a) hamper the achievement of the objects of the founder; or
(b) prejudice the interest of beneficiaries; or
(c) are in conflict with the public interest,
the court has a common law power and may, on application in terms of section 13 of the Trust Property Control Act[14], allow the amendment of a trust deed. An example of such order would be where a particular trust property is substituted with another property, or where an order is made for termination of the trust.

[10] PA Olivier, S Strydom, GPJ van den Berg, Trust Law and Practice at 2-7&8 (Service Issue 5 2017)
[11] E Nel: The Testamentary Trust: Is it a Trust or a Will? PER/PELJ 2018 (21) 6
[12] Definition of "trust instrument" section 1 of the Trust Property Control Act 57 of 1988.
[13] E Nel The Testamentary Trust: Is it a Trust or a Will? PER/PELJ 2018 (21) 4
[14] Trust Property Control Act 57 of 1988

The High Court in *Hanekom v Voight*[15] had to determine whether the trustees of a testamentary trust could amend the trust deed without application to court.

The facts of the case were as follows:

- ☐ The appellant and her three sisters were the beneficiaries of a testamentary trust that was formed in 1980 in terms of their grandfather's will. The father of the four sisters was the only appointed trustee at that time.
- ☐ All four beneficiaries were appointed as trustees of the trust, together with their father in 2001. The beneficiaries concluded an agreement with their father, which effectively amended the trust deed. They changed the prescribed manner in which decisions were to be taken in future as well as extending the class of persons qualifying as beneficiaries. The Master of the High Court then appointed new trustees in terms of the amended trust deed and the trust was administered accordingly.
- ☐ In 2014 the Appellant (one of the sisters) approached the High Court for an order to declare the amendments invalid. Her argument was based on the fact that the parties lacked the power to amend the testamentary trust.
- ☐ The Court unanimously held that the trustees and beneficiaries, presumably acting together, have a general power to amend the deed of a particular trust, unless there are minor or unborn beneficiaries, in which case a court order will be necessary. The appellant then took the decision on appeal.
- ☐ The trust deed failed to provide for amendments but did empower the trustees to terminate the trust. This inspired the appeal court to further argue that the party (father of the four sisters) authorised by the trust deed to terminate the trust was by implication also empowered to amend it as "*the greater power sanctions the exercise of something less*"[16]. The basis for this argument is that amendments are less infringing than the termination of the trust as the trustees can merely terminate this trust and transfer the assets to a new trust with different stipulations, which is effectively similar to amending the existing trust deed.[17] The appeal was thus dismissed.

This judgment highlighted the importance of differentiating between the spheres of testamentary law and trust law in order to establish legal certainty. E Nel made the following interesting remark: "*He endorsed the submission that the trust mortis causa evolves once the administration of the*

[15] Hanekom v Voight 2016 1 SA 416 (WCC)
[16] Ex Part Knight and Others 1946 CPD 800 811
[17] Cameron et al Honeré's South African Law of Trusts 5th ed 506

deceased estate has been completed, from being a testamentary document to being a fully-fledged independent legal figure called a trust"[18]. This principle may evolve further in future through case law.

When drafting a will that includes a testamentary trust, it is impossible to make provision for all circumstances that may occur in the future. It is therefore very important to make sure that wills make provision for the trustees to be authorised to extend their powers in a testamentary trust, or alternatively be granted the power to draft a more detailed trust deed, provided that any variation does not prejudice the interests of the beneficiaries.

Resignation of a trustee

Section 21 of the Trust Property Control Act[19] allows trustees to resign, irrespective of the provisions of the trust instrument. The trustee could resign by notice to the Master and the beneficiaries as is provided for in section 21.

Removal of a trustee

Ideally, the trust deed should set out the circumstances under which a trustee may be removed as well as the procedures to be followed. If the trust deed is silent on the removal of a trustee, one of the procedures discussed below has to be followed[20].

In practice the clauses pertaining to testamentary trusts contained in wills often neglect to set out the circumstances under which a trustee may be removed. This begs the question whether a trustee may be removed if he/she is unwilling to resign. Section 20(1) of the Trust Property Control Act[21] provides the Court with the power to remove a trustee if it is in the interest of the trust and its beneficiaries. The Court may remove a trustee from office on application by the Master of the High Court or any other person having an interest in the trust property. This section confirms the common law principle that the Court has the power to remove a trustee when it is in the best interest of the beneficiaries and the proper administration of the trust.

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[18] E Nel: The Testamentary Trust: Is it a Trust or a Will? PER/PELJ 2018 (21) 7
[19] No 57 of 1998
[20] Removal of a Trustee with Specific Reference to the Trust Instrument Article, A10 to A 15, Premiums & Problems Article Edition 118
[21] Id

In the case of *McNair v Crossman and Another*[22] the relationship between the trustees had irretrievably broken down. The Court made it clear that mere friction and enmity between trustees or beneficiaries will not in itself be an adequate reason to remove a trustee from office. The ultimate consideration of the Court is whether or not the conduct of a trustee imperils the proper administration of the trust.[23] The court further found that, bearing in mind that the trustees are the co-owners of the property of the trust and that they must act in unison in all trust related matters, there should at least be some form of mutual respect between the trustees. The Court ruled that where the relationship between trustees have broken down beyond repair, it is in the best interest of the beneficiaries and the administration of the trust that a trustee should be removed. It is thus clear that misconduct or *mala fides* is not necessarily required to remove a trustee from office.

Section 20(2)[24] gives the Master the power to remove a trustee under certain circumstances. These specific circumstances are as follows:

(a) the trustee has been convicted of an offence of which dishonesty is an element or any other offence for which he has been sentenced to imprisonment without the option of a fine;
(b) the trustee fails to give security or additional security to the satisfaction of the Master within two months of having been requested, or within a further period as allowed by the Master;
(c) the trustee's estate is sequestrated, liquidated or placed under judicial management;
(d) the trustee has been declared by a competent court to be mentally ill or incapable of managing his own affairs or if he is by virtue of The Mental Health Act, detained as a patient in an institution or as a State patient;
(e) the trustee fails to perform satisfactorily any duty imposed upon him, by or under the Act, or to comply with any lawful request of the Master.

What is important from a practical point of view is that even though it is possible to remove an unwilling trustee through the above legislative remedies and procedures, it remains an expensive and lengthy exercise.

[22] [2019] ZAGPJHC 298
[23] *Gowar and Another v Gowar & Others [2016] 3 All SA 382 (SCA)*
[24] The Trust Property Control Act No 57 of 1998

Termination of a testamentary trust

The wording of trust clauses is crucial and should be unambiguous in respect of who the beneficiaries are, what rights they acquire, when the trust terminates as well as the duties of the trustees.

Generally, the appointed trustees will continue to manage the trust assets in accordance with the will until termination of the trust. A testamentary trust can be terminated for the following reasons:[25]

(a) The trust assets have been fully distributed, making it uneconomical to continue;
(b) The trust has served its purpose in terms of its stated objective;
(c) There is no beneficiary;
(d) The trustees are given the authority to terminate the trust in the trust instrument.

When dealing with the termination of a testamentary trust, the High Court in *Van Rensburg v Van Rensburg N.O and others*[26] dealt with the question as to when exactly a testamentary trust is terminated. In this matter, the will of the deceased provided for a testamentary trust to be created for the surviving spouse until her death, where after the trust had to be terminated and all retained income and capital paid to the children in equal shares. The court ruled that the trust indeed terminated on the death of the spouse and the distribution of assets to children is merely an administrative function by the trustees to finalise the matter.

The following actions need to be taken when terminating a trust:[27]

(a) All outstanding liabilities need to be settled;
(b) A final financial statement needs to be drafted and lodged with the South African Revenue Services (SARS)
(c) Any accrued income and available capital after the payment of all taxes must be transferred to the trust beneficiaries;
(d) The trust needs to be deregistered with SARS and its bank account closed.

There is no provision in the Trust Property Control Act that requires the deregistration of trusts, but it is advisable that the trustees go on record with the relevant Master of the High Court.[28]

[25] W Geach and J Yeats: Trusts Law and Practice 2007 180
[26] 2020 ZAECGHC 29
[27] Chief Master Directive 2/2017 dated 6 March 2017 Trusts: Dealing with various trust matters
[28] Documents the Master needs to deregister are set out in Master's Directive 2/2017

The use of testamentary trusts and the Section 4(q)[29] deduction

Testators often need to make a decision between the use of limited rights such as a *usufruct,* a *fideicommissum* or an annuity and the use of a testamentary trust. These limited rights are used in wills to create an intervening interest for the surviving spouse in circumstances where the capital asset must ultimately devolve upon other heirs. A testamentary trust is another option available to testators in these circumstances.

The deduction afforded in section 4(q) of the Estate Duty Act[30] is frequently used in estate planning for the reduction or eradication of estate duty. Testamentary trusts can be used with the section 4(q) deduction in mind, but a proviso contained in this section needs to be taken in to account. In terms of the proviso contained in section 4(q)(2) there will be no deduction allowed in respect of property that is bequeathed to a trust for the benefit of a surviving spouse where the trustees have a discretion to allocate such property or any income therefrom to any person other than the surviving spouse. The language used in the second proviso is not clear and there are contrasting views between authors and academics regarding the interpretation of this proviso. This is even more evident with recent legal opinions given on this matter and the South African Revenue Service's response to these opinions.

According to Davis et al[31] it appears that the second proviso will cover the situation where the will states that the trustees must pay fifty percent of the estate income to the surviving spouse and that the balance can be distributed in accordance with the trustee's discretion[32]. They are of the opinion that the section 4(q) deduction will not apply in the above circumstances. Davis et al[33] states that the proviso after all provides that no section 4(q) deduction will be available if a trustee has a discretion to allocate such property or any income therefrom to any person other than the surviving spouse[34].

Meyerowitz[35] on the other hand is of the opinion that such a strict literal interpretation of the proviso would lead to unfavourable and unfair results[36]. He points out that the correct approach is to accept that whenever the surviving spouse's right to income, whether in whole or in part,

[29] The Estate Duty Act 45 of 1955
[30] Id
[31] DM Davis, C Beneke & RD Jooste, Estate Planning at 2-26 (Service Issue 51 2018)
[32] Id
[33] Id
[34] Id
[35] Meyerowitz, Administration of Estates and Their Taxation, 2010 at 28-15 to 28-16
[36] Id

from a trust cannot be defeated by the exercise of the trustee's discretion, including his discretion as to the allocation of capital, the proviso should not operate to prevent the value of the vested right from being deductible under s 4(q)[37].

In a recent SARS private binding ruling the matter of the discretion that was given to the trustees of a testamentary trust and the nature of the right that the surviving spouse obtained came to the fore. The facts of the matter were as follows:[38]
The deceased bequeathed assets to a testamentary trust;
The spouse of the deceased was the only beneficiary whilst she is alive;
The deceased specifically illustrated in the Will that this was a discretionary trust, irrespective of the fact that there is only a single beneficiary which has been appointed;
The will of the deceased made provision for substitute beneficiaries in the event of the surviving spouse passing away;
The trustees were granted certain discretionary powers;
The will of the deceased did not clearly determine that the surviving spouse had a vested right with respect to the assets or income of the testamentary trust.

The question that was asked is whether the section 4(q) deduction would be allowed.
SARS gave the following comments[39]:
"The purpose of section 4(q) is to allow the deduction for property that accrues to the surviving spouse. Section 4(q)(ii) provides for an extension of the deduction in the case where the property accrues to a trust for the benefit of the surviving spouse. It should still be read in the narrow sense of the purpose of the provision, which is that if the property that vests in a trust or any income deriving therefrom does not vest in the surviving spouse, "no deduction" should be allowed.

The nature of the surviving spouse's right is important to determine whether a deduction is allowed under section 4(q). The surviving spouse must have a vested right in the property of the trust that will be included in the surviving spouse's estate upon death and will not be distributed to another beneficiary of the trust. If the trustees had a discretion to dissolve a trust upon the death of the surviving spouse and to dispose of the property or to distribute it to someone else, the proviso applies and no deduction is allowed under section 4(q).

[37] Id
[38] Due to confidentiality and privacy, no names and specific details may be shared in this article.
[39] This private binding ruling was given in April 2021.

The surviving spouse does not have to be the sole beneficiary and can be one of many beneficiaries. The determining factor is whether the surviving spouse has a vested right in the property of the trust for the deduction to apply. The deduction under section 4(q) is allowed on a pro-rata basis to the extent that the surviving spouse has a vested right in the trust property or the income deriving therefrom.

The trustee's discretion would nullify the deduction if the surviving spouse had no vested right to the property of the trust. If the surviving spouse has a vested right to a certain portion of the trust property and the income deriving therefrom and the balance of the property in the trust is subject to the trustee's discretion, the deduction under section 4(q) is allowed to the extent of the vested right. The vested right must be stipulated in the will of the deceased and no discretion in the trust deed to change or influence the surviving spouse's right or entitlement. Therefore, the mere existence of the trustee's discretion prevents the deduction if the surviving spouse has no vested right to the property in the trust or the income that derives therefrom."[40]

SARS then came to the following conclusion[41]:
"My understanding of the case at hand is that the trustees had a discretion to make distributions to someone other than the surviving spouse, even though it may only apply once the surviving spouse passes away. Upon the death of the surviving spouse, the trust does not dissolve and the property does not go into the surviving spouse's estate; it can therefore not be said that the surviving spouse enjoyed a vested right to the property of the trust or the income that is derived therefrom. Whatever the surviving spouse receives is entirely up to the discretion of the trustees and they could change or influence the surviving spouse's entitlement to the trust property or income derived therefrom."

Testators should thus take caution in giving a discretion to the trustees of a trust and should be extremely clear in their will whether their surviving spouse obtains a vested right or not, as a deduction for section 4(q) may not be allowed by SARS.

[40] The text is quoted directly from the e-mail response from SARS.
[41] This private binding ruling was given in April 2021

Costs that need to be considered when creating a testamentary trust

When a financial or estate plan is drafted for a client and a testamentary trust is created, it is vital to consider the administration costs and taxes when calculating the income and capital needs for the beneficiary.[42]

Section 22 of the Trust Property Control Act[43] provides as follows:

"*A trustee shall in respect of the execution of his official duties be entitled to such remuneration as provided for in the trust instrument or, where no such provision is made, to a reasonable remuneration, which shall in the event of a dispute be fixed by the Master*."

The following is a list of fees that may be applicable in the administration of a testamentary trust:

(a) an acceptance fee - receiving and protecting trust assets[44];

(b) an ongoing management fee - calculated as a percentage of the assets under management[45];

(c) preparation of annual financial statements;

(d) submission of the annual tax return;

(e) termination fee[46].

Conclusion

A will should not be treated as a template with standard clauses without proper evaluation of the client's unique situation. One should always bear in mind that is very costly to bring court applications to rectify poorly drafted wills.

Financial advisers consulting with clients must ensure that such clients understand the implications of creating a testamentary trust for minor children, spouses or other persons, as well as the costs involved in setting up and administering these structures. Adequate provision should thus be made in this regard.

[42] Income tax during the period the trust exists as well as any capital gains tax on the sale of assets or when the trust terminates.

[43] 57 of 1988

[44] Most Trust Companies charge a fee of 1% plus VAT on gross assets received

[45] This fee can either be charged as a percentage or a fixed fee based on a sliding scale of assets under management.

[46] Most Trust Companies charge a fee of 2% plus VAT on gross assets

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McNair v Crossman and Another [2019] ZAGPJHC 298

van *Rensburg v van Rensburg N.O and others* 2020 ZAECGHC 29

Chief Master Directive 2/2017 dated 6 March 2017

Premiums & Problems Article Edition 118

PER/PELJ 2018

Unrehabilitated Insolvent as the Beneficiary of a Deceased Estate

Petri Lourens CFP®

B.Proc, LLB, Adv. PG Dip in Fin. Plan, Certificate Insolvency Law

Legal Advisor Manager

Personal Finance: Western Cape

Anél Strampe CFP®

B.Comm, LLB, LLM, Adv. PG Dip in Fin. Plan, PG Dip in Estate Planning

Legal Advisor Advanced

Personal Finance: George Western Cape

Introduction

The continuing Covid-19 pandemic has had profound economic implications on an already strained South African economy. Some families lost their primary breadwinner due to illness, many businesses did not survive lockdowns and employers had to cut costs by implementing retrenchments. This has unfortunately resulted in a rise of persons becoming insolvent.

The primary goal of estate planning for clients is usually to ensure that there is enough liquidity in the estate of the deceased, and to ensure that the heirs will inherit according to the will of the deceased. The scenario where an heir of a deceased is an unrehabilitated insolvent is often overlooked in planning and could result in unintended consequences. Due to the Covid-19 pandemic many people lost their businesses or employment and have been sequestrated. It is therefore important for planners to be aware of the position of unrehabilitated insolvent heirs. This articles aims to examine the position of an unrehabilitated insolvent as an heir and how it should be dealt within the context of estate planning.

Wessels v De Jager

The court case of Wessels v De Jager[1] put the position of an insolvent heir in the spotlight. The facts of this case were as follows: Mr. Wessels was married out of community of property to Mrs. Wessels. She took out a life cover policy on her life and nominated her husband as the beneficiary of the proceeds. Mr. Wessels was, at that time, declared insolvent and was not rehabilitated yet. Thereafter Mrs. Wessels passed away without a valid will and according to the law of intestate succession Mr. Wessels was the only heir. Mr. Wessels repudiated his inheritance as well as the life cover benefit due to him. His curator, Mr. De Jager, was of the opinion that the right of the insolvent (Mr. Wessels) to repudiate (reject) the above benefits vests in the curator and that the proceeds and inheritance should constitute an asset in the insolvent estate. An application was brought to set aside the said repudiation. His curator, Mr. De Jager was of the opinion that the right of the insolvent (Mr. Wessels) to reject the above benefits rested with him as the curator and that the proceeds and inheritance should constitute an asset in the insolvent estate of Mr. Wessels. Van Heerden HR disagreed with the curator. It was held that when an offer is made to an insolvent person, he is entitled or competent to accept or reject it and that such asset or right does not vest in his estate (and by implication in the curator). Vesting only takes place once the beneficiary/heir adiates (accepts). The benefit in terms of the life policy and the

[1] 2000 4 SA 925 (SCA)

intestate inheritance is therefore not a vested right but a mere competence to a right and may be adiated or repudiated.

The judgment in the Wessels case was met with different views from legal academics. Sonnekus[2] did not agree with the decision and stated that delatio takes place upon the death of the deceased and the right is created in that moment with no formal adiation as a prerequisite. He is also of opinion that an insolvent person has limited contractual capacity and therefore cannot repudiate because it will be regarded as a disposal. Stander's[3] view is that at the death of the deceased, the heir receives a competence to decide if he or she wants to adiate or repudiate. Adiation does not automatically occur and must be an implicit decision by the heir. In her view there is nothing to adiate if no right is obtained and if an unrehabilitated insolvent adiates, a legal claim is created that is an asset in the estate of the insolvent heir.

It is clear that where an unrehablitated insolvent is nominated as an heir of a deceased estate it creates a difficult situation. If the inheritance is adiated it will form part of the insolvent estate that is managed by the curator. If the inheritance is repudiated it is lost and the unrehabilitated insolvent receives nothing from the deceased. To understand this position we will examine relevant sections of the Insolvency Act[4].

Provisions of the Insolvency Act

The question to be answered in the Wessels-case was whether a repudiation of inheritance is an act of insolvency or a disposition without value.

In terms of section 2 of the Insolvency Act (hereinafter referred to as "the Act") the term ***"property"*** includes a contingent right. A ***"disposition"*** is defined as "any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the Court". The repudiation of an inheritance could thus possibly be viewed as a disposition.

[2] Sonnekus Delatio en Fallacia in die Hoogste hof 2000 TSAR 793.
[3] Stander 1999: 14
[4] 26 of 1936.

Section 8(C) of the Act provides that a debtor commits an act of insolvency if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another.

Section 26(1) of the Act provides that any disposition of property by the insolvent not made for value may be set aside by the Court if such a disposition was made:

"*(a)* more *than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;*

(b) within two years of the sequestration of his estate, and the person claiming under or benefiting by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:

"Provided that *if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.*"

It could therefore be argued that if repudiation of the insolvent is seen as an act of insolvency, the insolvent could be sequestrated in terms of section 8 of the Insolvency Act. If the repudiation is seen as a disposition by the insolvent not made at value it would mean that the curator could set aside the repudiation in terms of section 26.

The Insolvency Act is silent on the situation where an unrehabilitated insolvent inherits or receives a benefit from a deceased person. It is the view of the authors that the Insolvency Act should be amended to ensure legal certainty and include a provision that repudiation of inheritance by an unrehabilitated insolvent is not seen as disposition.

Solution

The importance of a valid and up to date will cannot be overemphasized. It is recommended that an insolvency clause be created when a will is drafted to ensure that any nominated beneficiary, heir or legatee will not receive any benefit should they be declared insolvent. This will ensure that the bequest of the testator/testatrix will not form part of the insolvent estate of the heir. It will also create certainty and peace of mind for the parties involved. An example of such a clause is as follows:

Unrehabilitated Insolvent

In the event of any beneficiary under this Will being an unrehabilitated insolvent when he/she becomes entitled to claim his/her inheritance, I revoke any bequest to such beneficiary and bequeath the assets, which he/she would have inherited, to the trustee(s) hereinafter appointed, in trust, subject to the following conditions:
As trustee(s) I appoint my executor(s).

The trustee(s) will be entitled to undertake any valid activities necessary for the control, upkeep and enhancement of trust assets as fully and completely as if I was present and acted myself.
The trustee(s) will be entitled, in his/her/their absolute discretion to utilise any part of the trust income and, should the income be insufficient, any part of the capital towards the maintenance, education and general well-being of the beneficiary concerned and/or his/her dependants. Any income not so utilised will be capitalised.

The *trust will be terminated on a date to be determined by the trustee(s) in his/her/their sole discretion. On termination the trust capital and accrued income will be distributed to the relevant beneficiary and/or his/her descendants and/or his/her dependants in such proportion as the trustee(s) may determine.*

Should *the beneficiary concerned die, prior to termination of the trust, the trust assets will devolve upon his/her legal descendants by representation per stirpes and, failing such descendants, upon his/her intestate heirs according to the rules of intestate succession.*

Conclusion

The current difficult economic climate, aggravated by the ongoing Covid-19 pandemic, has put the legal position of insolvent persons at the forefront. It is clear that there is a risk when an inheritance is bequeathed to an unrehabilitated insolvent. The legal consequences of a sequestrated person repudiating a benefit is unfortunately not made clear in the Insolvency Act. It is therefore of the utmost importance to include a clause in a valid will that makes provision for this contingency. Such a clause should determine what must happen to the inheritance and ensure that it will not form part of the insolvent estate of an heir.

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Estate Duty – Persons Liable and Apportionment

Anél Strampe CFP®

B.Comm, LLB, LLM, Adv. PG Dip in Fin. Plan, PG Dip in Estate Planning

Legal Advisor Advanced

Personal Finance: George Western Cape

Introduction

Estate duty is a tax that is levied in terms of the Estate Duty Act[1] on the death of a person in respect of property and deemed property in the estate of such person and after the permissible deductions and abatement have been applied. The Estate Duty Act (hereafter referred to as the Act) provides that estate duty of 20% is payable on estates with a dutiable value below R30,000,000 and 25% is payable on estates to the extent that the dutiable value exceeds R30,000,000. The Act sets out the property and deemed property that will form part of the gross estate and also which property and deemed property are excluded from the estate for the purposes of calculating estate duty.

Estate planning is the process of making arrangements during a person's lifetime for the management and disposal of the estate of that person, whilst ensuring that there will be sufficient liquidity to pay debt, cash bequests, estate administration costs and taxes upon death and that the loved ones of the deceased are taken care of.

A common misconception exists that the estate will always be liable for estate duty on the entire dutiable amount. It is important to note that section 11 of the Act sets out who is liable for estate duty and in which proportions the duty is payable. Although section 12 of the Act provides that estate duty is payable by and recoverable from the executor, section 13 gives the executor the right to recover the proportionate estate duty from other persons in the event of such persons being liable therefor. It is important to be aware of who will actually be liable and how the apportionment is applied when estate planning is done. Liquidity in the estate is necessary to ensure there is sufficient cash available to pay the estate duty and administration costs on the death of the deceased while certain other persons may also need to make provision for cash to cover estate duty that they might be liable for.

Persons liable for estate duty

On the death of a person, different persons could become liable for the payment of estate duty. Property refers to all movable, immovable, corporeal and incorporeal assets of the deceased, all rights or limited interests in property. Deemed property includes proceeds on domestic policies on the life of the deceased (subject to certain exclusions)[2] as well as property that the deceased

[1] Act 45 of 1955

[2] Section 3(3) of the Estate Duty Act. Property which is deemed to be property of the deceased includes—
(a) so much of any amount due and recoverable under any policy of insurance which is a 'domestic policy', upon the life of the deceased as exceeds the aggregate amount of any premiums or consideration proved to the satisfaction of the Commissioner to have been paid by any person who is

was competent to dispose of for his own benefit or for the estate's benefit immediately prior to his or her passing[3].

In terms of section 12 of the Act, any estate duty shall be payable by and recoverable form the executor of the estate.

Section 11(a)(i) sets out that where duty is levied on the property of the deceased that constitutes any fiduciary, usufructuary or like interest, the person to whom any advantage accrues from such limited right as a result of the death of the deceased, will be the person liable for the duty. In terms of section 11(a)(ii) the executor is liable for estate duty on all other property (such as all immovable and movable assets of the deceased).

Where duty is levied on property which is deemed to be the property of the deceased and the property consists of an amount recoverable under an insurance policy, the executor is liable, unless such amount is recoverable by a person other than the executor in which case that person will be liable[4]. Where the proceeds of an insurance policy is thus payable to the estate of a deceased person, the executor will be liable for the estate duty. Where a security cession is registered on a life policy, Meyerowitz[5] is of opinion that the liability for the duty rests upon the executor and not the creditor.

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entitled to the amount due under the policy, together with interest at six per cent per annum calculated upon such premiums or consideration from the date of payment to the date of death: Provided that the foregoing provisions of this paragraph shall not apply in respect of any amount due and recoverable under a policy of insurance, if—

(i) the amount due under such policy is recoverable by the surviving spouse or child of the deceased under a duly registered ante-nuptial or post nuptial contract; or

(iA) the Commissioner is satisfied that the policy was taken out or acquired by a person who on the date of death of the deceased was a partner of the deceased, or held any share or like interest in a company in which the deceased on that date held any share or like interest, for the purpose of enabling that person to acquire the whole or part of—

(aa) the deceased's interest in the partnership concerned; or

(bb) the deceased's share or like interest in that company and any claim by the deceased against that company, and that no premium on the policy was paid or borne by the deceased;

(ii) except where the provisions of paragraph (i) or (iA) of this proviso apply, the Commissioner is satisfied and remains satisfied that such policy was not effected by or at the instance of the deceased, that no premium on such policy was paid or borne by the deceased, that no amount due or recoverable under such policy has been or will be paid into the estate of the deceased and that no such amount has been or will be paid to, or utilized for the benefit of, any relative of the deceased or any person who was wholly or partly dependent for his maintenance upon the de ceased or any company which was at any time a family company in relation to the deceased;

[3] Section 3(2) of the Estate Duty Act.

[4] Section 11(1)(b)(i) of the Estate Duty Act

[5] Meyerovitz: 30-15.

Where property is donated in terms of a donation mortis causa the donee is responsible for the estate duty in terms of section 11(b)(ii).

Where the estate of the deceased acquires an accrual claim against the deceased's spouse or such spouse's estate under the Matrimonial Property Act, the executor will also be liable for payment of estate duty in respect of such claim[6].

Where the executor is liable for estate duty, it must be paid from the assets in the estate. If there is not sufficient liquidity in the residue of the estate, assets in the estate will need to be sold to provide such liquidity, if the heirs are unwilling or unable to provide the shortfall in liquidity.

If persons other than the estate is liable for estate duty on property or deemed property included in the estate (as discussed above), section 13 of the Act empowers the executor to recover the proportionate estate duty from such persons.

Apportionment of estate duty

Estate duty is assessed on the total dutiable amount and as pointed out above, the executor is primarily responsible for the payment of the total estate duty with the right to, where applicable, recover the proportionate duty from other persons liable therefore in respect of property accruing to them on the death of the deceased.

The formula to determine the amount that the executor may recover where a person other than the executor is liable therefore is essentially provided via the provisions of Section 13(2) of the Act. The salient provisions in this section stipulate that the duty attributable to any such property (including deemed property) will be a sum that bears to the full estate duty payable in respect of the estate the same ratio as that portion of the net value of the estate (i.e. the value of the estate before deduction of the section 4A abatement) which is attributable to the inclusion in the estate of the value of the said property, bears to the net value of the estate.

[6] Section 11(b)(iii)

The relevant formula in to calculate the amount recoverable by the executor (commonly referred to as the apportionment of estate duty) is as follows:

<u>Value of property/deemed property</u> x Total estate duty payable

Net value of estate

Example 1

The total net value of A's estate is R15, 000,000 and the total estate duty payable is R2, 300,000 (15 000 000 – R3 500 000 = 11 500 000 x 20% = R2 300 000). ***Included in A's estate is an insurance policy on the life of A of which to B (the son of A) is the beneficiary for proceeds in the amount of R2,500,000.*** **A paid all the premiums in respect of the policy. A was also the holder of a usufruct over property, and the value of the usufruct was calculated to be R1, 000,000. C (the daughter of A) is the bare dominium holder of the property.** The liability for the payment of the total estate duty of R2, 300,000 will be apportioned as follows:

B: R2, 500,000/R15, 000,000 x R2, 300,000 = R383, 333.33

C: R1, 000,000/R15, 000,000 x R1, 500,000 = R153, 333.33

A's estate: R11, 500,000/15,000,000 x R2, 300,000 = R1, 763,333.34

If C does not have funds to pay the amount of R153, 333.33 to the executor, section 14 of the Act would allow her to borrow money or mortgage the property with the consent of the Master for the payment of estate duty, notwithstanding any provision contrary to any testamentary provision, deed or in any law. Proper estate planning would have insured that C was prepared to have funds available to pay her portion of the estate duty liability.

The Act[7] provides that where estate duty in respect of any domestic policy on the life of the deceased is recoverable from more than one person, the amount of duty payable by each shall be such duty as bears to the total duty attributable to the property the same ratio as the amount of the policy recoverable by the person bears to the total value of the policy included in the estate.

Example 2

The total net value of A's estate is R15,000,000 and the total estate duty payable is R2,300,000 (15 000 000 – R3 500 000 = 11 500 000 x 20% = R2 300 000). ***Included in A's estate is an insurance policy on the life of A of which to B (the son of A) is the beneficiary for 60% of the proceeds, and***

[7] Section 3(3)(a) and section 13(3).

C (the daughter of A) is the beneficiary for 40% of the proceeds). **The total proceeds of the policy is R3, 000,000.** A paid all the premiums in respect of the policy. The liability for the payment of the total estate duty of R2, 300,000 will be apportioned as follows:

B: R1, 800,000 (R3, 000,000 x 60%)/R15, 000,000 x R2, 300,000 = R276, 000

C: R1, 200,000 (R3, 000,000 x 40%)/R15, 000,000 x R1, 500,000 = R184, 000

A's estate: R12, 000,000/15,000,000 x R2, 300,000 = R1, 840,000

It must be born in mind that where the apportionment of estate duty is calculated, only the amount included in the estate for estate duty purposes is taken into account in such calculation. In this regard, the proviso contained in section 3(3)(a) of the Act that allows for the reduction of policy proceeds with an amount equal to premiums plus 6% interest (from date of payment of the premium till date of death of the insured) thereon paid by the person who receives the policy proceeds is of particular relevance. In such an instance, not the entirety of the proceeds of a policy on the life of the deceased will be deemed to be property in the deceased estate[8].

Example 3

The total net value of A's estate is R15, 000,000 and the total estate duty payable is R2, 300,000 (15 000 000 – R3 500 000 = 11 500 000 x 20% = R2 300 000). ***Included in A's estate is an insurance policy on the life of A of which to A is the contracting party and B is the beneficiary). The total proceeds of the policy is R3,000,000. B paid all the premiums in an amount of R170 000 in respect of the policy.*** **Compound interest of 6% on the premiums from date of payment to date of death is calculated to be R30,000.** The liability for the payment of the total estate duty of R2,300,000 will be apportioned as follows:

B: R2,800,000 (R3,000,000 – R170,000 – R30,000)/R15,000,000 x R2,300,000 = R429,333.33

A's estate: R12,200,000/15,000,000 x R2,300,000 = R1,870,666.67

It also often happens that a policy is taken out on the life of a person for the benefit of another. If the person who takes out the policy also pays the premiums and receives the proceeds of the policy, the same principles discussed above will apply.

[8] The amount that forms part of deemed property in the deceased estate is only so much of the amount due and recoverable as exceeds the aggregate of the amount of premiums or consideration paid by the person who is entitled to the benefit under the policy, together with compound interest at six per cent per annum calculated on the premium from the date of payment to the date of death of the deceased.

Example 4

The ABC Trust takes out a life insurance policy for the amount of R5, 000,000 on the life of A to cover an outstanding loan account in the ABC Trust. For purposes of this example, let's assume that the total amount of premiums paid was R250 000, and the interest on the premiums from date of payment till the date of A's death amounted to R20 000. If the payer of the premiums on the life insurance policy was A, the full proceeds of R5, 000,000 would constitute deemed property in A's deceased estate[9]. If the ABC Trust however paid the premiums the amount to be included in A's deceased estate will be calculated as follows:

Proceeds payable to ABC Trust: R5, 000,000
Total premiums payed by ABC Trust: (R250, 000)
Interest on the premiums payed: (R20, 000)
Amount to be included in A's estate: R4, 730,000.

Let's assume that the value of the net estate of A was R20 000 000, and that the total estate duty liability amounted to R3 300 000 (R20 000 000 – R3 500 000 = R16 500 000 x 20%). The liability for the payment of the total estate duty of R3, 300,000 will be apportioned as follows:

ABC Trust: R4, 730,000/R20, 000,000 x R3, 300,000 = R780, 450
A's estate: R15, 270,000/R20, 000,000 x R3, 300,000 = R2, 519,550

It must further be borne in mind that the benefit of deducting premiums plus 6% from date of payment of the premium to date of death of the insured is extended only to the person entitled to the amount "due and recoverable" under the policy. If a person thus paid the premiums on the life insurance policy on the life of another person, but a third party is nominated as beneficiary or entitled to the proceeds as the contracting party, the deduction of premiums plus 6% will not be allowed. Furthermore, if the policy is due and recoverable to a person and that person paid no premiums in respect of the life insurance policy, the estate of the deceased insured person will not be entitled to subtract premiums plus 6% interest from the proceeds.

Example 5

The ABC Trust takes out a life insurance policy for the amount of R5, 000,000 on the life of A. If the ABC Trusts cedes the policy on the life of A to B (the son of A), but the trust continues to pay the premiums on the policy, the full proceeds of R5,000,000 will be included as deemed property in

[9] The person to whom the proceeds is "due and recoverable" does not include the deceased's estate or the executor.

the estate of A. The full amount of R5, 000,000 will thus also be taken into account for purposes of calculating the apportionment of estate duty, i.e. the amount that the executor if A's estate will be able to recover from B.

If B however took over the payment of the premiums from ABC Trust from date of cession and the proceeds are payable to B upon the death of A, the result will differ: only premiums paid by B, plus 6% interest (interest will be added from the date of payment of premiums by B to date of A's death) thereon, will be subtracted from the proceeds, and the balance will be included as deemed property in the A's estate. For purposes of this example, let us assume that the situation upon A's death is as follows:

Proceeds payable to B:	R 5, 000, 000
Total premiums payed by ABC Trust:	R 150, 000 (not subtracted from proceeds)
Interest on premiums payed by ABC Trust:	R 15, 000 (not subtracted from proceeds)
Total premiums payed by B:	(R 100, 000) (subtracted from proceeds)
Interest on premiums payed by B:	R 5, 000) (subtracted from proceeds)
Amount to be included in A's estate:	R 4, 895, 000

Let's assume that the value of the net estate of A was R20 000 000, and that the total estate duty liability amounted to R3 300 000 (R20 000 000 – R3 500 000 = R16 500 000 x 20%). The liability for the payment of the total estate duty of R3, 300,000 will be apportioned as follows:

ABC Trust: R4, 895,000/R20, 000,000 x R3, 300,000 = R807, 675

A's estate: R15, 105,000/R20, 000,000 x R3, 300,000 = R2, 492,325

The following life insurance policies are not included in the estate of a deceased person for estate duty purposes:

- ☐ Policies payable under ante nuptial or postnuptial contracts to a spouse or children[10];
- ☐ Insurance affected by partners or shareholders on each other's' lives to purchase the interest of the deceased person, if the deceased person paid no premiums in respect of the policy on his/her own life (policies funding buy-and-sell agreements)[11]; and
- ☐ Insurance not effected by or at the instance of the deceased where the deceased paid no premiums on the policy and none of the proceeds are payable to the estate of the deceased,

[10] Section 3(3)(a)(i) of the Estate Duty Act
[11] Section 3(3)(a)(iA) of the Estate Duty Act

or a relative/dependent of the deceased, or a family company in relation to the deceased[12], for example, a key-person policy meeting these requirements.

As life insurance policies complying with the abovementioned requirements will be excluded from the estate of a deceased person for estate duty purposes, and thus not attract any estate duty, the executor of the estate will not be entitled to recover estate duty from the persons entitled to the proceeds. The apportionment of estate duty will thus not be applied in these instances.

Where the spouse of a deceased person is the beneficiary on a life insurance policy on the life of the deceased, the deceased estate will be entitled to a deduction under section 4(q) of the Act equal to the value of the proceeds payable to the surviving spouse. The effect of this deduction is that the estate will not be liable for estate duty on the value of proceeds in respect of which the spouse of the deceased is the beneficiary. As such proceeds will not attract any estate duty, the executor of the deceased estate will not be able to recover estate duty form the surviving spouse and the apportionment of estate duty will not be applied. The same principles will apply[13] where the beneficiary under a life insurance policy is a public benefit organisation[14], an institution, board or body exempt from tax[15], the State or a municipality[16].

Conclusion

This article underlines the importance of understanding where the liability for the payment of estate duty lies when doing an estate planning exercise. It is not only necessary to make provision for this liability in the estate of the deceased, but also for beneficiaries who may be liable for a calculated portion of estate duty.

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[12] Section 3(3)(a)(ii) of the Estate Duty Act
[13] Section 4(h) of the Estate Duty Act
[14] Where such public benefit organization is exempt from tax in terms of section 10(1)(cN) of the Income Tax Act 58 of 1963.
[15] In terms of section 10(1)(cA)(i) of the Income Tax Act 58 of 1963, if its sole or principal object is the carrying on of a public benefit activity as contemplated in section 30 of the Income Tax Act.
[16] As defined in section 1 of the Income Tax Act, 58 of 1962.

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Ownership and Succession of Communal Land

Charlotte van der Merwe CFP®
LLB, Adv. PG Dip in Fin. Plan
Legal Advisor Specialist
Personal Finance: Johannesburg

Introduction

As a client facing legal adviser, I have come across a number of client's who run their businesses from a piece of communal land[1] that they have received from the chiefs or heads of their communities. This then begs the question whether the use of such land will be classified as land ownership and whether it will form part of the client's estate. In this article I will explore the issue of land ownership in communal land and whether a person's right to communal land will form part of their estate on death and if it is therefore classified as property for estate duty purposes.

What is considered property?

Before we look at communal land we need to explore what property is. In terms of the Estate Duty Act, a person's estate consists of all property of that person as at the date of death of such person.[2] Section 3(2)[3] further defines "property" as any right in or to property, moveable or immovable, corporeal or incorporeal. The Administration of Estates Act defines "immovable property" as land and every real right in land or minerals (other than any right under a bond) which is registerable in any office in the Republic used for the registration of title to land or the right to mine. Immovable property includes everything that is attached to it, naturally and artificially. Land is therefore regarded as a single immovable object that can only be alienated or otherwise disposed of as a unit and can only be transferred from one person to another by means of registration of a deed of transfer.

To prove ownership over a property, one has to be in possession of a title deed. The Deeds Registries Act[4] defines an owner as the person registered as the owner or holder of immovable property. Accordingly, a piece of land will form part of a person's estate if such person is the registered owner of such land. Will this be the case where the person has a right to use communal land?

What is Communal land?

Communal land is owned by the state and is managed by the tribal authorities or heads of a certain community. Members of the community has to seek permission from these authorities to occupy or make use of the communal land or a subdivided section of the communal land. As

[1] Also known as tribal or cultural land.
[2] Section 3(1) Estate Duty Act 45 of 1955
[3] Estate Duty Act 45 0f 1995
[4] 47 of 1937

each community or tribe follow their own rules and processes there is no way to determine what the one correct and acceptable process is that has to be followed.

In many instances, a member of the community would receive permission to make use of communal land for commercial purposes. In this case, the person would want their right to the land as well as the business that is being run on the communal property to be inherited by a member of their family.

With this in mind, does the right and or permission to use or occupy communal land, grant ownership to such member of the community? Further to this, will such property devolve in terms of the last will and testament of such community member?

The South African Government has enacted several pieces of legislation to redress inequity in land ownership. For the sake of this article we will only be looking at the legislation that has relevance to the ownership of communal land and if it will form part of a persons deceased estate:
Before it's repeal, the Black Administration Act provided that land held under quitrent tenure cannot be the subject of will.[5] The Act has since been repealed. The Upgrading of Land Tenure Rights Act[6] provides for the upgrading and conversion into ownership of certain rights granted in respect of land, the transfer of tribal land in full ownership to tribes and other matters connected therewith. The Act provides that the ownership of these lands have to be registered and such owners must be supplied with a title deed.[7] Similarly, the Provision of Land and Assistance Act provides that the ownership of land shall be registered in accordance with the Deeds Registries Act.[8]

There are numerous other legislation that have been proclaimed for the administration of communal land but no act seems to provide for the succession of communal land where the person was given permission to occupy the land but the ownership was never transferred to such person. The Communal Land Right Act aimed to provide for legal security of tenure by

[5] Section 23(1) and (2) of the Black Administration Act 38 of 1927
[6] 122 of 1991
[7] Section 3 of the Upgrading of Land Tenure Rights Act 112 of 1991
[8] Section 9(1) Provision of Land and Assistance Act 126 of 1993

transferring communal land but the act was found to be unconstitutional in its entirety[9]. Consequently, people are left uncertain about the nature of their rights.

The Land Titles Adjustment Act[10] does however regulate the allocation or devolution of certain land in respect of which one or more persons claim ownership, but do not have registered title deeds in respect thereof. The Act states that the Minister may designate such land or any part thereof to such persons. Again, such ownership should be registered in terms of the Deeds Registries Act.

The Communal Land Tenure Bill (hereinafter referred to as the Bill) has been drafted (but has not been legislated yet) and seeks to provide for the transfer of communal land to communities by giving ownership of land rights, amongst other things, to the members of the community.

The Communal Land Tenure Bill

The Bill defines communal land as land owned, occupied or used by members of a community subject to shared rules or norms and customs of that community and includes land owned by the state but used by communities as communal land.

One of the objectives of the Bill is to legally secure tenure in relation to communal land by converting legally insecure land tenure rights held by a community member or a community that occupies communal land, into ownership.[11] The Bill further allows for the Minister to transfer ownership or grant the right to use or lease communal land.[12]

Where ownership is granted to the community or a member of the community, the communal land must be registered in the name of the community and the member[13] in terms of the conditions of registration as set out in section 63 of the Deed Registries Act[14].

The Bill provides that where a subdivided portion[15] have been registered in a person's name such person will be the owner of that subdivided portion of communal land, provided that a

[9] Tongoane and Other v Minister for Agriculture and Land Affairs and Others 2010 ZACC 10
[10] 111 of 1993
[11] Section 2(a)(i) of the Communal Land Tenure Bill
[12] Section 9, 10 and 11 of the Communal Land Tenure Bill
[13] Section 12(3) of the Communal Land Tenure Bill
[14] 47 of 1937
[15] As provided for in section 17(1)(d) For use of residential, agricultural, industrial and commercial purposes

community may impose conditions on such ownership or reserve any right in its favour.[16] It is important to note that according to the Bill, this subdivided section (for use of residential, agricultural, industrial and commercial purposes) cannot be sold, donated or in any other manner alienated to a person who is not a member of that community without offering members of the owner's family, a member of the relevant community or the state the first option to acquire such subdivided portion.[17]

Where a person was granted a right to use, lease or any other right relating to property as may exist in law[18], the community or state will remain the owner of that subdivided portion of communal land.[19] The section does however state that such right may be converted into ownership after uninterrupted occupation by the same person. The period may be determined by the community in its community rules or be prescribed by the Minister.

Does the right to occupy the land constitute a fiduciary, usufructuary or like interest in the property?

In terms section 3 (2) of the Estate Duty Act, property includes any fiduciary, usufructuary or other like interest in property (including a right to an annuity charged upon property) held by the deceased immediately prior to his death.

A fiduciary interest is an interest in property, which gives the holder of the fiduciary interest the bare ownership of the property together with the right to use the property. An example of this in the context of communal land would be, where the state transfers ownership and the right to use of a piece of land to one member of the community with the condition that on the death of such member, the ownership and use should be transferred back to the state.

On the other hand, a usufructuary interest is an interest in property, which gives the usufructuary only the right to use and enjoy the property. In this instance, the state gives a member of the community the right to use and enjoy a piece of land but on the death of such member this right vests in the state as the holder of the ownership in the land.

[16] Section 18(2) of the Communal Land Tenure Bill
[17] Section 13(b) of the Communal Land Tenure Bill
[18] Section 11(2)(b) of the Communal Land Tenure Bill
[19] Section 18(3) of the Communal Land Tenure Bill

In both instances, the fiduciary and usufructuary may not dispose of the property. On the death of the fiduciary (member of the community), full ownership in the property passes to the fideicommisary (the state as beneficiary of the property). On the death of the usufructuary, the bare dominium[20] holder (the state) obtains the use of the property as the bare dominium holder already has ownership of the property.
We have already established that the state is the owner of communal land and that the use of the property is "transferred" to a member of the community. At the death of the community member, the state regains use of the property. One could therefore argue that the community member's right to occupy communal land could be classified as property in their estate on death based on it being a usufructuary interest. Again, as with the ownership in land, the rights of the usufructuary should be included in the title deed and registered with the Deeds Office.[21]

Further to this, Section 66 of the Deeds Registries Act provides that no personal servitude of usufruct, usus or habitation purporting to extend beyond the lifetime of the person in whose favour it is created shall be registered. In other words, the act does not allow a limited interest to be registered for longer than the lifetime of the person in whose favour it is created. The section further states that a transfer or cession of such personal servitude to any person other than the owner of the land encumbered thereby may not be registered. With this, we can be certain that the occupier of the land may not bequeath the land to another person in terms of his or her last will and testament as the act does not allow for the transfer of a limited interest to anyone other than the owner of the land, which in this case would be the state.

Conclusion

It is clear that even though there is a lack of clarity regarding the succession of communal land, the legislation that does exist all aim to have the ownership of communal land registered. Where a person is only in possession of a "permission slip" to occupy communal land it is clear that the land will not form part of such person's estate and cannot devolve in terms of their last will and testament. A person has to be in possession of a title deed and the land has to be registered in such person's name in terms of the Deeds Registries Act in order for such person to be declared the rightful owner of such land. The same goes for the person's right to occupy that land which may constitute a limited interest in favour of such person.

[20] The right of ownership of the asset that is subject to the usufruct.
[21] Section 65 of The Deeds Registries Act 47 of 1937

If the Communal Land Tenure Bill is enacted into law, the ownership of communal lands will be regulated and we can therefore assume that the owner of such property will be able to bequeath such property in term of their last will and testament, if the terms of section 13(b) as stated above is taken into account.

Further to this, the legislation does not make provision for persons who make use of communal land for commercial purposes and the succession thereof. With this in mind, it is important for financial advisers to be cautious when advising clients who occupy, or make use of communal land for commercial use. Clients have to be aware of what will happen to these properties at their death and make contingency plans in these circumstances. The burden of prove rests on the person that is occupying the land. If the client cannot prove ownership or where the state is clearly the owner of the land, the client will not be able to bequeath the property or land in terms of their last will and testament. The land will most likely devolve in terms of the rules of the relevant community.

It is also important to note that should the client be in possession of the title deed to the communal land or have a limited interest over the land and such interest has been registered with the Deeds Office. The client's estate will be liable for taxes and other costs relating to such property. These included but are not limited to estate duty, capital gains tax and transfer cost. Please consult with your legal advisor in this regard.

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The Definition of Spouse and Intestate Succession

Keith Peter CFP®
B.Soc.Sc, LLB, Adv. PG in Fin Plan, MBA
Legal Advisor Manager
Personal Finance: KwaZulu-Natal

Introduction

Monogamous civil marriages between two people of the opposite gender in South Africa are no longer the only recognised union of two people. The Department of Home Affairs published the Green Paper On Marriages In South Africa in the Government Gazette[1] on 4 May 2021 for public commentary. The proposed date for promulgation is 2023. This bill seeks to recognise unions of people irrespective of sexual orientation, religious beliefs or cultural backgrounds. In addition to this, the South African Law Reform Commission published an extension of the consultation process on the Review of Aspects of Matrimonial Property Law on 6 September 2021[2]. One of the motivations for this paper is "*the need for equality and fairness and the prohibition of discrimination on the based on gender, race, religion and marital status*"[3].

The Civil Unions Act[4] legalised same-sex marriages allowing two people regardless of gender to enter into a marriage or civil partnership. There are limitations to the Civil Union Act, in respect of cohabitation between people of the opposite sex. Section 6 of the Civil Union Act allows marriage officers to object to solemnising a civil union between persons of the same sex on grounds such as conscience, religion and belief, and they cannot be compelled to do so. The objection is discriminatory as all genders are recognised by the Constitution, including transgender and nonconforming persons. According to gender activists, Section 6 is used as a vehicle to perpetuate discrimination against same-sex couples, particularly where the impact of a conscientious objection provision is markedly greater on the couple than on the potential objector.[5]

Whilst we await for the promulgation of the new marriages law, the courts have been proactive in highlighting the unconstitutionality of the Intestate Succession Act in respect of "spouses" in domestic partnerships, be it heterosexual or homosexual where the parties are not married but exhibit all the elements of a marriage.

[1] Government Gazette No. 44529; https://www.gov.za/sites/default/files/gcis_document/202105/44529gon398.pdf
[2] chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fwww.justice.gov.za%2Fsalrc%2Fipapers%2Fip41-prj100E-MatrimonialPropertyLawReview-6Sep2021.pdf&clen=890908&chunk=true
[3] *Ibid* on page 2.
[4] Civil Unions Act No. 17 of 2006
[5] Government Gazette No. 44529; https://www.gov.za/sites/default/files/gcis_document/202105/44529gon398.pdf

The case of Bwanya vs The Master of the High Court Cape Town[6] brought to the fore the definition of surviving spouse in terms of the Intestate Succession Act. This article will look at various recent courts' decisions in respect of the recognition of spouse in terms of the Intestate Succession Act.

Law of Intestate Succession

In terms of section 2 of the Wills Act[7], the requirements for a valid will are as follows:

i. The will must be signed by the testator on each page and at the end of the document.
ii. The will must be signed in the presence of two competent witnesses (over 14 years and competent to give evidence in a court of law) present at the same time.
iii. The witnesses must sign the will in the presence of the testator on the last page confirming that the signature of the person is that of the testator,
iv. If a will is signed by the making of a mark, a commissioner of oaths has to certify that he or she has satisfied him or herself as to the identity of the testator and that the will so signed is the will of the testator, and each page of the will, excluding the page on which his or her certificate appears, has to be signed anywhere on the page by the commissioner.

Where a person dies without a valid will, the estate of the deceased will devolve according to the Intestate Succession Act. There is a predetermined order in respect of beneficiaries, which is as follows[8]:

- The surviving spouse of the deceased;
- The surviving spouse and children (the spouse will be entitled to R250 000 or a child's share whichever is the greater)
- The children (and other descendants if there is no surviving spouse) of the deceased
- The parents of the deceased (where there is no surviving spouse or descendants)
- The siblings of the deceased (where one or both parents are predeceased)

Example

- A dies with a net estate value of R3 000 000 and is survived by a spouse only. The spouse will the sole beneficiary
- A dies with a net estate value of R3 000 00 and is survived by a spouse and two children. The spouse will be entitled to the greater of R250 000 or a child's share. A child's share will be

[6] Bwanya v Master of the High Court, Cape Town and Others (20357/18) [2020] ZAWCHC 111; 2020 (12) BCLR 1446 (WCC); 2021 (1) SA 138 (WCC)
[7] Section 2 of the Wills Act 7 of 1953
[8] Intestate Succession Act No. 81 of 1987

R3 000 000 / 3 = R1 000 000. Therefore the spouse will entitled to R1 000 000 and the children will be entitled to R1 000 000 each.

- A dies with a net estate value of R3 000 000 and has no spouse or children but is survived by his parents. Each parent will inherit R1 500 000.
- A dies with a net estate value of R3 000 000 and has no spouse or children and is survived by one parent and the predeceased parent has two descendants/children (A's siblings). The surviving parent will inherit of R1 500 000 and the two descendants of the predeceased parent will each inherit R750 000.
- A dies with a net estate value of R3 000 000 and has no spouse or children; and both parents predeceased him; but A is survived by siblings. The descendants of the predeceased parents (the siblings of A) will inherit i.e. the descendants of the father will inherit ½ of the estate and the descendants of the mother will inherit ½ of the estate.
- A dies with a net estate value of R3 000 000 and has no spouse, children, parents or siblings, the estate will devolve in equal shares upon other blood relations of A who are related to him in the closest degree,
- A dies with a net estate value of R3 000 000 and has no traceable relatives, the estate will be forfeited to the state after 30 years.

Definition of Spouse in the Law of Intestate Succession

The term "spouse" is not defined in the Intestate Succession Act.[9] Legislation has evolved to not only recognise marriages, or matrimonial unions in terms of the Marriages Act[10], but also in terms of the Recognition of Customary Marriages[11] and the Civil Union Act.[12].The definition of spouse is no longer confined to people married in terms of the Marriage Act[13]

The Marriage Act governs the solemnisation and registration of marriages in South Africa which results in civil marriages. Civil marriages can only be entered into between a man and a woman.

In terms of the definition section of the Civil Union Act[14], **"civil union partner"** means a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of this Act;

[9] Intestate Succession Act No. 81 of 1987
[10] Marriages Act No.25 of 1961
[11] Recognition of Customary Act 120 of 1998
[12] Civil Unions Act 17 of 2006
[13] Marriage Act No. 25 of 1961
[14] Civil Unions Act 17 of 2006

The Recognition of Customary Marriages Act[15] recognises marriages concluded in accordance customary law. In terms of definition section of this Act, customary law means the customs and usages traditionally observed among indigenous African person of South Africa and which forms part of the culture of those peoples. This includes polygamous marriage. In terms of section of the Act, a man is allowed to enter into more than one customary marriage on application to court to approve the written contract to regulate the matrimonial system of the marriages.

Prior to the Civil Union Act, there was unfair discrimination based on sexual orientation and marital status, in respect of people living together as life partners and parties in polygamous or customary marriages. The various cases in this article look at the manner in which courts have dealt with the definition of spouse in terms of the Intestate Succession Act.

Same-Sex Partnerships

Gory vs Klover

Before the enactment of the Civil Union Act, the definition of spouse did not include same- sex partners. Therefor a same-sex surviving partner did not qualify as a spouse in terms of the Intestate Succession Act.

This case of Gory v Kolver[16] looked at the constitutional validity of section of section 1(1) of the Intestate Succession Act. The Intestate Succession Act did not provide same-sex life partners with the same rights that heterosexual spouses enjoyed in terms of the intestacy.

Gory and Brooks (the deceased) were partners in a permanent same-sex life partnership at the time of Brooks' death, with reciprocal duties of support. Brooks died intestate on 30 April 2005 and his parents nominated as Kolver as the executor of the estate, in their claimed capacity as intestate heirs. Gory also claimed to be the deceased's sole intestate heir, which resulted in the motion proceedings been instituted by Gory in the Pretoria High Court in October 2005.

The Constitutional Court held that the definition of spouse must include a "partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support". Therefore, homosexual partners in a permanent relationship who had a duty of support to each other qualified as intestate heirs. However, this judgment did not extend to partners of

[15] Recognition of Customary Act 120 of 1998
[16] Gory v Kolver 2007 (4) SA 97 (CC)

the opposite gender in the same position, i.e. heterosexual partners in a permanent relationship with reciprocal duties. Opposite-sex partners who were not married thus did not qualify as intestate heirs.

Religious Marriages

Daniels vs Campbell

In Daniels vs Campbell NO & Others[17] 2004 (5) SA 331 (CC) the court recognised the wife to a monogamous Muslim marriage as a "spouse" for purposes of intestate succession and the Maintenance of Surviving Spouse Act.

Hassam vs Jacobs

The case of Hassam vs Jacobs[18] looked at the rights of widows of polygamous marriages in terms of the Intestate Succession Act. Hassam was the second wife of Ebrahim Hassam. She lodged a claim against the executor of her husband's estate after her husband died in August 2001. The executor, Johan Jacobs refused to recognise Hassam's as a spouse in terms of the Maintenance of Surviving Spouses Act and the Intestate Succession Act. The reason for non-recognition was that the marriage was polygamous.

The presiding judged held that Hassam would have been recognised as a surviving spouse and entitled to the relief sought, had it being a monogamous marriage. Not accepting her claim would result in unfair discrimination. The exclusion of the widows of polygamous Muslim marriages from the benefits of Intestate Succession Act and Maintenance of Surviving Spouses' Act was discriminatory and contradicted section 9 of the Constitution[19]. In terms of this section, "everyone is equal before the law and has the right to equal protection and benefit of the law" and "equality includes the full and equal enjoyment of all rights and freedoms"[20]. Therefore, the court held that Muslim widows are able to inherit from their husband's estate where the husband died without a will.

[17] Daniels vs Campbell NO & Others 2004 (5) SA 331 (CC)
[18] Hassam vs Jacobs NO and Others (CCT83/08 [2009] ZACC 19
[19] Constitution of the Republic of South Africa, 1996.
[20] Section 9(1) and 9(2) of the Constitution of the Republic of South Africa Act 108 of 1996

Cohabitation of Heterosexual People

Bwanya vs Master of the High Court

In the matter of Bwanya vs Master of the High Court, Cape Town and Others[21], the Court considered whether heterosexual couples who lived together without entering into a civil marriage would qualify as a spouse for purposes of the Intestate Succession Act, as the term "spouse" is not defined in the Intestate Succession Act

Bwanya and the deceased met in February 2014 and began living together in the deceased's house in June 2014. From the evidence led, the deceased treated Bwanya as his wife and third parties corroborated this. The deceased was preparing to pay the necessary lobola. However, the deceased died in April 2016 without a valid will. Bwanya contented that she qualified as an intestate heir as she was the spouse of the deceased. The executor rejected this claim and Bwanya alleged that this was unconstitutional.

The Court referred to Gory vs Kolver[22] and highlighted the discrepancy in that life partners in a permanent same-sex relationship are regarded as spouses for purposes of section 1 of the Intestate Succession Act, but not life partners in a permanent opposite-sex relationship. The Court held that this unfair discrimination based on gender and sexual orientation and contravened section 9 of the Constitution, 1996[23]. The court ruled that ruled that section 1(1) of the Intestate Succession Act[24] should include the words "or a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support" after the word "spouse" wherever it appears. The Court also found that as it stands, section 1(1) also impairs the dignity of such an opposite-sex life partner.

An application was brought before the Constitutional Court for confirmation of the order handed down by the Western Cape Division of the High Court declaring section 1(1) of the Intestate Succession. The application also included an appeal against the Western Cape Division of the High Court's decision not to declare the definition of "survivor" under section 1 1 of the Maintenance of Surviving Spouses Act.[25]

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[21] Bwanya v Master of the High Court, Cape Town and Others (20357/18) [2020] ZAWCHC 111; 2020 (12) BCLR 1446 (WCC); 2021 (1) SA 138 (WCC)
[22] See footnote 6 *supra*
[23] Section 9(1) and 9(2) of the Constitution of the Republic of South Africa, Act 108 of 1996
[24] Intestate Succession Act No. 81 of 1987
[25] Post Judgement Media Summary, Jane Bwanya v The Master of the High Court, Cape Town CCT241/20

Bwanya argued before the Constitutional Court that section 1(1) of the Intestate Succession Act discriminatory on the grounds of gender, sexual orientation and marital status. It was further stated that the Intestate Succession Act afforded same-sex partners greater rights than opposite-sex partners even though both have the ability to marry. In respect of the definition of 'survivor' in section 1 of the Maintenance of Surviving Spouse, Bwanya argued that the maintenance under the aforementioned Act needs to be extended to the other forms of relationship which includes permanent heterosexual life partnerships, where the partners owe each other a reciprocal duty of support. The absence of including partners in these partnerships from the definition of 'survivor' is discriminatory and denies her to equal protection and benefit of the law.[26]

The Constitutional Court held that the "omission in section 1(1) of the Intestate Succession Act 81 of 1987 of the words 'or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support' after the word 'spouse', is unconstitutional and invalid." The court confirmed that section 1(1) of the Intestate Succession Act is to be read to include the above mentioned words after the word 'spouse.'[27] The Constitutional Court held that the section 1 of the Maintenance of Surviving Spouses Act was unconstitutional and invalid because the definition of 'survivor' did not include 'surviving partner of permanent life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate.'[28]

Conclusion

The cases re-visited the interpretation and application of the word "spouse" in terms of the Intestate Succession Act. Our courts are liberal in extending the definition of spouse to include people that are not in a traditional monogamous civil marriage when it comes to intestate succession.

A life partnership in itself, even in the presence of co-habitation, does not give rise to reciprocal duty of support. The parties must support and maintain each other, agreed contractually or tacitly (to be inferred from the facts). With an increase in different forms of "non-conventional" relationships of a permanent nature, courts have to treat each case on its own merits in terms of

[26] Post Judgement Media Summary, Jane Bwanya v The Master of the High Court, Cape Town CCT241/20
[27] Jane Bwanya v The Master of the High Court, Cape Town, Case CCT241/20
[28] Jane Bwanya v The Master of the High Court, Cape Town, Case CCT241/20

the concept reciprocal duty of support. The courts have to consider the intention of the two parties to the relationship in respect of their agreed (expressly or tacitly) duties and obligations before affording them protection in terms of the Constitution and deeming them spouses for purposes of intestate succession.

Where parties are cohabitating in a same-sex or opposite-sex relationship or a relationship governed by religious tenets, it is important for them to have their financial affairs in order. This includes having a properly drafted will in place. This will prevent unintended consequences befalling the estate of the deceased to the detriment of the surviving party of the relationship. In terms of the Estate Duty Act[29] , a ***"spouse",*** in relation to any deceased person, includes a person who at the time of death of such deceased person was the partner of such person—

(a) in a marriage or customary union recognised in terms of the laws of the Republic;

(b) in a union recognised as a marriage in accordance with the tenets of any religion; or

(c) in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent:

Provided that a marriage or union contemplated in paragraph (b) or (c) shall, in the absence of proof to the contrary, be deemed to be a marriage or union without community of property.

The Maintenance of Surviving Spouses Act [30] allows a surviving spouse to lodge a claim for maintenance where the marriage is dissolved due to death or divorce. The maintenance will usually terminate on death or remarriage of the surviving spouse.

The Constitutional Court held in Volks v Robinson and Others[31] that the word 'spouse' in the Maintenance of Surviving Spouses Act did not include an opposite-sex life partner for purposes of a claim in terms of the Maintenance of Surviving Spouses Act. The reasons were that the maintenance benefit in terms of section 2(1) of the said Act falls within the scope of maintenance support obligation attached to marriage and this reciprocal duty of support of spouse in a marriage arises by operation of law.[32]

[29] Section1 Estate Duty Act No. 45 of 1955
[30] Maintenance of Surviving Spouses Act 27 of 1990
[31] Volks v Robinson and Others[31] (CCT12/04) [2005] ZACC 2; 2005 (5) BCLR 446 (CC) (21 February 2005)
[32] Volks v Robinson and Others[32] (CCT12/04) [2005] ZACC 2; 2005 (5) BCLR 446 (CC) (21 February 2005)

The Western Cape Division of the High Court in the Bwanya case upheld Volks vs Robinson determination. The court held that the deceased person must have had a legal duty to support the surviving partner by operation of law, and not contract. As unmarried partners, there was no such legal duty and therefore the definition of spouse could not be extended to allow for a maintenance claim.

However, the Constitutional Court confirmed that the definition of 'survivor' in the Maintenance of Surviving Spouses Act was unconstitutional and the definition of 'survivor' needs to include a surviving partner of a permanent life partnership where there were reciprocal duties of support. The majority in the Constitutional Court held that the exclusion of permanent heterosexual life partners from benefit accorded by section 2(1) of the Maintenance of Surviving Spouses Act amounts to discrimination on the grounds of marital status. Whilst the majority maintained the sanctity of marriage and did not equate permanent heterosexual partnerships with that of marriage, it contented that one cannot distinguish the duty of support existing these two categories on the basis that one arises by operation of law (marriage) and the other from agreement (permanent heterosexual partnerships). As such the "denial of section of the section 2(1) maintenance benefit to permanent life partners constitutes unfair discrimination."[33]

Finally, cohabiting parties should have a cohabitation agreement in place (in addition to having valid Wills drafted). A cohabitation agreement is entered into between the parties who are cohabitating. It can be verbal or written. It regulates the relationship and protects the rights of the parties. The agreement should cover issues regarding joint assets and liabilities; responsibility for living expenses, maintenance and duration of the agreement. It is important to note that it is not a marriage contract. The agreement will ensure protection of both parties in the event that the partnership is dissolved on death or separation.

[33] Bwanya v The Master of the High Court, Cape Town, Case CCT241/20

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Estate Planning for Addiction

Saudiqa Fakier CFP®

LLB, Adv PG Dip. Fin Plan, PG Dip Legal Practice

Legal Advisor Advanced

Personal Finance: Western Cape

Introduction

Addiction and financial problems go hand in hand. It is an enormous social pandemic. Substance abuse includes the use of illegal narcotics, as well as abuse of legal substances like alcohol and prescription or over the counter medication etc. This abuse often leads to addiction.

Whilst substance abuse has physical consequences, the effect thereof from a psychological and relationship perspective immediately comes to mind when thinking about the harmful effects of addiction. Detrimental financial consequences usually also go hand in hand with addiction. Physical dependency consumes an addict's life with the result that such a person's financial well-being usually falls by the wayside. From a financial perspective, this could result in the loss of employment, residence and other necessities. This raises serious concerns, not only for the addict but also for their family and dependents.

This article explores some of the steps one can take to mitigate the financial effects of substance abuse and addiction.

Curatorship

Addictive habits are often expensive. Assets are sometimes liquidated in order to financially support addiction. In some instances, persons are altered from a mental perspective due to the harmful effects of drug use to the extent that they are unable to appreciate the consequences of their daily actions. In circumstances where addiction has the consequence that an individual is unable to manage his/her own affairs, such person could be placed under curatorship or alternatively under administration.

Being incapable of managing one's own affairs, means that a person has a mental, emotional or physical condition that results in being unable to receive and evaluate information, or make or communicate decisions to such an extent that the person is incapable to perform the functions inherent in managing their assets and lives. This could have a detrimental effect on the estate of such person. The person may for example have property that will deteriorate unless adequate property management is provided. It could be that funds are needed for the support, care or welfare of the person or those his/her dependents where such person is unable to take the necessary steps to obtain or provide funds needed for that responsibility.

Curatorship can be compared to the guardianship of a minor child, who lacks the contractual capacity to act, and therefore needs a legal guardian who has full contractual capacity to assist and act on the child's behalf.

What is contractual capacity?

Contractual capacity is the ability to execute a juristic act, for example entering into a legally binding contract, It entails the competence to formulate a will, and the competence to act with a sober mind with regard to that will.

There is a rebuttable presumption that a person who is 18 years and older possesses the necessary mental capacity to enter into a contract. A person who alleges contractual incapacity as result of mental illness in these circumstances bears the onus of proving this.[1]

A person who lacks the competence to exercise their will in a sober manner may be declared mentally ill under the Mental Health Act 18 of 1973. There is a rebuttable presumption that such a mentally ill person would not understand and appreciate a transaction and therefore unable to contract. Any contract entered into by such person is void and thus unenforceable by law. Such persons may be placed under curatorship (or administration).

Declaration as a prodigal

If it can be shown that the addict is incapable of managing their own affairs because of a tendency of squandering their assets, the addict may be declared a prodigal.

The term prodigal is defined as follows: "*Prodigals are persons with normal mental ability who squander their assets in an irresponsible and reckless way due to some defect in their power of judgment*"[2].

An example would be someone who is addicted to drugs, alcohol or gambling and wastes all their money and resources in order to fund their addiction. To protect such persons and their families, their status may be restricted by an order of the High Court.

[1] Lotz, Nagel and Prozesky-Kuschke in Nagel ed Business law (2011) pg 44
[2] https://www.coursehero.com/file/24405233/LAW-OF-PERSONS-CHAPTER-10pdf/

Restriction of contractual capacity will be limited to commercial transactions and handling finances, but will not affect their capacity to marry or retain parental control over their children[3].

A prodigal's capacity to act is curtailed, not because the person lacks the mental capacity, but because the person lacks the necessary judgment to know which obligations they should be party to[4].

In both the instance of being declared mentally ill, or being declared a prodigal there is a rebuttable presumption that the addict lacks the necessary contractual capacity and that any contract that they enter into is thus unenforceable by law[5].

Curatorship is appropriate in both the instance of mental illness, and when someone is declared a prodigal. A person may lose contractual capacity due to an illness like Alzheimer's disease or as a result of an accident. Loss of contractual capacity may also occur where an addict's mental ability has deteriorated due to substance abuse[6]. If gambling or substance addiction leads to the squandering of a person's assets, such person could be declared a prodigal, even is his/her mental capability is not effected. Curatorship is thus appropriate in both types of situations addicts finds themselves in and a curator *bonis* would be appointed.

What is a curator bonis?

A curator bonis is the person appointed to administer the estate of another person declared incapable of managing their own affairs

There are also other types of curators. A curator *personae* is the person who makes decisions of a more personal nature on behalf of another person. A curator *personae* would be responsible for the personal care and custody of another person and could even make decisions in respect of medical treatment on behalf of such person[7]. Such decisions could include submitting the person for drug tests or rehabilitation.

[3] https://www.studocu.com/en-za/document/nelson-mandela-university/law-of-contract-201/chapter-5-contractual-capacity/4056961
[4] Phil Morkel Bpk v Niemand 1970 (3) SA 455 (C)
[5] Gibson South African Mercantile and Company Law. Visser Pretious Sharrocka and Mischke pg 27
[6] Molete v MEC for Health, Free State (2155/09) [2012] ZAFSHC 126
[7] https://www.justice.gov.za/juscol/docs/note-MOH01.pdf

A curator *ad litem* is a legal representative, like an advocate or attorney, appointed to act on behalf of and represent someone's interests during legal proceedings[8].

How is a curator appointed?

The common law process of appointing a curator involves an application to the High Court. The application must be heard in the High Court in whose jurisdiction the addicted person is domiciled, or owns property.

A notice of motion is initiated by any interested party (applicant)[9]. The following documentation needs to accompany the notice of motion"

(i) a supporting affidavit by the interested party (applicant); and
(ii) a completed J197[10] form;
(iii) specialist medical reports from psychiatrists, psychologists or occupational therapists;
(iv) proof of financial squandering of assets.

The affidavit it must stipulate that a similar application has not been brought in another court's jurisdiction. The notice of motion is served upon the person incapable of managing his/her own affairs. If the person cannot appreciate nature of the application because of his/her condition, it should be served to the immediate carer if possible.[11] Service is executed by the Sheriff of the Court.

The Court first appoints a curator *ad litem* to investigate the matter and report to the Court. If, after considering all documents and circumstances, the Court finds that the person lacks capacity to act and manage his/her own affairs, the curator *bonis* is appointed and this is made an order of Court.

Although the appointment of a curator will have the effect of the person's estate being managed, is criticised for being an expensive exercise due to the costs associated with specialists reports and advocate's and attorney's fees.

[8] https://honeyattorneys.co.za/appointment-of-a-curator/
[9] Like a family member, friend, employer, care-giver
[10] Application for appointment of tutor/curator
[11] https://www.lawsoc.co.za/upload/files/mo_adminofcuratorshipestates_2015_11.pdf

Where a person who is married in community of property is placed under curatorship, his/her spouse would require the consent of the curator *bonis* to dispose of or encumber the assets in the estate, where the consent of a spouse is required in terms of the Matrimonial Property Act[12].

A single person can fulfil the role of more than one type of curator. It is not uncommon for a person's spouse to be appointed as both curator *bonis*[13] and *personae* of that person, as each role confers different powers over the person under curatorship. If the spouse is not the appointed curator, the curator's consent to conduct may be required for transactions affecting the person's assets, or for medical treatment where applicable.

Mental Health Care Act Application

An alternative way to protect a person suffering from an addiction estate is to go the route of a Mental Health Care Act[14] application. This alternative route is more informal and less costly than the formal High Court approach. The Master of the High Court appoints an administrator (akin to a curator bonis) over the estate of the person incapable of managing their affairs.

An interested party, like a spouse, parent, friend or child, can bring the application. A completed CB 11 form[15] needs to be submitted, which serves as an affidavit and addresses questions pertaining to the person's mental state.

Along with the CB11 form, recent doctors' reports are necessary as well as proof that the application was served on the addict or their carer. In claiming an addict may be suffering a mental illness, the Mental Health Care Act[16] requires a formal diagnosis of such mental illness.

There must thus be a diagnosis of mental illness caused by the addiction, and the lack of mental capacity to act or incompetence of managing the person's own affairs.

[12] Act 88 of 1984, Section 15
[13] Ex parte Powrie 1963 1 ALL SA 420 (W)
[14] Act 17 of 2002
[15] Application to Master of High Court to appoint Administrator Form
[16] Mental Health Care Act 17 of 2002

It must however be borne in mind that an appointment of an administrator in terms of the Mental Health Act is only allowed if the estimated property value of the addict is less than R200 000 and his/her annual income is below R24 000[17].

Process

The appointment of a curator and the appointment of an administrator are thus two methods which concerned family members can employ to protect an addict's estate. In this way, one can prevent further financial erosion of the addict's assets to some extent. The curator's or administrator's responsibilities include:

- to receive, take care of, control and administer all the assets;
- to carry on/or discontinue, subject to any law which may be applicable, any trade, business or undertaking;
- to acquire, whether by purchase or otherwise, any property, movable or immovable, for the benefit of the estate; and
- to apply any money for the maintenance, support or towards the benefit of the person;
- to invest or re-invest any funds[18].

It is important to understand how the above processes can be beneficial, but it is also important to understand their limitations. Curatorship will not necessarily prevent the sale of small assets to order to feed the addiction, but it should avoid the sale of large assets like businesses, immovable property or investments to support the addiction.

Curatorship comes to an end in a similar way in which in came about, i.e. by way of a court application. It can be the brought by the rehabilitee under curatorship or an interested party.

Inter Vivos Trusts a Mechanism to Leave An Addict An Inheritance

An inter *vivos* or testamentary trust is a useful way to leave funds and assets to an heir who is an addict. The appointed trustees are authorised to administer the trust in accordance with what the trust deed stipulates.

In a discretionary trust, the trustees have a fiduciary duty to administer funds for the benefit of the beneficiaries, but they hold the discretion to decide when, how much and which beneficiary is

[17] Section 60(4)(b)(i) of the Mental Health Care Act 17 of 2002 read with regulation 47, General Regulations to the Mental Health Act, GNR.1467 of 15 December 2004.
[18] www.justice.gov.za accessed May 2021

to benefit. If the beneficiary is an addict, this is an extremely valuable function. The beneficiary who suffers from addition only manages funds and assets after a distribution is made to him/her.

If administered correctly by the trustees, assets in the trust will be protected from the addict's creditors and thus, where applicable, an addict's insolvent estate. An addict's spouse and children could also be nominated as beneficiaries of the trust. An inheritance can therefore be protected by distributing capital and income to the other beneficiaries instead of the addict, and will be unaffected if the addict passes away.

It is ideal that the trust deed appoint more than one trustee, so that decisions on trust assets are decided upon jointly. Where there is only one trustee appointed and this person is also a beneficiary, SARS can conclude that the trustee was administering the assets for his/her own benefit because of the unfettered unilateral control of such assets. This may thus result in trust assets forming part of the trustee's estate for estate duty purposes[19].

Staged distributions

Lump sum distributions or outright bequests to a vulnerable adult in the throes of addiction can prove to be unwise and even fatal if that person uses the funds to purchase harmful substances. Such a person will have full control of what possibly took the testator a lifetime to accumulate and squander it in a short period. One can choose to exclude someone from a will but that will not necessarily change his/her behavior for the better. Disinheritance may have the opposite effect[20].

A solution is to use a conditional distribution of trust assets in terms of the trust deed. The trust deed could stipulate to make a certain distribution to a beneficiary at regular intervals, or better yet, at or after the occurrence of specific events. Hence the distribution of trust funds or assets are conditional to the desired outcome. These are also informally referred to as incentive trusts[21], because of their conditional nature that induces specific desired behavior in beneficiaries by specifying criteria that must be met for disbursement of funds. This mechanism is commonly used in United States[22]. Trust deeds are designed, and thus worded, to encourage certain behavior

[19] Section 3(3)(d) of the Estate Duty Act 44 of 1955
[20] https://www.forbes.com/sites/robclarfeld/2018/07/05/when-should-children-have-access-to-their-inheritances/?sh=800714910f8c
[21] https://www.investopedia.com/terms/i/incentivetrust.asp
[22] Conditional Love. Incentive Trusts and the inflexibility problem. Joshua C. Tate 2006 in https://scholar.smu.edu/cgi/viewcontent.cgi?article=1582&context=law_faculty

and discourage undesirable behavior. The potential receipt of trust income or capital is the proverbial dangling carrot incentive to create positive behavioral changes. The trustee has a fiduciary duty to act in terms of the trust deed, which houses a distribution schedule that trustees will have to comply with.

Examples of how this mechanism may be used

- A trustee is authorised to make a distribution to a beneficiary suffering from addiction when the beneficiary attends regular rehabilitation meetings or clears drug tests for a specified period.
- A larger lump sum distribution to the beneficiary is allowed on the attainment of a specified period of sobriety
- If the beneficiary attains and stays employed for a certain duration of time, a distribution is allowed.
- A distribution is made if the beneficiary undergoes regular substance abuse counseling.

The objective is that the founder of the trust incentivises the positive outcome of addiction recovery. The trustee would be obliged to exercise their discretion in line with a distribution schedule. The trust deed could for example stipulate that the trust assets should vest in the event of uninterrupted sobriety (e.g. after 10 years), and could provide for other capital beneficiaries in the event of the addicted beneficiary not meeting the conditions.

The approach of using a conditional "incentive" trust is that it rewards sober lifestyle habits with financial gain. It is beneficial to the beneficiary recovering form addition because it will prevent squandering of their assets and inheritance whilst fostering healthy life choices.

Trustee appointment

To ensure the successful operation of the trust one must appoint the right persons to act as trustees. Strong and skilful independent trustees with no emotional ties to the beneficiary are important. Trustees, who will withhold a distribution if the required conditions are not met, are key to the successful implementation of the objective of the trust.

Conclusion

Declaring someone mentally ill or a prodigal may be what it takes to prevent assets from being squandered. The appointment of a curator *bonis*, although cumbersome, is beneficial as there is a court appointed person to assist or act on an addict's behalf.

One should refrain from giving big amounts of money or high value assets directly to an addict. It is much safer to transfer it to a trust, under the control of skilled trustees to administer it on behalf of the addict. The trust deed could also set out conditions that must be adhered to before a trustee is allowed make a distribution to an addicted beneficiary. By doing it this way, a measure of control is gained and high value assets are protected from being squandered, whilst at the same time encouraging a positive lifestyle for the addict.

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www.justice.gov.za accessed May 2021

Decisions on your Sickbed

Madeleine Britz CFP®
BLC, LLB, Adv. PG in Fin Plan
Legal Advisor Advanced
Personal Finance: Nelspruit

Introduction

Much has been written on the importance of having a will in place and the do's and don'ts on bequeathing your earthly possessions when you die. It is however equally important to consider the steps to be followed if you get so sick due to a stroke, accident or cancer or any other illness or contingency and you are no longer able to make decisions yourself. An obvious question in this regard is whether you have the right to refuse consent to any medical treatment that will keep you alive by artificial means when you are no longer competent to express your instructions.

Legal Status of Prospective Decision to Refuse Medical Intervention

A "living will" is an instruction or advanced medical directive given while you are still "*compos mentis*" (of sound mind), instructing that you do not wish to be kept alive artificially if, in future, you are not able to express your wishes in this regard.

Where a patient has lost his or her capacity to decide to refuse or undergo medical treatment, the question arises whether an instruction in a living will not to receive medical treatment must be honoured. The current legal status of a living will is unclear. The living will is not catered for or defined in the Wills Act[1] nor is it explicitly recognised by any other statute. There is also no direct authority within the common law. A court case in which the living will featured was Clarke v Hurst.[2]

Clarke v Hurt

Dr Clarke suffered cardiac arrest after undergoing an epidural block and a sudden loss of blood pressure. He stopped breathing and his heart stopped beating. The medical team resuscitated him but by that time he had already suffered severe brain damage and was diagnosed as being in a permanent vegetative state[3]. He was unable to consume food without the help of a nasogastric tube to feed him artificially. He was in this state for more than four years when his wife applied to the Court to be appointed as curatrix. She sought confirmation to authorise the discontinuance of any present or future treatment, to withhold agreement or the authority to agree to any medical treatment for him and to act within these powers, despite the fact that her

[1] Wills Act 7 of 1953
[2] 1992 4 SA 630 (D)
[3] A permanent vegetative state was explained by Thirion J in Clarke v Hurst 1992 4 SA 630 (D) 640D-F as "a neurological condition where the subject retains the capacity to maintain the vegetative part of neurological function but has no cognitive function. In such a state the body is functioning entirely in terms of its internal controls. It maintains digestive activity, the reflex activity of muscles and nerves for low level and primitive conditioned responses to stimuli, blood circulation, respiration and certain other biological functions but there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner".

decisions might hasten the death of the patient. The Court granted the order and a week later the patient passed on.

Evidence led at the hearing confirmed Dr Clark was a life member of the South African Euthanasia Society (SAVES). He had signed a living will whereby he directed that he did not want to be kept alive artificially and would be allowed to die in the event where in future he contracts a terminal illness with no hope of recovery, or where he becomes permanently unconscious. Dr Clark even held a public speech on the right to die in certain circumstances. Unfortunately, although Thiron J recognised the fact that the patient had a strong conviction not to be kept alive, the court did not base its decision on the patient's instructions, nor did the court rule on the validity of the "living will". Thiron J ruled that the discontinuance of the artificial feeding regime would not be the legal cause of the patient's death[4]. He also concluded that in terms of the legal convictions of society, it would not be wrongful or unlawful to discontinue any medical treatment or artificially feeding regime that had merely kept his body alive[5], and that it would be in the patient's best interest to let him die[6]. The court recognised the fact that although the patient had passed beyond the point where it could be said that he had an interest in the matter, his wishes as previously expressed when he was still competent should be given effect to. The judgement however does not provide authority on the legal validity of the living will[7].

The South African Law Commission

In 1992 the South African Law Commission made an effort to address this gap in our law. The Commission initiated a research project on euthanasia as well as the artificial preservation of life and related matters (such as the need for legal recognition of advance directives).

Draft legislation, which authorises health care practitioners to honour advance directives including a living will or a medical power of attorney prepared by a patient when he or she was competent, was proposed (but never enacted) by the Commission in 1998[8]. The

[4] 660B-C. The court based its finding on the more flexible criterion for legal causation introduced in S v Mokgethi 1990 1 SA 32 (A), namely whether policy considerations of reasonableness, fairness and justice require that an Act is viewed as the legal cause of a result.
[5] 653-657.
[6] 660D-F.
[7] Strauss "The 'right to die' or 'passive euthanasia': Two Important Decisions, One American and the Other South African" 1993 SACJ 196 208 who regrets the court's reluctance to give explicit recognition to living wills; Fleischer "End-of-life Decisions and the Law: A New Law for South Africa?" 2003 (21) Continuing Medical Education 20; McQuoid-Mason 59.
[8] South African Law Commission "Report on Euthanasia and the Artificial Preservation of Life" (1998) RP 186/1999.

recommendation[9] provided that any person of sound mind above the age of 18 (eighteen years) may make an advance directive by signing either a living will that directs the withdrawing or withholding of any medical treatment when the patient has an terminal illness, or a power of attorney appointing a person to make medical decisions if the patient becomes non compos mentis or terminally ill and cannot make decisions. Health care practitioners may only honour an advance directive when they decide the patient cannot make or communicate decisions and has a terminal illness which is defined as either a vegetative state or a condition that will inevitably cause "untimely death" and "extreme suffering" for the patient. The proposals by the Commission were never enacted.

Since "living wills" are not legally recognised by statute or common law, some academics argue that since a "living will" is an instruction to refuse medical treatment in the future, the principles governing a contemporaneous refusal of medical treatment by a patient should also apply to an advance directive in a "living will".

Strauss[10] was the first jurist to write on the need to recognise the validity of the "living will" in South Africa. Even before the Clark[11] judgement, Strauss argued that if a person is entitled to refuse medical treatment when it is proposed by a medical practitioner, there is no reason why the same person cannot refuse such treatment at an earlier stage. If such a refusal was properly recorded, it will stand until revoked by the person who made it[12]. Strauss argued further that doctors and hospital staff must respect the patient or declarant's statement of refusal. Should a doctor disregard such statement by keeping him or her alive by artificial means, the doctor would, in his opinion be "technically" guilty of assault in both civil and criminal law[13]. Other medical law experts still accept his view.[14]

In order to assist medical practitioners in advising patients on their treatment or more particularly, the refusal of treatment, the Medical Association of South Africa published some guidelines on living wills in 1994. In 2012 the South African Medical Association (SAMA) published a directive

[9] In the "Summary of Recommendations" of the report.
[10] (Strauss,1984 :387)
[11] Clarke v Hurst 1992 4 SA 630 (D).
[12] Strauss 344-345.
[13] 345.
[14] McQuoid-Mason 2005 SACJ 27-28; Carstens and Pearmain 209; Burchell Principles of Criminal law (2006) 328.

dated 4 April 2012, entitled *"Living Wills and Advance Directive"*[15]. ***Medical practitioners are cautioned on the following in this directive:***

- Any person my refuse medical treatment even if such refusal will result in irreversible harm or death, unless such treatment is sanctioned by law.
- In order to make such a declaration the person must be "*compos mentis*" and be over the age of medical consent.
- The declaration will remain valid even if the person becomes "*non-compos mentis*".
- This principle is not applied in the same fashion for a Power of Attorney which loses its authority once the principal or patient becomes mentally incompetent.
- A "living will" is not the same as a will in the testamentary sense of the word.
- At present there is no law in South Africa regarding the enforceability and validity of "living wills".
- The guidelines are there to assist doctors who are confronted with a "living will".
- Doctors are cautioned to treat the "living will" with considerable circumspection and to obtain advice from SAMA if necessary.

The directive contains various guidelines to assist medical practitioners and can be accessed on SAMA'S website. They also provide an example of a living will.

The 2019 National Health Amendment Bill and an explanatory summary (as part of the Bill) was published and introduced to Parliament on 27 February 2019. Notice of this introduction was published in the Government Gazette No. 41789 of 24 July 2018. This Memorandum sets out some important proposed amendments regarding living wills and advanced directives:

*"**MEMORANDUM ON THE OBJECTS OF THE NATIONAL HEALTH AMENDMENT BILL, 2019***

1. BACKGROUND

1.1. Dying is a natural and inevitable part of life. Unless we die an unnatural death, we will go through a natural dying process. For some, it will be peaceful and dignified; for others it will be filled with pain, distress and suffering. We do not know which it will be.

1.2. Any competent person may foresee the possibility of becoming incompetent when they enter the terminal phase of the dying process, and may wish to control their health care decision-making as they are able to do when they are competent. Advance

[15] https://www.samedical.org/images/attachments/guidelines-with-regard-to-living-wills-2012.pdf.

health care directives are designed to enable competent persons to express their preferences and give instructions about such possible future situations.

1.3. The National Health Act, 2003 (Act No. 61 of 2003) (''the principal Act''), does, to an extent, contain provisions regarding advance health care directives in that in one provision of the Act, a "living will" is inferred and in another, provision is made for the appointment of a substitute health care decision-maker. However, it is argued that these provisions, while a step in the right direction, are inadequate for a number of reasons. These reasons, inter alia, include that a "living will" is not expressly recognised; the purpose, scope and format of these advance health care directives are not explicitly set out; it is not clear whether they may in certain circumstances be overridden by family or treating medical doctors; whether persons acting upon the directives are immune from civil and criminal prosecutions; and how to deal with a situation where two substitute decision-makers disagree about the treatment the patient should receive.

2. OBJECTS OF THE BILL

2.1. The National Health Amendment Bill, 2019 ("the Bill"), will amend the principal Act so that advance health care directives such as the living will and the durable power of attorney for health care are legally recognised, and that legal certainty and legal enforceability regarding these directives are provided for.

3. CONTENTS OF THE BILL

3.1. Clause 1 amends a definition in section 1 of the principal Act and inserts new definitions.

3.2. Clause 2 inserts new sections 7A and 7B into the principal Act to provide for the two types of advance health care directives, namely the durable power of attorney for health care and the living will. This clause sets out the content of each of these advance health care directives and the various requirements that must be complied with. It also sets out how these directives can be revoked. This clause also refers to the newly inserted Schedules 2 and 3, which provide examples of a durable power of attorney for health care and a living will, respectively.

3.3. Clause 3 amends section 93(1) and (3) of the principal Act by numbering the existing Schedule in the principal Act as Schedule 1.

3.4. Clause 4 inserts new Schedules 2 and 3 into the principal Act. These Schedules provide examples of a durable power of attorney for health care and a living will, respectively.

3.5. Clause 5 provides for the short title and commencement.

4. *ORGANISATIONAL AND PERSONNEL IMPLICATIONS*

   None.

5. *FINANCIAL IMPLICATIONS FOR THE STATE*

   None.

6. *DEPARTMENTS, BODIES OR PERSONS CONSULTED*

   The following stakeholders were consulted:

   6.1. *Dignity SA;*

   6.2. *Prof W A Landman (Landman, WA End-of-life decisions, ethics and the law: A case for statutory legal clarity and reform in South Africa, Ethics Institute of South Africa, 2012.)*

   An explanatory summary of the draft Bill was published for public comment in Government Gazette No. 41789 on 24 July 2018.

7. *PARLIAMENTARY PROCEDURE*

   7.1. *The Member proposes that this Bill must be dealt with in accordance with the procedure prescribed by section 75 of the Constitution. Even though the Bill seeks to amend the National Health Act, 2003, which regulates a functional area of concurrent national and provincial legislative competence listed in Part A of Schedule 4 of the Constitution, namely "health services", the nature of the amendments proposed in the Bill are largely administrative and hence it is proposed that the Bill should be dealt with in accordance with section 75 of the Constitution.*

   7.2. *The Member is further of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities."*

The 2019 National Health Amendment Bill has not been enacted. Therefore there is currently no law at regulating the validity of a "living will". Dignity South Africa[16], which advocates the right of the individual to self-autonomy in end-of-life decisions, however states on their website that although "The Living Wills Society" (SAVES) no longer exists, the advice in an article published on their website[17] remains valid:

[16] https://dignitysouthafrica.org/
[17] https://dignitysouthafrica.org/sage-advice

To make a valid living will the following conditions apply[18]:

- ❑ You must be at least 18 years old; and
- ❑ You must be *compos mentis* and not be in any mental distress; and
- ❑ You must understand and be fully informed of the consequences of such a will; and
- ❑ You must understand that the will applies to all future circumstances and situations; and
- ❑ You must not be forced or influenced to sign such a will.

How do you draft a living will?

You need to address your doctor, family and any health authority. The following is an example of the language to be used in a living will:

"If the time comes when I can no longer take part in decisions for my own future, let this declaration stand as my directive. If there is no reasonable prospect of my recovery from physical illness or impairment expected to cause me severe distress or to render me incapable of rational existence, I do not give my consent to be kept alive by artificial means, including any pacemaker, nor do I give my consent to any form of tube-feeding when I am dying; and I request that I receive whatever quantity of drugs and intravenous fluids as may be required to keep me free from pain or distress, even if the moment of death is hastened.

Do not resuscitate: I do not give my consent to any person's attempt at resuscitation, should my heart and *breathing stop and my prognosis is hopeless.*"

It is advisable to make it clear in your living will that you may be given fluids intravenously in these circumstances because dehydration can cause huge discomfort[19].

Practical tips and recommendations

- ❑ It is advisable to use an attorney, legal adviser or fiduciary specialist for the drafting and advice of your living will.
- ❑ One original living will signed by yourself and two competent witnesses should be kept at your place of residence, where someone else can easily obtain it to hand it over to the people who should treat you should you, for example, be unconscious. A second original document must be kept for use should you be admitted to a hospital, nursing home or hospice where it can be kept in your patient file and a third original document must be handed over to your doctor.

[18] https://dignitysouthafrica.org/sage-advice
[19] https://dignitysouthafrica.org/sage-advice,Raw 6

- A living will should not be contained or added as an appendix to your last will and testament. A last will and testament only takes effect after your death, as opposed to the living will which applies when you become incapable of making decisions.
- The provisions of living will may also have implications for the payment of "dreaded disease benefits" provided by insurance companies, where certain survival periods may apply. It is therefore of the utmost importance to consult your financial advisor for advice in this regard.
- It is wise not to leave the difficult decisions regarding the discontinuation of medical treatment to your family or doctors, and to rather make your wishes regarding the matter known in advance through a living will. Unnecessary stress and expenses on the part of the family can be avoided in this way and you save yourself from possible protracted pain and suffering.

Conclusion

Although living wills are not currently recognised by statutory law, South African law does recognise each person's right to accept or decline medical treatment. Section 12 of the Constitution[20] provides that everyone has the right to bodily and psychological integrity, which includes control over one's own body.

Although legislation on living wills has not been enacted in South Africa, it is my opinion that living wills that comply with the relevant guidelines remain valid, even in the event of a declarant becoming *non compos mentis* after drafting such document.

[20] The South African Constitution Act 108 of 1996

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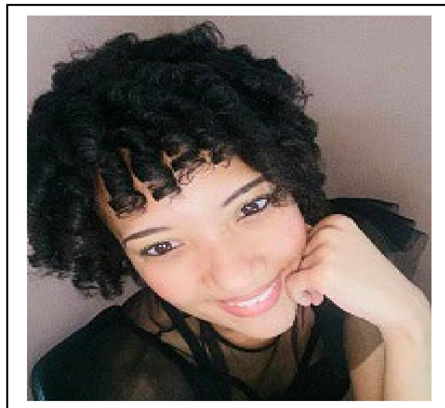
'Till Death do us Part' – Know the Importance of Your Marital Regime on Your Estate



Tarryn Miles CFP®
LLB, PG Dip in Fin. Plan
Legal Advisor
Personal Finance: Pretoria

Introduction

As quoted by Anne Lamott: "A good marriage is where both people feel like they're getting the better end of the deal."

Prior to a couple's marriage being solemnised, they need to understand the various marital regimes and the impact of their chosen marital regime on their individual and/or joint estates. This article will focus on this topic.

South African Legislation governing martial regimes

South African marriages are governed by various sources of legislation.

- Matrimonial Property Act[1], which regulates monogamous marriages for opposite sex couples. There are three different forms of marital regimes provided for in the Act, namely:
  - (a) Marriage in community of property;
  - (b) Marriage out of community of property (without accrual) and
  - (c) Marriage out of community of property (with accrual).
- The Civil Union Act[2], which regulates the solemnisation and registration of civil unions, by way of either a marriage or a civil partnership, provides for the legal consequences of the solemnisation and registration of civil unions[3]. The Act[4] applies to both opposite sex and same sex persons who chose to enter into a civil union. A civil union will be in community of property, unless an ante-nuptial agreement is concluded before the marriage.
- The Recognition of Customary Marriages Act[5] allows persons to enter into polygamous marriages. The only polygamous marriages regulated by legislation in South Africa are customary marriages[6]. A person may not be married to different persons in terms of a customary marriage and a civil marriage at the same time. However, two people who are married to each other in terms of customary law, can enter into a civil marriage with each other as well[7]. A customary marriage is valid if the requirements in terms of section 3 of the Act[8] are met, namely that the persons must be above the age of 18 years, both persons must

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[1] 88 of 1984
[2] 17 of 2006
[3] Section 2 of the Civil Union Act 17 of 2006
[4] 17 of 2006
[5] 120 of 1988
[6] https://www.legalwise.co.za/help-yourself/legal-articles/customary-marriages. Accessed on 03/08/2021
[7] https://www.legalwise.co.za/help-yourself/legal-articles/customary-marriages. Accessed on 03/08/2021
[8] Recognition of Customary Marriages Act 120 of 1988

consent to be married to each other under customary law and the marriage must be negotiated and entered into or celebrated in accordance with customary law.

Section 7(2) of the Recognition of Customary Marriages Act[9] provides that a monogamous customary marriage entered into after the commencement of the Act[10], will be a marriage in community of property and of profit and loss, unless the parties enter into an ante-nuptial contract before getting married. Polygamous customary marriages however are by default out of community of property. In terms of Section 7(6) of the Recognition of Customary Marriages Act[11], the proprietary consequences of marriages entered into after the commencement of the Act[12], are regulated by a written contract between the husband and his wives.

- Muslim marriages are not regulated by legislation in South Africa. Muslim marriages are categorised as religious marriages. Muslim Marriages are deemed to be marriages out of community of property, excluding the accrual system[13].

Who qualifies as a spouse?

It is important to determine whether a person qualifies as a spouse for estate and tax planning. The Income Tax Act[14] and Estate Duty Act[15] defines a spouse as follows: *A 'spouse', in relation to any person, means a person who is the partner of such person-:*

In a marriage or customary union *recognized in terms of the laws of the Republic;*

(a) In a union recognized as a marriage in accordance with the tenets of any religion; or

(b) In a same sex or heterosexual union which the Commissioner is satisfied is intended to be permanent,

*and **'married'**, **'husband'** or **'wife'** shall be construed accordingly: Provided that a marriage or union contemplated in paragraph (b) or (c) shall, in the absence of proof to the contrary, be deemed to be a marriage or union without community of property."*

[9] 120 of 1988
[10] 120 of 1988
[11] 120 of 1988
[12] 120 of 1988
[13] Definition of a spouse in terms of the Income Tax Act 58 of 1962 & Estate Duty Act 45 of 1955
[14] 58 of 1962
[15] 45 of 1955

Marital status has an effect on estate and tax planning. It is therefore important to determine who is a 'spouse' for estate planning purposes for three important reasons. Firstly, in terms of section 4q, of the Estate Duty Act[16], bequests between spouses are deductible for estate duty purposes. Secondly, transfers between spouses are exempt from capital gains tax[17]. Lastly, donations between spouses are exempt from donations tax[18].

The term "spouse" is not defined in legislation regulating the law of succession or maintenance[19]. In the case of ***Volks NO v Robinson and Others***[20], the Constitutional Court ruled that a surviving partner in a heterosexual life partnership, where no marriage was concluded, should not be regarded as a surviving spouse for purposes of the Maintenance of Surviving Spouses Act[21]. On the other hand in the case of ***Gory v Kolver***[22], the Constitutional Court held that partners in a same-sex relationship must be regarded as 'spouses' for purposes of the Intestate Succession Act[23]. The reason for the difference in the decisions of Volks NO v Robinson and Others[24] and Gory v Kolver[25] , is that before 1 December 2006, partners in a same-sex relationship were not allowed to conclude a marriage.

In the case of ***Daniels v Campbell NO and Others***[26], the applicant was a woman married in terms of Muslim rites, whose husband had died intestate. The court noted that Muslim marriages were not recognised in South African law. The court concluded that this was in violation of section 9 of the Constitution. It therefore held that the applicant could inherit. The scope of this judgment was restricted to monogamous Muslim marriages. In ***Hassam v Jacobs NO and Others***[27], the scope was extended to polygamous Muslim marriages.

Marital Property Regimes

Before tying the knot, due regard must be given to the marital regime that will apply to a marriage. This will be discussed further below.

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[16] 45 of 1955
[17] Income Tax Act 58 of 1962
[18] Section 56 of the Income Tax Act 58 of 1962
[19] M Botha et al, The South African Financial Planning Handbook (2019), at 808
[20] 2005 (5) BCLR 446
[21] 27 of 1990
[22] 2007 (4) SA 97
[23] 81 of 1987
[24] 2005 (5) BCLR 446
[25] 2007 (4) SA 97
[26] 2004 (5) SA 331
[27] 2009 (5) SA 572

In Community of Property

A marriage in community of property is the default marital regime in terms of the Matrimonial Property Act[28], if an ante-nuptial contract is not concluded before the marriage is solemnised.

A joint estate is formed when spouses are married in community of property. From an estate planning perspective this has the consequence, that the two spouses do not have their separate estates anymore. Each spouse owns 50% of the assets and the liabilities in the joint estate. If you are married in community of property the marital regime also places a limit on the freedom of testation. ***A spouse married in community of property is only entitled to bequeath 50% of the assets in the joint estate in his/her will***. Spouses must therefore give careful consideration to their marital regime when drafting their will. If the spouses wish to exclude property from the joint estate, it must be done by way of concluding a separate ante-nuptial contract before the marriage.

The value of property bequeathed to a surviving spouse (i.e. from either the deceased's 50% share in the joint estate or from assets of the deceased excluded from the joint estate), by way of a valid will or in terms of intestate succession, would be deductible from the gross estate of the deceased for estate duty purposes[29].

Certain assets do not form part of the joint estate.

This would include:

- assets inherited where the testator expressly excluded the inheritance from community of property [30]; and
- property burdened with a fideicommissum [31];
- any amount recovered by a spouse by way of damages, other than damages for patrimonial loss, by reason of a delict committed against such spouse[32],
- damages recovered by one spouse against the other spouse in respect of bodily injuries suffered by him or her and attributable either wholly or in part due to the fault of the other spouse [33].

[28] 88 of 1984
[29] Section 4(q) of the Estate Duty Act 45 of 1955
[30] Allen West Excluding community of property. LexisNexis 14 January 2021.
[31] Allen West Excluding community of property. LexisNexis 14 January 2021.
[32] Section 18(a) of the Matrimonial Property Act 88 of 1984
[33] Section 18(b) of the Matrimonial Property Act 88 of 1984

Section 15 of the Matrimonial Property Act[34], provides that a spouse in a marriage in community of property may not perform certain juristic acts, with regards to the joint estate, without, depending on the situation, the written or oral consent of the other spouse.

A disadvantage of a marriage in community of property is that when one spouse incurs debt, such debt will form part of the joint estate[35]. In the unfortunate event of one of the spouses being sequestrated, the other spouse will also be sequestrated, resulting in both spouses obtaining the status of an insolvent[36]. For purposes of insolvency, a marriage out of community of property could thus be more advantageous than a marriage in community of property.

Out of Community of Property without Accrual

Spouses who wish to be married out of community of property without the accrual must enter into an ante-nuptial agreement, before the marriage. The antenuptial contract must be entered into before a notary public and must be registered at the deeds office. If their contract was not registered on time they may apply to the court for permission for late registration of their contract in terms of Section 88 of the Deeds Registries Act[37]. Spouses may also change their matrimonial property regime from in community of property to out of community of property by registration of a Postnuptial Contract in terms of Section 21(1) of the Matrimonial Property Act[38].

Section 2 of the Matrimonial Property Act[39], provides that:

Every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is subject to the accrual system.

At the consultation with the Notary, the spouses will have an option to select whether or not they would like the accrual system to apply to their marriage. If they do not expressly exclude the

[34] Act 88 of 1984
[35] Section 14 of the Matrimonial Property Act 88 of 1984
[36] M Botha et al, The South African Financial Planning Handbook (2019), at 813
[37] https://nordienlaw.co.za/practice-areas/postnuptial-contracts/?nordienlaw.co.za/practice-areas/postnuptial-contracts&gclid=EAIaIQobChMIzqzwtKOX8gIVAbbtCh3HSwkmEAAYASAAEgI6tPD_BwE. Accessed on 03/08/2021
[38] https://nordienlaw.co.za/practice-areas/postnuptial-contracts/?nordienlaw.co.za/practice-areas/postnuptial-contracts&gclid=EAIaIQobChMIzqzwtKOX8gIVAbbtCh3HSwkmEAAYASAAEgI6tPD_BwE. Accessed on 03/08/2021
[39] 88 of 1984

accrual system, it would automatically apply[40]. If they do not want to include the accrual system to their marital regime, they would need to specifically exclude it from their marriage[41].

Upon the dissolution of the marriage, each spouse retains his/her own separate estate. The value of property bequeathed to a surviving spouse, either by way of a valid will or in terms of intestate succession, would be deductible from the gross estate of the deceased for estate duty purposes, in terms of Section 4q of the Estate Duty Act[42].

Section 21 of the Insolvency Act[43], regulates the process in the case where a spouse becomes insolvent. Section 21 of the Insolvency Act[44] prevents a person who is sequestrated to assign their property to be the property of the solvent spouse', in order to keep it away from creditors. In terms of this section, all the property of the solvent spouse is also attached as if their estate is being sequestrated. The burden of proof then rests on the solvent spouse to prove which assets belongs to him/her. Section 21(2) of the Insolvency Act[45] provides that the following needs to be proven by the solvent spouse for his/her property to be released:

(2) The trustee shall release any property of the solvent spouse which is proved—

- *(a) to have been the property of that spouse immediately before her or his marriage to the insolvent or before the first day of October, 1926; or*
- *(b) to have been acquired by that spouse under a marriage settlement; or*
- *(c) to have been acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent; or*
- *(d) to be safeguarded in favour of that spouse by section 28 of this Act or by the Insurance Act, 1923 (Act 37 of 1923); or*
- *(e) to have been acquired with any such property as aforesaid or with the income or proceeds thereof.*

If the solvent spouse attained property during the marriage, such spouse must prove that the assets were attained by way of a valid title in order to protect it against the creditors of the insolvent spouse. In the case where the property is registered in the name of the solvent spouse, but was paid for by the insolvent spouse, the asset may fall in the insolvent spouse's estate[46].

[40] Section 2 of the Matrimonial Property Act 88 of 1984
[41] Section 2 of the Matrimonial Property Act 88 of 1984
[42] 45 of 1955
[43] 24 of 1936
[44] 24 of 1936
[45] 24 of 1936
[46] M Botha et al, The South African Financial Planning Handbook (2019), at 813

Out of Community of Property with Accrual

Marriages out of community property entered into after 1 November 1984, will automatically include the accrual system, unless the accrual system is expressly excluded in the ante-nuptial contract[47].

Spouses may exclude any asset from the accrual in the ante-nuptial contact, but they will need to ensure that specific details are included in the contract which clearly identifies the asset[48].

In terms of this marital regime, during the duration of the marriage, each spouse will conduct their own separate estate independently and will not require the consent of the other spouse regarding their own undertakings. The accrual system will only be relevant at the dissolution of the marriage on the death of a spouse or on divorce.

The accrual system is defined in section 3 of the Matrimonial Property Act[49] as follows:

3. Accrual system

(1) *At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.*

(2) *Subject to the provisions of section 8(1), a claim in terms of subsection (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.*

Generally speaking, whatever the spouses acquire during the existence of the marriage will be taken into account when calculating the accrual. The following assets of a spouse will however not be taken into account for purposes of the accrual calculation:

[47] Section 2 of the Matrimonial Property Act 88 of 1984

[48] https://www.moneyweb.co.za/financial-advisor-views/the-accrual-system-death-of-a-spouse/. Accessed on 03/08/2021

[49] 88 of 1984

- Non-patrimonial damages awarded to a spouse[50],
- Assets excluded from the accrual system in terms of the ante-nuptial contract[51],
- Any inheritance, legacy or donation received during subsistence of the marriage[52], (an inheritance received before the marriage that is not specifically excluded from the accrual system in terms of the will of the testator, will form part of the accrual calculation),
- Donations between spouses[53].

Half of the difference in the accrual value (i.e. the difference between the commencement value and the value at date of dissolution of the marriage) of the estates of the spouses on dissolution of the marriage will be owing by the estate that shows the larger accrual.

Spouses should preferably include the commencement value of their assets in the ante-nuptial contract to avoid disputes. Where the commencement value was not provided in the ante-nuptial contract, a rebuttable presumption exists that the commencement value is nil[54].The accrual in an estate is the amount by which the net value of the estate at dissolution of the marriage is more than the net value at the commencement of the marriage[55]. If a spouse's liabilities exceed the assets at commencement of the marriage, the commencement value will be nil[56]. The commencement value can thus never be less than nil.

Where persons are married out of community of property with inclusion of the accrual system, the accrual claim will affect the estate planning process. The spouse with the larger accrual must first take into account the accrual claim, before he/she can decide on bequests to other heirs, as the accrual of the estate of a deceased spouse is determined before effect is given to testamentary dispositions[57]. The accrual claim of a surviving spouse is deductible for estate duty purposes in the estate of the deceased spouse[58]. It is important to note when the spouse who is entitled to the accrual claim, fails to execute such claim against the estate of the deceased spouse, it will amount to a donation and have possible donations tax implications.

[50] Section 4(1)(b)(i) of the Matrimonial Property Act 88 of 1984
[51] Section 4(1)(b)(ii) of the Matrimonial Property Act 88 of 1984
[52] Section 5(1) of the Matrimonial Property Act 88 of 1984
[53] Section 5(2) of the Matrimonial Property Act 88 of 1984
[54] Section 6(4)(b) of the Matrimonial Property Act 88 of 1984
[55] Section 4(1)(a) of the Matrimonial Property Act 88 of 1984
[56] Section 6(4)(a) of the Matrimonial Property Act 88 of 1984
[57] Section 4(2) of the Matrimonial Property Act 88 of 1984
[58] Section 4(IA) of the Estate Duty Act 45 of 1955

The value of property bequeathed to a surviving spouse, either by way of a valid will or in terms of intestate succession, would be deductible from the gross estate of the deceased for estate duty purposes, in terms of Section 4q of the Estate Duty Act[59].

Changing your Marital Regime after your marriage has been concluded

Section 21(1) of the Matrimonial Property Act[60] provides that spouses wishing to change their marital regime, may do so by making an application to the High Court. In order to succeed there must be valid reason for doing so, none of the creditors may be disadvantaged and no other person prejudiced by such a change. Spouses will need to understand how their new marital regime will affect their finances going forward, especially if their marriage will dissolve due to death or divorce.

In such an instance is important that the spouses ensure that their wills are reviewed and updated, where necessary, in order to cater the effect of the amended marital regime. The spouses will thus also need to review their respective estate plans.

Conclusion

Before persons get married, it is important for them to be made aware of the different marital regimes and what implications each option has on their estates. This is necessary in order for them to make an informed decision that will best suit their individual circumstances and financial needs.

Clients are therefore encouraged to speak to a financial advisor and seek proper financial advice before tying the knot.

[59] 45 of 1955
[60] 88 of 1984

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Volks NO v Robinson and Others 2005 (5) BCLR 446

Has Democracy Failed a Spouse in a Customary or Religious Marriage?

A look at whether true equality under South Africa's marriage laws is possible.

Nevetha Maharaj CFP®

B.Soc.Sc. LLB. B Com (HONS)(IR), ADV PG Dip in Fin. Plan,

ADV PG Dip in Estate Planning

Legal Advisor Advanced

Personal Finance: Kwa Zulu-Natal

Introduction

South Africa's Colonial history has led its laws to be crafted on English and European ideals, which regarded everything not conforming with Western values as invalid and unlawful. With the onset of Democracy in South Africa and the recognition of all its citizens as equal, the laws that existed in South Africa in respect of marriages fell short in a progressive democracy filled with diverse and varied cultures.

Whilst marriages and the patrimonial consequences of such unions on death and divorce began to evolve it seems that the legislature has failed to accommodate, if not protect those that have historically been vulnerable in society. Women in customary, religious and domestic relationships, as well as children born out of these unions have been side-lined and the legislature's procrastination in passing proper laws has left more than a few citizens vulnerable and destitute.

This article will explore the challenges of a wife in customary and religious marriages, especially in the legal recognition of a spouse in a customary and religious marriage, with a focus on such a spouse's proprietary consequences on the dissolution of such a union.

Background

During Apartheid, there was different legislation that governed marriages for different race groups. Black marriages, governed by the now repealed **Black Marriages Act**[1], were not formally recognised because they were deemed potentially polygamous and did not conform to the standard of the Western civil marriage, which marriage was accepted, implemented and recognised in the Republic of South Africa under the Marriage Act[2].

This set the tone for decades where women in South African indigenous communities were considered to be minors. Women had no capacity to enter into any contractual agreements, own property, be part of legal proceedings, negotiate or terminate marriages or have the ability to be guardians to their own children. Women always required a man's consent or assistance and were considered to have no legal capacity[3].

[1] Act 38 of 1927
[2] Act 25 of 1961
[3] MM Meyer, recognition of customary marriages , 2012, Justice College Masters training Notes No T 32

Essentially the rights of women were suppressed in a patriarchal society. This became the accepted practise in most, if not all indigenous communities in South Africa.

Hindu and Muslim marriages, if not subsequently registered as a civil marriage, were not recognised and parties to such marriages remained classified as single and recorded at death as never married.

The democratic challenges

In 1996, the Constitution of the democratic Republic of South Africa was adopted and Chapter 2 (the Bill of Rights) of our constitution entrenched equality, including in relation to gender and marital status, which had the effect of challenging existing legislation at the time and hence leading to it being amended.

The Recognition of Customary Marriages Act of 1998 (hereinafter referred to as "the Act") was passed and became effective on 5 November 2000[4]. This legislation set a new legislative framework for the recognition of marriages in terms of customary unions irrespective whether it was monogamous or polygamous[5].

Notably, the Act excluded Hindu and Muslim marriages , same sex relationships and co-habitation arrangements.

Significantly, the Act gave recognition to marriages before the Act was promulgated which ensured that:

- each spouse in a customary Union was given the status of a spouse
- the proprietary consequences of such unions continued to be governed by customary law
- monogamous marriages entered into before the commencement of the Act would be a marriage in community of property and the parties will have the option to have their marriages governed by an Ante nuptial contract[6].

[4] Act 120 of 1998

[5] Nevetha Maharaj, customary marriages: the women's right to maintenance and property ownership. De Rebus, 1 August 2020;

[6] MM Meyer, recognition of customary marriages , 2012, Justice College Masters training Notes No T 32

The Act prescribes conformation to the following requirements for a customary union to be recognised:

- The parties to the union must be 18 years or older , and both their consent must be obtained
- The marriage must be negotiated, entered and celebrated in terms of customary law
- If a minor is part of the marriage, the parents or the legal guardian must consent to the union
- The parties may not be prohibited from marrying by blood or affinity
- The HUSBAND to a customary union is further required in terms of Section 7(6) of the Act to make an application to court to approve a written contract to regulate the future matrimonial property system of his marriage. A failure to comply with this requirement by the husband could render any further marriage VOID **(*Mayelanev Ngwenyana and another (2010) JOL 25422*).** The Act makes provision for such contracts to be registered up to three months after the marriage.[7]

The practical implementation of The Act presented certain challenges, as existing legislation did not support new legislation. The result was that the courtroom was used to ensure that the rights of the vulnerable was enforced, and legislation as a result was challenged and amended.[8]

Death's reality

In 2005, five years after the Act was in existence, the Constitutional Court in the matter of **BHE vs Magistrate Khayelitsha (the BHE case)[9]**, successfully challenged existing legislation. Up until then, only black men could inherit from estates. **The BHE case** was based on the unfair discrimination of the deceased's two daughters and spouse in a customary union. They were not allowed to inherit because they were female.

The Constitutional Court held that in cases where there was no dispute to inheritance, the family had to decide whether indigenous laws of succession would apply or the intestate succession act would apply. Where there is a dispute, such dispute would have to be decided by the Magistrate's Court.

The result of this court challenge included the amendment of the **Intestate Succession Act 27 of 1990** in 2005 to include all intestate estates, without race discrimination.

[7] Justice college
[8] De rebus
[9] (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC)

The circumstance of a spouse in a polygamous marriage was not considered, nor was the spouse of a Hindu or Muslim marriage. The unequal treatment of females in customary or religious marriages persisted

Section 15 of the Bill of Rights[10] providing that ***"everyone has the freedom of conscience , religion , thought belief and opinion"*** and Section9, **"the equality clause",** which confirms that "**everyone is equal before the law and has the right to equal protection and benefit of the law"** was not given any credence. Spouses in minority communities who practised their religious thoughts and beliefs were not recognised as spouses, and therefore were not able to claim the proprietary rights on the dissolution of their unions.

Basic human rights, as the basis of a progressive democracy, were not being implemented.
The Constitutional Court in **Daniels vs Campbell NO and others**[11], not only declared sections of the **Intestate Succession Act** invalid, but also found that sections of the **Maintenance of Surviving Spouses Act**[12] were unconstitutional and invalid. These Acts failed to recognise a Muslim spouse's (married in terms of Muslim rights) right to claim from her husband's intestate estate, including a claim for reasonable maintenance.

The constitutionality of the Maintenance of Surviving Spouse Act was also successfully challenged in **Kambule vs The Master of the High Court 2007 (3) SA**. The matter presented the case of Ms Kambule, who was spouse in terms of a polygamous customary union. She was the deceased second spouse, the deceased having married his 1st spouse in terms of the Black Administration Act[13]. The Court ordered that the legislature amend the Maintenance of Surviving Spouses Act to include all spouses in a polygamous customary union.
This judgment gave value to the notion of equality in such unions.

In the matter of **Govender vs Ragavayah 2009 1 ALL SA 371 (D)**, the applicant was the surviving spouse in a Hindu marriage. Her husband died intestate. The surviving spouse was not recognised by the courts as a spouse and her husband's parents then stood to inherit in terms of the Intestate Succession Act.

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[10] Chapter 2 of the Constitution of the Republic of South Africa.
[11] [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) (11 March 2004)
[12] Act 27 of 1990
[13] Act 38 of 1927

This court directed that section 1 of the Intestate Succession Act[14] must include the surviving spouse of a monogamous Hindu marriage.

The Court decisions were giving direction to intestacy and maintenance, but the practice of polygyny[15] , as practiced under Islam, is still not recognised or acknowledged.

A well scripted Bill of Rights, that was applauded internationally, could not find true application in a melting pot of cultures. Women are still marginalised and do not enjoy primary human rights of equality. The practice of religion and beliefs is still not recognised. Clear bias existed based on gender, race and ethnic origin.

The widows' woes continued

In customary unions, the unfair treatment of spouses in polygamous customary unions had also found its way to the courts. Shortfalls of the Recognition of Customary Marriages Act, 10 years after implementation , was finally challenged in the landmark decision of **Gumede (born Shange) vs the President of the Republic of South Africa (2008) ZACC 23; 2009(3) SA 152 (CC) (the Gumede case).** Spouses, married **before** the commencement of the Act rightfully pointed out that they were treated differently to spouses that were marriage in terms of customary law **after** the commencement of the Act.

The Constitutional Court, in its judgment, dealt with the proprietary rights of a female in a monogamous customary union, but failed to extend its judgment to consequences of a polygamous marriage that had been entered into before the commencement of the Recognition of Customary Marriages Act.

Repeatedly, the legislature and the judiciary did not address the issue of equally in customary and religious marriages.

Government was aware of the gaps in legislation after the **Gumede** judgement, but no amendments to legislation were made. If a wife in a customary marriage wished to have her rights recognised and enforced, she had no option but to approach the courts for relief.

[14] Act 81 of 1987, as amended

[15] Definition of Polygny in Islam Traditional Sunni and Shia Islamic marital jurisprudence allows **Muslim men to be married to multiple women** (a practice known as polygyny and polygamy)—up to four at any point in time.

Discrimination on the basis of gender, race and ethnic origin was evident, thus limiting the right to human dignity and to not be discriminated against unfairly.

In a melting pot of cultures, equality still seemed a far reality for women.

In 2018, the Constitutional Court was again the platform for women who had been marginalised in their polygamous relationship because of the lack of adequate and appropriate law

In ***Moosa NO and Others v Harneker and Others* 2017 (6) SA 425 (WCC) (*Harneker*),** which was subsequently confirmed by the Constitutional Court (CC) in ***Moosa NO and Others v Minister of Justice and Others* 2018 (5) SA 13 (CC) (*Moosa*)**, the Court, in its judgement, dealt with Section 2(C)(1) of the Wills Act[16] in the context of a polygynous marriage. This section provides as follows: *If any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse'*.

The husband in this case was married to two women according to Islamic Law, one of whom he subsequently married in terms of civil law with the consent of his second wife. They all lived in the home with their children. The second marriage was never registered in terms of any applicable South African legislation.

The *husband* passed away and his will provided for the distribution of his estate to his wives and children. The children renounced their inheritance, agreeing in writing that their "mothers" shall inherit equally.

The Registrar of Deeds registered the property in the name of the wife who was married under civil law, but refused to register the property in the name of the second wife who was married only under Islamic Law, on the basis that she was not a surviving spouse in terms of the law as it was applied at the time[17].

The unequal treatment of the widows in this matter led to the laws being challenged once again. The Court declared section of the Wills Act invalid and inconsistent with the Constitution in that:

[16] Act 7 of 1953, as amended
[17] Moosa NO and Others v Minister of Justice and Others 2018 (5) SA 13 (CC) at para 9

1. it excluded the second wife and
2. 'directly discriminated against her, based on religion and marital status'.

The Court concluded that the situation 'can only be cured by a reading-in of words that the term "surviving spouse" … encompasses in its meaning … every "surviving" husband or wife who was married by Muslim rites to a deceased testator'.

The Constitutional Court unanimously confirmed, that legislation should be amended: *"For purposes of this sub-section, a surviving spouse includes every husband and wife of a de facto monogamous and [polygamous] Muslim marriage solemnised under the religion of Islam' into this provision"*[18].

Recognition in certain spaces is becoming more defined but full recognition of religious marriages, while constitutionally protected, is not yet a reality.

Currently, pending the confirmation of the Constitutional Court, the Supreme Court of Appeal has held, in the matter of **President of the Republic of South Africa v Womens Legal Trust Centre Trust; Minister of Justice and Constitutional Development v Faro; and Minister of Justice and Constitutional Development v Esau (case no 612/19) (2020) ZASCA 177**, that South Africa's marriage laws must change and in a bid to bridge the gap in legislation has indicated that:

- ❑ The State's failure to take necessary legislative and other measures to recognise and regulate Muslim marriages is a breach of its duty under section 7(2) of the Constitution. This section places an obligation on the state to respect, promote and fulfil the rights in the Bill of Rights.
- ❑ The Marriage Act and the Divorce Act are inconsistent with the Constitution as it fails to fully recognise Muslim marriages and do not regulate the consequences of such marriages.
- ❑ Other provisions of the Divorce Act are declared unconstitutional for the following reasons:
  - i. It does not allow a wife to approach a court to claim relief upon divorce by her husband in a Muslim marriage.
  - ii. Children born from Muslim marriages do not enjoy the same protection as children born from civil marriages upon divorce. In the case of civil marriages, a court has automatic supervision powers to ensure that the best interests of any minor child born from the marriage are protected. However, the courts are not involved in the dissolution of Muslim

[18] *Moosa NO and Others v Harneker and Others* 2017 (6) SA 425 (WCC) (*Harneker*), which was subsequently confirmed by the Constitutional Court (CC) in *Moosa NO and Others v Minister of Justice and Others* 2018 (5) SA 13 (CC) (*Moosa*) at para 21 of the Moosa judgement

marriages and cannot play a supervisory role to ensure that the best interests of a minor child born out of such marriage are protected.

iii. It fails to provide for the redistribution of matrimonial property on the dissolution of a

Muslim marriage, where it would be justified to do so.

- The common law definition of marriage, which defines marriage as "the legally recognised voluntary union for life on one man and one woman to the exclusion of all others", is declared to be inconsistent with the Constitution and invalid to the extent that it excludes Muslim marriages.
- The declarations of constitutional invalidity are referred to the Constitutional Court for confirmation and are suspended for a period of 24 months to allow for existing legislation to be amended, or new legislation to be passed that will recognise and regulate Muslim marriages in South Africa.[19]

Relief pending the change of legislation was outlined as follows by the Court:

- The Supreme Court of Appeal declared that Muslim marriages which have not yet been dissolved or is in the process of being dissolved at the date of the order (18 December 2020), may be dissolved in accordance with the Divorce Act as follows:
  - The entire Divorce Act will be applicable, except that that all Muslim marriages must be treated as if they are out of community of property (unless any agreement exists to the contrary).
  - In the case of polygamous Muslim marriages, courts must consider all relevant factors (such as any contracts or agreements) and must make any equitable order that it deems just. The courts may also join any person who has a sufficient interest in the matter (for example, the other spouse in the polygamous Muslim marriage).[20]
- Special protection for minor children in respect of consent to a marriage under section 12(2) of the Children's Act 38 of 2005 will also apply to Muslim marriages concluded after the date of this order. This means that a minor child above the minimum age cannot get married without him/her giving consent.

Hopefully Hindu marriages will find inclusion in the legislative changes as well, as the attempt to have Hindu marriages recognised failed in the matter of **Singh vs Rampersad and others**[21]. A

[19] Legalwise , A hopeful future for the full recognition of Muslim marriages in South Africa
[20] Legalwise , A hopeful future for the full recognition of Muslim marriages in South Africa
[21] 2007 3 SA 443(D)

surviving spouse in a Hindu marriage asked the Court to declare that her marriage falls within the ambit of the Marriage Act, alternatively the Divorce Act, so that she could avail herself to divorce procedures. Divorce is not recognised in Hinduism hence the appeal to the judiciary for help. The attempt failed as the Court did not recognise the marriage as fitting onto the ambit of the Marriage Act.

In 2018, the Constitutional Court also passed judgment in the **Ramuhovhi and others vs the President of the Republic of South Africa 2018 (2) SA 1 CC (the Ramuhovhi case)**, which judgment sought to rectify the gap in the Recognition of Customary Marriages Act[22] that was identified in the **Gumede[23]** Judgment in 2008.

The case dealt with the following issues

1. The unequal treatment of women irrespective of whether their marriage was a monogamous or polygamous marriage that was concluded before the commencement of the Act.
2. Gender discrimination based on whether husbands in polygamous marriages entered into before the commencement of the Act, had exclusive proprietary rights on marital property. Wives were considered to be minors and the impact of death of a husband or divorce was that the wife or wives could be left with nothing[24].

The facts of this case highlighted the limitations of the right to human dignity and the right not to be discriminated against unfairly in these circumstances.

If such an infringement on a basic human right is to be justified, section 36 of the Constitution applies . The limitation in terms of this section is reasonable and justifiable on consideration of, but not limited to, the following factors:

1. The nature of the right;
2. The importance of the limitation;
3. The relation between the limitation and its purpose; and
4. The least restrictive means to achieve this purpose

[22] Act of 1988

[23] Gumede (born Shange) vs the President of the Republic of South Africa (2008) ZACC 23 ; 2009(3) SA 152 (CC)

[24] Gumede (born Shange) vs the President of the Republic of South Africa (2008) ZACC 23 ; 2009(3) SA 152 (CC)

The Court has further power to consider other vital factors.

The decision of the **Ramuhovhi case**[25], finally directed that:

- section 7(1) of the Act be declared constitutionally invalid, as upheld by the High Court of South Africa that sat in the Limpopo Local Division , Thohoyando; and
- this declaration of constitutional invalidity be suspended for a period of 24 months so that the legislature has an opportunity to amend the legislation and correct the invalidity of Section 7(1) of the Act; and
- interim measures for customary marriages concluded before the commencement of the Act up to the passing of the amendment to the Act would include: -
  - Wives and husbands will have joint and equal ownership and rights to and joint and equal rights of management and control over, marital property and these rights shall be exercised as follows:
    - In respect of all house property, by the husband and the wife of the house concerned, jointly and in the best interest of the family unit constituted by the house concerned; and
    - In respect of all family property, by the husband and all the wives jointly and in the best interests of the whole family constituted by the various houses.
  - Each spouse retains the exclusive rights to his or her personal property.

The relevant changes in respect of customary unions have since been effected via section 2 of The Recognition of Customary Marriages Amendment Act 2021[26], which amended section 7(1) and (2) of The Recognition of Customary Marriages Act[27].

There are however still glaring gaps in the amour of the legislature. An example of this is the **Muslim Marriage Bill**, drafted and presented to parliament as far back as 2011, that still has not found its way to being enacted. The reason for this appears to be that there still is too much opposition and debate surrounding the Bill. The Court direction in the abovementioned Faro and Esau judgment[28] has still not found fruition.

[25] Ramuhovhi and others vs the President of the Republic of South Africa 2018 (2) SA 1 CC
[26] Act 1 of 2021
[27] Act 120 of 1998
[28] President of the Republic of South Africa v Women's Legal Trust Centre Trust; Minister of Justice and Constitutional Development v Faro; and Minister of Justice and Constitutional Development v Esau (case no 612/19) (2020) ZASCA 177

Notwithstanding the impending changes to current legislation ordered by the courts, the legislature has introduced the Green Paper On Marriages In South Africa (the Green Paper). Its purpose is to ensure that an equality policy framework is established and implemented that will encompass constitutional as well as the South African society dynamics. The Green Paper hopes to ensure inclusivity as well as recognition and status for all those that enter into marriages in South Africa. [29]

The Green Paper suggests the following options:[30]

Option 1: Inclusive customary and religious marriage regime

The Recognition of Customary Marriages Act could be amended to cater for all polygamous marriages irrespective of race, cultural and religious persuasions.

Option 2: Religion and culture-neutral marriage regime

South Africa could do away with categorising marriages along racial, religious and cultural lines. That means South Africa will adopt a dual system of either monogamous or polygamous marriages. Monogamous marriages will either be homogeneous or heterogeneous.

Option 3: Gender neutral marriage regime

South Africa could do away with categorising marriages along lines of race, sexual orientation, religion and culture. That means South Africa will still adopt a dual system of either monogamous or polygamous marriages as in option 2.

Given the history and varied complexity of our rainbow nation, the new proposed legislation shall present uncomfortable conversations. The Green Paper has already been controversial. In trying to ensure equality in the true sense, the Green Paper ensures that not only minority religious groups find inclusion, but in seeking absolute equality also introduces the concept of polyandry. Polyandry is the concept of a female having more than one husband. This concept is sure to encourage engagement and debate in the coming years as the legislation flows through parliament[31].

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[29] Green Paper on Marriages : April 2021

[30] Green Paper on Marriages: April 2021 at page 51 – 52

[31] Waheeda Amien , June 2020, South Africa's failure to legislate on religious marriages leave women vulnerable.

Public comment on the introduction of the Bill has already presented emotional reactions. The opinions and reactions speak directly in most cases to control, patriarchal hierarchy and is certainly not compatible to the notion of equality in our constitution. These opinions question female ability and potential genealogy of future children. Bias is very evident and is unlikely to stop the proponents of this legislation from considering such comments[32].

Professor Collis Makato, an academic, stated in an interview with the BBC that "African society is not ready for true equality and the concept of polyandry is difficult to conceptualise in African culture"[33]. The legislature should ensure that the recognition of polyandry also include a framework that guides the dissolution of such relationships.

In suggesting a way forward, the following options are considered as a design framework for new legislation[34]:

- A Single Marriage Act: the challenge with this approach is that there is a myriad of potential marriages possible is South Africa. Many of these practices are irreconcilable with each other and finding middle ground with all connected and related parties would not be possible or stand up to constitutional scrutiny.
- An Omnibus or Umbrella Marriage Act: this suggests a harmonisation of existing legislation so that conflicting gender religious and cultural rights may co-exist.
- Parallel Marriage Acts: this option proposes the retention of the status quo. While the option is viable , this would require the amendment of various existing legislation to ensure that the legislation is in line with constitutional principles and that all the loophole which have been highlighted through the years by case law are addressed.

Conclusion

The legislative landscape is buzzing with change as far as marriages in South Africa are concerned. The wheels on this democratic vehicle have begun to turn a little faster and hopefully the marginalised female minority shall in the near future enjoy the equality promised to them[35] in the Constitution more than 20 years ago.

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[32] India Today , The right to equality: South Africa debates should women have multiple husbands

[33] Press Trust of India , May 2021, Legal status of Hindu and Muslim marriages in South Africa under the spotlight in green paper

[34] The Green Paper on Marriage : April 2021 at p54

[35] Waheeda Amien , June 2020, South Africa's failure to legislate on religious marriages leave women vulnerable.

In the road ahead the legislature has to take cognisance of its responsibility in terms of section 7(2) of the Constitution, that emphasises the fact that the state is expected not only to respect and protect the rights in the Bill of Rights, but also to promote and fulfil them. This advocates for more than mere accommodation: a positive recognition by the state is required to proactively ensure that its citizens are empowered.

As a rainbow nation, our diversity in South Africa is celebrated.

The Constitution, and especially the Bill of rights, creates a framework for accommodating rather than suppressing diversity. The new laws are therefore expected to protect persons in previously unrecognised marriages. However, more importantly, opportunity and space must be created for people to manifest their beliefs freely and in all spheres of life, including marriage and the practice of their religion.

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The Proprietary Consequences of Marriage, Divorce and Death as a Result of Globalization

Jothi Chirkoot CFP®
BA (Law), LLB, ADV PG Dip in Fin. Plan, PG Dip
Compliance
Legal Advisor Advanced
Personal Finance: Kwa Zulu-Natal

Introduction

The world has become increasingly inter-dependent over the years and in times that are more recent, globalization has accelerated at a rapid pace. This is because of a variety of factors, examples of which are increased job opportunities, capital mobility, improved technology and communications enhancing networking among people. This has brought about an increase in the movement of persons around the world. Often, therefore, a person may marry in one country while domiciled in another, acquire property in several countries and then get divorced in yet another jurisdiction[1]. This gives rise to many pertinent questions during estate planning.

Marriages

Destination weddings are becoming more popular where couples choose to marry outside of South Africa. Another scenario is where one or both parties work in another country temporarily and they may decide to get married in that country. Which matrimonial property system would apply to such marriages as each country has its own legislation governing marriages?

In South Africa, the law which will govern such marriages is the law of the country where the husband is domiciled[2]. In South Africa, the proprietary consequences of a marriage are governed by the *lex domicillii matrimonii,* that is the laws of the place where the husband was domiciled at the time the marriage was concluded[3] even if the husband subsequently acquires a new domicile. Domicile, in a nutshell, is the address of your permanent home[4].

If the husband is ordinarily resident in South Africa and working in South Africa but the parties choose to have a destination wedding in Jamaica, the matrimonial laws of South Africa will apply as the husband is domiciled in South Africa.

The same would apply if the parties are working in the United Kingdom intending to return to South Africa but marry in the United Kingdom (UK). The South African matrimonial property laws will apply because the husband was domiciled in South Africa at the time of the marriage. The

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[1] Makola, TM. 2018. A Comparative Legal Analysis of the Effects of Divorce on Marital Property. LLM Dissertation. The University of South Africa, page 12

[2] Meyers Attorneys, The Legal Consequences of Destination Weddings, https://www.myersattorneys.co.za/post/the-legal-consequences-of-destination-weddings

[3] Hillard v Hillard (1464/2007) [220] ZAFSHC 135 (4 December 2008)

[4] Viljoen, S.2018.Legal rule applicable when marrying abroad. Available at https://regsdienste.solidariteit.co.za/en/legal-rule-applicable-when-marrying-abroad/ [accessed *28 June 2021]*

latter will still apply if the husband acquires a new domicile in the UK after the marriage. A problem can however arise where the parties do not sign an ante-nuptial contract (ANC) because they are under the misconception that if they marry in the UK the marriage will automatically default to one that is out of community of property in the absence of a signed contract, in accordance with laws applicable in the United Kingdom[5]. This is not the case if the husband is still domiciled in South Africa. In the absence of a signed ANC between the parties, this marriage will automatically default to a marriage in community of property in accordance with the South African laws. This will have a huge impact on their assets and liabilities each party acquires as well as their holistic estate planning.

If the parties conclude their marriage in South Africa, but they are in the process of emigrating and the intention at the time of marriage is to live in another country permanently, the husbands' country of domicile will change and the laws of that country will apply. However, in such a scenario, to avoid any doubt in future, it is advisable to rather sign an ante-nuptial contract before the marriage[6].

Should a couple decide not to have the proprietary consequences of their marriage governed by the *lex domicillii matrimonii*, they should include a clause in their ante-nuptial contract that indicates a different legal system to govern the proprietary consequences of their marriage, or if they wish to change their matrimonial property regime after the marriage, conclude a postnuptial contract[7].

Divorce

A spouse living in South Africa may institute a divorce action in a South African court even though the other spouse lives overseas or vice versa. In terms of the Divorce Act[8] a South African Court will have jurisdiction where both or either of the parties are domiciled in the area of the Court's jurisdiction on the date that the action is instituted or has been ordinarily resident in the Republic for a period of not less than one year.

[5] Maurice Phillips Wisenberg Attorneys, International Expat Divorce South Africa, https://www.divorcelaws.co.za/international-divorces-in-south-africa.htm
[6] The Legal Consequences of Destination Weddings: 5 November 2019. Available at https://www.myersattorneys.co.za/post/the-legal-consequences-of-destination-weddings
[7] Makola, TM. 2018. A Comparative Legal Analysis of the Effects of Divorce on Marital Property. LLM Dissertation. University of South Africa,
[8] Section 2, Divorce Act 70 of 1979

If, for example, the husband was domiciled in England at the time of the marriage and no contract was entered into, the marriage will be governed in terms of English law. Should the parties later emigrate to SA, the marriage would remain out of community of property. Thus in a contested divorce where the husband was domiciled in England at the time of the marriage, a South African court is obliged to apply English law in respect of the patrimonial consequences of the divorce, i.e. the division of the estate. However, other aspects for example maintenance of a spouse and children, and care and contact will be dealt with in terms of South African law[9].

It is important to note that should the husband acquire a new domicile after the marriage, the marital domicile remains unaltered. In this way, a husband is prevented from intentionally changing his domicile to create a disadvantage for his wife.

It is uncertain what the effect of the *lex domicillii matrimonii* principle will be on same-sex international marriages. Which partner will be deemed the "husband" when both spouses are either male or female? To the author's knowledge, this has not yet been tested in a South African court. Perhaps a test case will pave the way for this misogynist practice to be abandoned.[10]. The Centre of Applied Legal Studies (CALS) commented to the South African Law Reform Commission in 2019, that the *Lex Domicillii Matrimonii* Rule " is a problematic principle due to its inherent sexism in forcing the domicile to follow the male in the relationship, its lack of awareness of gender neutral identifying individuals who may not identify as a man/women therefore not a husband/wife and it is further discriminatory as it does not have scope for the recognition of same-sex relationships"[11]. CALS has requested the Law Reform Commission to consider this principle and its discriminatory nature and calls for adequate legal reformations in relation thereto.

When a South African court grants a decree of divorce in respect of a marriage, where the proprietary consequences are in accordance with South African private international law governed by the law of a foreign state, the court has the same power that a competent court

[9] International Expat Divorce South Africa. Available at: https://www.divorcelaws.co.za/international-divorces-in-south-africa.html
[10] Foreign Divorce in SA, Simon Dippenaar, Divorce Attorneys 21 February 2019, https://divorceattorneycapetown.co.za/international-foreign-divorce/
[11] CALS, Submission to the South African Law Reform Commission on Issue Paper 35 on a single marriage statute (project 144), at page 13

of the relevant foreign state would have had to order that assets be transferred from one spouse to the other[12]. This includes applying a validly concluded foreign pre- or post-nuptial contract[13].

In the case of *Hillard vs Hillard* [14] the court had to decide where the husband (defendant/respondent) was domiciled at the time the marriage was concluded. The wife (plaintiff/appellant) instituted a divorce action against the defendant. She claimed that section 2 of the Matrimonial Property Act with the inclusion of the accrual system should apply since the *ante nuptial* contract (ANC) did not expressly stipulate that the accrual system be excluded. The parties were married in Lesotho by *ante nuptial* contract. The law in Lesotho does not make provision for the inclusion of the accrual system in a marriage by ANC. Plaintiff alleged the defendant was domiciled in South Africa at the time of the marriage although he worked in Lesotho. The defendant argued that his domicile was in Lesotho at that time and that even though there was a time that he was domiciled in South Africa, he later changed it to Lesotho by choice. The Court found that in acquiring a domicile of choice there must be a physical presence and there needs to be *"a fixed and deliberate intention to abandon his previous domicile and to settle permanently in the country of choice"*[15]. The respondent failed to prove this. The respondent's actions showed that he did not intend to leave South Africa. He invested large sums of money in property in South Africa and none in Lesotho, investments and bank accounts were held in South Africa and he had purchased a farm in South Africa where he intended to move to on retirement. For these reasons, the Court concluded that the respondent was domiciled in South Africa at the time of the marriage. The Matrimonial Property Act applied to the marriage and in the absence of express exclusion thereof in the ANC, the accrual system was applicable to the marriage.

Death

If persons are no longer a resident of South Africa on their death, their assets in South Africa must be dealt with in terms of the Administration of Estates Act. This means their South African estate must still be wound up in South Africa and will be subject to estate duty in terms of the Estate Duty Act[16].

[12] Section (7), Divorce Act 70 of 1979
[13] Cato A, Cato Neethling Wiid Inc., Family Law in South Africa: Overview, 01 October 2020. Available at: Available at: https://uk.practicallaw.thomsonreuters.com/6-566-4825?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a359839
[14] Supra, note 3
[15] *Supra*, note 3 at paragraph 3
[16] Estate Duty Act 45 of 1955

South Africans living abroad is often faced with the following scenarios:

1. Receiving a cash bequest and cash proceeds of legacies and distributions from a South African resident estate
2. Having assets left in South Africa (fixed property, shares, investments, pensions or policies) that you want to make sure will be dealt with according to your wishes upon your death.

In the first instance, the cash bequests and proceeds may be remitted abroad, provided that the Liquidation and Distribution Account bearing a Master of the High Court reference number is available[17]. Other assets inherited by non-residents maybe exported under cover of the of the required SARS Customs Declaration provided these are assets bequeathed in terms of the deceased's will or in accordance with the liquidation and distribution account and accompanied by the Master of the High Court reference number

In the second instance, a will drafted in the jurisdiction where the assets are situated, will facilitate an easier administration process. This is particularly important for people who have assets in various different countries. It may however be possible to use a single worldwide will to deal with all one's assets.

Conclusion

The *lex domicillii matrimonii* is archaic in that the marital property regime, and by extension consequences of divorce, are governed by the domicile of the husband at the time of the marriage.

Clients often enquire from their financial advisors about the financial implications of the events of marriage, divorce and/or death taking place in a country other than South Africa, or if the client is living temporarily in or has immigrated to South Africa. It is therefore important to understand the relevant impact. The legislation applicable in the respective jurisdictions must be considered and where required, a recommendation should be made to consult with an expert specialising in the specific sphere of the law. The financial advisor will also need to ensure that the estate plan accommodates anticipated changes of a client in this regard.

[17] Currency and Exchange Guidelines for Individuals, 2021-05-21 at page 20

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Life Insurance Policies and a Marriage in Community of Property – Is it a Case of Throwing your Eggs in One Basket?

Stephan Van Zyl CFP®

BProc LLM (Commercial Law), LLM (Financial Planning Law), ADV PG Dip in Fin. Plan.

Legal Advisor Manager

Personal Finance: Pretoria

Introduction

Marriages in South Africa is governed by the Matrimonial Property Act of 1984[1]. Three different marital regimes are provided for:

- ❑ Marriage in community of property;
- ❑ Marriage out of community of property excluding the accrual system; and
- ❑ Marriages out of community of property including the accrual system.

This article will focus on property included in a joint estate when parties are married in community of property and with specific reference to life insurance policies on the life of a person who is married in community of property.

Marriage in Community of Property – Joint administration and restrictions

People who are married in community of property own all the assets and are responsible for liabilities in the estate jointly, subject to certain exclusions. They do not have two distinct estates. A joint estate is created when they enter into the marriage and each spouse then owns a 50% undivided share in the assets of the joint estate. On termination of the marriage, either by death or divorce, the joint estate is shared equally between the spouses, irrespective of their contributions to such joint estate[2]. The Matrimonial Property Act[3] provides for the joint administration of the community estate and in terms of Section 15 of the Act, spouses may not, amongst other things, alienate, cede or pledge any shares, debentures, insurance policies[4], fixed deposits or similar assets, without the consent of the other spouse[5]. Section 15(3)(b)(vi) of the Act[6] also prevents a spouse to receive money from insurance policies or annuities in favour of the other spouse, without the consent from that spouse.

In Community of Property - Rights of the parties to an Insurance Contract

It is important to understand the rights of the different role players to an insurance contract and more specifically when these parties are married in community of property. A ***policyholder*** is defined in the Long-term Insurance Act[7] as any person who is entitled to the policy benefits under a long-term policy[8]. The life insured under a policy is therefore not automatically the policyholder

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[1] Act 88 of 1984
[2] Botha *et al.*, South African Financial Planning Handbook, 2021: Paragraph 31.3.1
[3] Act 88 of 1984
[4] Section 15(2)(c)
[5] Section 15(1) and 15(2)
[6] Matrimonial Property Act 88 of 1984
[7] Act 52 of 1998
[8] Section 1

of the policy. The policyholder is the owner of the policy but someone else can be the life assured and/or the beneficiary of the proceeds of the policy. All the rights under the policy vests in the owner of the policy (policyholder). The policyholder can also be the life assured on the policy. However, the right to proceeds is linked to the ownership of the policy and not to being the life insured. Policies may be owned by more than one person jointly. Joint ownership of policies is a regular occurrence, for example joint ownership of policies to fund a buy-and-sell structure[9]. The question that thus arises is whether persons married in community of property are automatically joint owners of a policy by virtue of the existence of a joint estate.

Does a policy on which the deceased is the life assured and contracting party form part of the joint estate or not?

There appear to be differing opinions in case law on whether the policy proceeds forms part of the joint estate or not.

In *Hees v Southern Life Association Ltd*[10] Claasen J determined that when it comes to marriages in community of property it is important to maintain a clear distinction between an insured's rights flowing from a policy and the entitlement to the monetary proceeds thereof. Claasen J determined that prior to the maturity date of the policy, the proceeds are not an asset in the joint estate. The insured does have certain rights under the policy, for example to surrender it etc., and those rights falls in the joint estate, but the policy itself and the monetary proceeds, vests in his estate.[11] Marius Botha[12] uses the following example to illustrate the effect of the ruling in the Hees judgment:

" In more simple terms, if two spouses, say H and W, are married in community of property and ***H takes out a policy on his life without nominating a beneficiary****, then during the lifetime of H, the joint estate has a claim against the insurer for "rights flowing from" the insurance policy. If the policy has acquired a surrender value and is surrendered, the amount that is paid to the joint estate is a payment in terms of a right "flowing from the insurance policy". The spouses will share equally in the amount paid to the joint estate by virtue of their joint ownership in the assets in the joint estate. If H dies and a sum assured of say R500 000 is payable under the contract, such a payment will be "flowing from" an "****entitlement to the monetary proceeds****" of the policy.*

[9] Botha M, Danielz No v De Wet & Another: Its effect on in-community-of-property marriages, Insurance and Tax, December 2008

[10] [2000] 1 All SA 327 (W) 332

[11] Botha M, Danielz No v De Wet & Another: Its effect on in-community-of-property marriages, Insurance and Tax, December 2008

[12] Botha M, , Danielz No v De Wet & Another: Its effect on in-community-of-property marriages, Insurance and Tax, December 2008

Who then is entitled to the benefits under the policy in the event of H's death? *It is the policyholder. As H (the life insured) has died, the joint estate no longer exists. The joint estate had been terminated by the death of H, the deceased (Danielz supra). If the joint estate is not the policyholder who then is? As the policy was jointly owned by two persons (H and W), the joint owners are the policyholders and they each have a* ***direct claim*** *against the life insurer for his or her half share of the proceeds of the policy. W's claim is not against the joint estate, she has a direct claim against the insurer. The deceased's (H) estate consists of two distinct components; firstly his half of the joint estate, and secondly the amount in respect of the direct claim that his executor institutes for his one-half share of the policy proceeds. The surviving spouse W ends up with her one-half share of the joint estate (which excludes the policy proceeds), plus her one half share of the policy proceeds under a direct claim against the insurer.*

If H bequeaths the residue of his estate to his children, his children will effectively inherit his one-half share of the policy proceeds. The other one-half is neither inherited by the surviving spouse, nor is it paid to her as part of the joint estate. She simply claimed and received it directly from the life insurer (by virtue of her rights as one of the policyholders under joint ownership). ***The estate duty position*** *in respect of the policy proceeds is this: the proceeds of the policy ("both halves" after allowing for the premiums plus 6% reduction) is deemed to be property, and one-half of the deemed amount is deductible in terms of the provisions of section 4(q) as it accrues to the surviving spouse under the direct claim against the insurer. If, on the other hand the deceased's one-half of the policy proceeds were bequeathed to his spouse W, either as a legacy or as part of the residue of his estate, the full deemed property value of the policy would be deductible under section 4(q) of the Estate Duty Act 45 of 1955."*

In *Ex parte MacInthosh NO: In re Estate Barton*[13] the Court also stated that an insured has rights under the policy during his lifetime, for example to surrender it, and that those rights form part of his assets, but the policy itself is not an asset in the estate of the insured. In the case of *Ex parte Calderwood NO: In re Estate Wixley*[14] Judge Gubbay determined that a policy is not an asset in the estate a deceased, although its proceeds would fall in the estate if no beneficiary is nominated. He also found that only a deceased's rights under the policy to surrender or obtain a loan upon it, forms part of the assets of a deceased.

[13] 1963 (3) SA 52 (N)
[14] 1981 (3) SA 727 (Z) (at 736 A-C)

There are however case law contrary to the position that was taken by the courts in the cases of *Hees*, *Ex parte MacIntosh*, and *Calderwood*.

In the judgment of Naidoo v Discovery Limited and Others[15] the Court held as follows in paragraph 12 of the judgment in respect of the question whether a policy falls within the joint estate during the lifetime of the deceased:

"As the policy in issue was a risk-only policy which could not be an asset in the estate of the deceased, on the strength of the authorities referred to above, it follows that it could never be an asset in the joint estate. ***During the deceased's lifetime the appellant had no right to receive the proceeds of the policy and therefore viewed from this perspective, the policy was also not an asset in the joint estate.***"

It is however important to note that this judgment dealt with the question of whether the policy forms part of the joint estate during the lifetime of the deceased policyholder, and the judgment does not deal with the issue of whether the proceeds from part of the joint estate on death.

In the case *of Danielz NO v De Wet & Another*[16] Traverso AJP ruled, with regards to policy benefits, ***that a joint estate will not have a claim to an asset that arose after the joint estate has been terminated by the death of a deceased***, because the rights in respect of the death benefits only arise after the death of the deceased. This is a very interesting approach that was taken by Judge Traverso. Marius Botha however holds the view that the Danielz judgment should not have any effect on the practice of dealing with life insurance policy proceeds where persons are married in community of property: where no beneficiary is nominated, the surviving spouse will, because of the joint ownership in the insurance policy, be entitled to half of the proceeds. This will however mean that the surviving spouse has a direct claim against the insurer, and not a claim against the joint estate[17].

In the case of *Wilcocks NO v Visser and New York Life Insurance Co*[18] the court found in the affirmative when they had to decide on whether the proceeds of a life policy falls within a joint estate or not. This approach was also taken in the case of *Warricker & another NNO v Liberty Life*

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[15] (202/2017) [2018] ZASCA 88
[16] [2008] JOL 22151 (C)
[17] Botha M, Danielz No v De Wet & Another: Its effect on in-community-of-property marriages, Insurance and Tax, December 2008
[18] 1910 OPD 99 (at 102-3)

Association of Africa Ltd.[19] Judge Van Oosten held that a life insurance policy is an asset in the estate of an insolvent person. He went on to say that generally an insured's right to the benefits under the policy forms part of his estate. The policy remains the property of the insured during his lifetime, with the power to deal with it as he likes and where a policy has a nominated beneficiary on it, the beneficiary will, after acceptance of the benefits, receive the proceeds of the policy.[20] Judge Smuts in the case of *Flint v Die Meester* found that normally an insured who has ceded a life policy in securitatem debiti has a reversionary right and this results that the policy is an asset in a deceased insured's estate[21].

Marius Botha and Wessel Oosthuizen[22] points out that Section 15(2)(c) of the Matrimonial Property Act[23] determines that a spouse shall not without the consent of the other spouse alienate, cede or pledge any insurance policies, amongst other things, that forms part of the joint estate. It is thus their view that this is indicative that a life insurance policy can form part of a joint estate. This article was however written before the judgment in ***Naidoo v Discovery Limited and Others[24], where the Court found that a pure risk life insurance policy (i.e. without a cash value) does not constitute an asset in the joint estate for purposes of section 15(2)(c).*** The court held that the reference to insurance policies in section 15(2)(c) pertains to insurance policies that are assets, i.e. policies having a current value, such as endowment policies that can be surrendered or made paid up.

The Insurance Act 27 of 1943, which was repealed and replaced by the Long-term Insurance Act 52 of 1998, excluded certain life insurance policies from the joint estate. When discussing these exclusions, Hahlo[25] said the following:

Where spouses are married in community of property, any life policy which is not covered by the aforestated rules forms part of the joint estate and is dealt with according to the ordinary rules. A policy which the husband effects on his own life, without nominating either his wife or a child of the marriage as his beneficiary, and without ceding it to his wife, would be an example.

[19] 2003 (6) SA 272 (W)
[20] At paragraph 9
[21] 1978 (3) SA 1079 (O) (at 1086 A-G)
[22] Botha M and Oosthuizen W, , Marriage in community of property: Estate duty treatment of insurance policies owned by the joint estate, Insurance and Tax, September 2005
[23] Act 88 of 1984
[24] (202/2017) [2018] ZASCA 88, paragraph 18 of the judgment,
[25] The South Africa Law of Husband and Wife, 5th Edition 1985, page 317

According to Meyerowitz[26], the proceeds of a life policy will be deemed property in a joint estate, where it pays to the estate of the assured married in community of property.

From the discussion above and as discussed by Wood-Bodley in his article in the South African Law Journal it therefore seems that the South African case law falls in two groups. The Wilcox, Warricker and Flint group that suggests that the right to policy vests in the joint estate and then the Hees, MacIntosh, Calderwood and Danielz group that suggests that the right to policy proceeds does not vests in the joint estate. Wood-Bodley does however point out that the Hees, MacIntosh and Calderwood matters differ from the Danielz case in that in the former three matters the beneficiary nomination remained valid, whereas this was not the case with Danielz.

It is my submission, and that of Wood-Bodley, that the reasoning in Wilcox, Warricker and Flint should prevail. The rights of the owner of the policy includes the appointment of a beneficiary, as well as the right to cancel the beneficiary appointment during his/her life. This reversionary interest that vests in the insured/policy owner during his/her lifetime, should in my view fall in the joint estate and therefore the policy proceeds must form part of the joint estate where there is no beneficiary nominated on the policy. [27]

Does a policy on which the deceased is the life assured and the surviving spouse is the contracting party form part of the joint estate or not?

Where the surviving spouse is the contracting party on the policy and the other spouse is the life assured, the policy proceeds on the death of the life assured will be an asset in the joint estate where there is no beneficiary nomination on the policy (or the beneficiary failed to accept the benefits). The policy would therefore be treated in the same manner as a policy where the deceased was the life assured and the owner, with the proceeds payable to the estate (which is the joint estate of the deceased and the surviving spouse)[28] The reason for the policy being included is that the ***joint estate had vested right to the policy proceeds on the death of the life, whether the policy is owned by the life assured, or the surviving spouse assured***[29]***.*** The estate of first-dying spouse (insured life) will thus be entitled to half of the policy proceeds via the joint

[26] Meyerowitz on Administration of Estates, 2010, paragraph 27.34
[27] Life Policies and Marriages in Community of Property – Who owns the proceeds of the policy on the insured's death, Danielz v De Wet, The South African Law Journal, 2010 (1) page 224 - 230
[28] Muller E, The treatment of life insurance policies in deceased estate with a perspective on the calculation of estate duty, THRHR, 2006 (69), page 269
[29] Warricker & another NNO v Liberty Life Association of Africa Ltd 2003 (6) SA 272 (W)

estate. This approach is also followed in practice, where the proceeds of such a policy is dealt with in the liquidation and distribution account and the proceeds of the policy is available to satisfy the claims of creditors in the estate[30]. Where there is however a ***beneficiary nomination on such policy***, ***it will not form part of the joint estate*** due to the principles of a *stipulatio alteri* (contract for the benefit of a third party) as discussed in the section below.

The following question is raised: ***Why are the policy proceeds treated differently when the parties are married in community of property and the surviving spouse is the only beneficiary on the policy of which the deceased spouse was the owner and the life assured?*** Again, one needs to look at the rights that the beneficiary has at the death of the deceased. On the death of the deceased the surviving spouse, as the beneficiary on the policy, only has a contingent right to the policy proceeds, which does not fall in the joint estate. Only once she accepted the policy benefits, by informing the insurer of his/her acceptance, is a vested right created to claim the proceeds of the policy from the insurer[31].

I am of opinion that the policy would be treated in the same fashion, as discussed in the preceding paragraph, had the parties been married in community of property and the parties where joint owners of a life assurance policy of which the surviving spouse was the beneficiary, and the deceased spouse was the life assured.

What if a beneficiary is nominated on the policy?

A policyholder (owner) normally has the right to appoint a beneficiary for the proceeds of the policy under a policy contract. Due to the "no rights" clauses in modern day insurance contracts, ***the beneficiary has no rights to the policy during the lifetime of the life insured.*** The contracting party (policyholder) reserves all rights to the policy, including to unilaterally revoke the beneficiary nominations. Prior to acceptance of the benefits, the beneficiary only has an expectation (*spes*) of receiving the benefits. If the life assured dies and the beneficiary accepts the benefits, it will be paid directly to the beneficiary by the insurer. If the beneficiary does not accept the benefits under the beneficiary nomination, the benefits will be paid to the estate of the policyholder (owner). The policy benefits, if accepted, vests in the beneficiary directly and does not flow

[30] Muller E, The treatment of life insurance policies in deceased estate with a perspective on the calculation of estate duty, THRHR, 2006 (69), page 269

[31] Muller E, The treatment of life insurance policies in deceased estate with a perspective on the calculation of estate duty, THRHR, 2006 (69), page 269

through the estate of the policyholder to the beneficiary.[32] This was confirmed in *Warricker NNO v Liberty Life Association of Africa Ltd*[33] where the court found that the right to the policy proceeds falls into the estate of the insured (contracting party) pending the acceptance of the nomination by the beneficiary. If the beneficiary rejects the benefits, the proceeds will vest in the insured's estate.[34]

In *Hees NO v Southern Life Association Ltd*[35] the court found that any encumbered property in a joint estate falls into the joint estate with the encumbrances. The court also found that in the absence of an express indication that a deceased had revoked a beneficiary nomination, the beneficiary nomination stands and the policy proceeds will not form part of the joint estate.

The judgment in Pieterse v Shrosbree and Others , Shrosbree v Love and Others[36] is also of importance in this regard. Although the matter dealt with the question of whether a policy with a beneficiary nomination will form part of the insolvent estate of a deceased policyholder and not with marriages in community of property *per se*, the principles underlined in the judgment is of importance. Paragraph 9 and 10 of the judgment are important in this regard:

"[9] In such a case the policy holder (the 'stipulans') contracts with the insurer (the 'promittens') that an agreed offer would be made by the insurer to a third party (the 'beneficiary') with the intention that, on acceptance of the offer by that beneficiary, a contract will be established between the beneficiary and the insurer. What is required is an intention on the part of the original contracting parties that the benefit, upon acceptance by the beneficiary, would confer rights that are enforceable at the instance of the beneficiary against the insurer, for that intention is at the 'very heart of the stipulatio alteri' (Ellison Kahn: 'Extension Clauses in Insurance Contracts' (1952) 69 SALJ 53 at 56). Thus the beneficiary, by adopting the benefit, becomes a party to the contract (see Total South Africa (Pty) Ltd v Bekker NO 1992 (1) SA 617 (A) at 625 D-G).

[10] On the death of the insured, provided that the nomination has not been revoked during the insured's lifetime, any claim to the policy proceeds by the beneficiary against the insurance company would be based on the contract of insurance between the deceased and the

[32] Louw Du Toit, A Sequence of Events – A practical discussion of the Life Insurance Contract, 2019, Old Mutual Premiums and Problems Article Edition, page A48 – A49
[33] 2003 (6) SA 272 (W)
[34] Louw Du Toit, 2019, A Sequence of Events – A practical discussion of the Life Insurance Contract, 2019, Old Mutual Premiums and Problems Article Edition, page A51
[35] 2000 (1) SA 943 (W)
[36] (146/02 , 435/03) [2004] ZASCA 129; [2006] 3 All SA 343 (SCA) (23 September 2004)

insurance company. It is to the insurance company and no one else that the beneficiary would have to look for payment. Section 63 does not regulate the payment of the proceeds of the policy, because the beneficiary appointment, until revoked, has the effect that payment of the proceeds will be made to the beneficiary and not the estate of the deceased."

The *judgment* thus underlines the principle that, due to the existence of a *stipulatio alteri* (contract for the benefit of a third party), when a beneficiary is nominated on a life insurance policy, the estate of a deceased, and by implication the joint estate of such deceased if he/she was married in community of property, would have no claim to the policy proceeds. This would only be applicable if the beneficiary nomination was not revoked prior to the death of the contracting party and the beneficiary accepts the offer by the insurance company.

In the case of *Naidoo v Discovery Ltd*[37] the court confirmed the position of *Hees NO v Southern Life Association* by determining that a policy with a beneficiary nomination is not an asset in the estate of the policyholder as the proceeds will go directly to the nominated beneficiary.

Wood-Bodley discusses the position that was taken by Reinecke et al in The Law of South Africa[38] in an article published in the South African Law Journal.[39]. Reinecke et al argues that the right to payment of the sum insured is created on conclusion of the contract of insurance subject to a time clause, that the proceeds only becomes payable on death. They also point out that a beneficiary may not accept the benefits and that the right to benefits cannot then just "float in the air". This implies that a reversionary right to the proceeds falls into the estate of an insured pending the acceptance of the nomination by the beneficiary. This approach is supported in the Warricker and other cases as discussed above[40].

Conclusion

I am of the opinion that where a person who is married in community of property is the contracting party on a life policy effected on his/her life and a ***beneficiary is not nominated on the policy***, ***the proceeds of such policy should form part of the joint estate when the life assured***

[37] [2018] ZASCA 88 (31 May 2018), page 5 - 6 at paragraph 10 - 12
[38] MFB Reinecke, SWJ Van Der Merwe, JP Van Niekerk, PH Havenga, J Church, Insurance, The Law of South Africa, Vol 12 (2002), paragraph 424
[39] Life Policies and Marriages in Community of Property – Who owns the proceeds of the policy on the insured's death, Danielz v De Wet, The South African Law Journal, 2010 (1) page 229
[40] Michael Wood-Bodley, Life Policies and Marriages in Community of Property – Who owns the proceeds of the policy on the insured's death, Danielz v De Wet, The South African Law Journal, 2010 (1) page 229

passes away. The surviving spouse will be entitled to half of the death benefits under the policy via the joint estate. This is due to the entitlement of the surviving spouse to the proceeds of the policy as half owner of the joint estate. For the reasons provided in this article this should also be the case where the surviving spouse is the owner of the policy and the first dying spouse is the life assured.

If *the policyholder appoints a beneficiary for proceeds on the policy and the beneficiary accepts the benefits under the policy after the life assured passes away*, the policy proceeds will not form part of the joint estate. The surviving spouse will not have a claim against the insurer for half of the proceeds as half owner of the joint assets. The beneficiary nomination compels the insurer to pay the benefits to the beneficiary upon acceptance. This excludes the proceeds of the policy from the joint estate, as the owner of the policy has exercised his/her right under the policy to confer the benefit under the policy to the beneficiary when the life assured dies. The proceeds will pay directly to the beneficiary on acceptance of the benefits as per the instruction from the policy owner. The proceeds of such a policy will not be dealt with in the winding up of the estate by the executor and will thus not be included liquidation and distribution account. The proceeds will therefore not be available to satisfy the claims of creditors of the joint estate[41]. It is however important to note that although the policy proceeds is not available for creditors in the estate where a beneficiary has accepted the benefits, such creditors will still have a claim against a surviving spouse where the parties were married in community of property. Should the surviving spouse thus be the beneficiary on a life insurance policy of which the deceased spouse was the contacting party and life assured, the policy proceeds might still be attached by creditors due to the responsibility of the surviving spouse for liabilities of the joint estate. In such an instance, it will however constitute a claim against the surviving spouse and not against the joint estate.[42]

[41] Muller E, The treatment of life insurance policies in deceased estate with a perspective on the calculation of estate duty, THRHR, 2006 (69), page 268
[42] Meyerowitz on Administration of Estates, 2010, paragraph 16.10

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Averting an Administrative Burden: The structuring of one's life insurance policies for the international family

Chris du Plessis CFP®

B.Proc, LLM, Adv. PG Dip in Fin. Plan.

Legal Advisor Manager

Personal Finance: Free State

Louw du Toit CFP®

B.Com Law, LLB, Adv. PG Dip in Fin. Plan, PG Dip in Estate Planning

Legal Advisor Advanced

Personal Finance: Free State

Introduction

Joseph Addison is quoted as saying: "No *one is more cherished in the world than someone who lightens the burden of another*". As financial advisors we can relate to this quote, as one of our roles is to lighten or avert the administrative burden of our clients and their dependants in their times of need.

It often happens that clients have children who have either emigrated, are in the process of emigrating or work abroad whilst being undecided on where they wish to settle. Should such client die, it could cause complications and/or delays in distributing proceeds from life insurance policies to beneficiaries living abroad. It is therefore important to consider various factors when structuring a client's life insurance portfolio in these circumstances.

The purpose of this article is to look at the various factors where a client has a beneficiary living abroad (whether he is only working abroad, has emigrated or is in the process of emigrating), that will influence such beneficiary's access to life insurance benefits. The access to such insurance benefit, in some instances, might include certain administrative hurdles. We will therefore briefly look at the structures that could be used to ensure quick and easy access to policy benefits by such beneficiaries.

The Life Insurance Policy Agreement

One of the advantages of a life insurance policy with a beneficiary nomination is that the beneficiary can personally claim the policy proceeds on the death of the life assured. There is therefore no need to wait for the appointment of an executor for the deceased's estate and subsequent winding up of the estate. Another advantage is that there are no executor's fees payable on the proceeds of life insurance policies that are payable to a beneficiary[1].

The life insurance policy with a beneficiary nomination is based on the common law principles of a *stipulatio alteri* (contract to the benefit of a third party)[2]. In short, it is an agreement between the contracting party or proposer (the *stipulans*) who contracts with the insurance company (the *promittens*) that an agreed offer would be made by the insurance company to a third party (the

[1] Premiums & Problems, Edition 121, 2020, p E 56
[2] MULLER Elzette Muller – The treatment of life insurance policies in deceased estates with a perspective on calculation of estate duty 2006 (96) THRHR

beneficiary)[3] at the occurrence of a certain event (for example death or disability of the life-assured).

In Warricker NNO v Liberty Life Association of Africa LTD[4] the approach was endorsed that the right to the policy proceeds falls into the estate of the insured (who was also the contracting party) pending acceptance of the nomination by the beneficiary. Therefore, if the beneficiary rejects the benefit, the policy proceeds vest in the insured's (the contacting party's) estate.

Example:
A takes out a life insurance policy on his life and nominates B as the beneficiary. A dies and B decides not to accept the benefits under the insurance policy. Due to B's failure to accept the benefits, the insurance company will pay out the benefits to A's estate.

It is furthermore important to note that the life insurance contract between the contracting party and the insurance company may stipulate that "the benefits will be paid in South Africa in South African currency". A life insurance company may therefore only pay the policy benefits of a life insurance policy to a South African bank account, whether it is the bank account of the contracting party (in the instance where there is no beneficiary or where the beneficiary rejects the benefits) or the beneficiary (where the beneficiary accepts the benefits).

The payment procedure of the policy proceeds is therefore regulated by the insurance policy agreement and one would always need to refer to the agreement of a specific life insurance policy, as the contract of various insurance houses may differ. For instance, some life insurance companies, notwithstanding that the insurance contract stipulates the proceeds will only pay out to a South African bank account, allows for policy proceeds to be paid directly to beneficiaries in foreign countries. The insurance company usually pays the policy proceeds via its local bank account to the foreign beneficiary's bank account. This process still requires the involvement of an authorised dealer to confirm the beneficiary's Tax Compliance Status, as will be discussed in more detail below. The only advantage, in this instance, is that there is no need for the beneficiary to open a South African bank account.

[3] Elzette Muller – The treatment of life insurance policies in deceased estates with a perspective on calculation of estate duty 2006 (96) THRHR
[4] 2003 (6) SA 272 (W)

A Bequest in a last will and testament

There are three elements that need to be present for a bequest to be valid, namely, a clear identification of the property being bequeathed, the interest in the property bequeathed and lastly the beneficiary needs to be identifiable[5]. A bequest will furthermore fail if the item being bequeathed is disposed of by the testator/testatrix prior to his or her death[6].

Residence for Tax Purposes

"Tax residence" often determines in which country you pay tax and how much tax is payable. Section 1 of the Income Tax Act[7] defines "resident", as either being a person who is "ordinarily resident" in South Africa or a person who is not ordinarily resident as such, but complies with the physical presence test as per the criteria set out in the definition of "resident" in the Income Tax Act. It should further be noted that where a person qualifies as being a resident of South Africa in terms of these criteria, such person may nonetheless not be deemed to be a South African resident if the double tax agreement between South Africa and another country provides otherwise.

In Hardy v Hardy[8] it was held that "ordinarily resident" means the place that a person's lifestyle is centred and to which the person regularly returns if his or her presence is not continuous[9].

In terms of SARS Interpretation Note 3 (Resident: Definition In Relation To A Natural Person – Ordinarily Resident), a natural person who emigrates from the Republic to another country, ceases to be a resident in the Republic from the date that he or she emigrates[10]. Such a person will be taxed as a non-resident from the date that he ceases to be ordinarily resident[11]. Once a person becomes a non-tax resident in South Africa, that person will only be subject to income tax on South African sourced income[12].

The importance of whether a person is "resident" or "non-resident" for income tax purposes also has in impact on the exchange control regulations applicable to such an individual, which will

[5] Ex parte Estate Davies 1957 3 SA 471 (N)
[6] Meyerowitz On Administration of Estate and Their Taxation, 2010, *D Meyerowitz*, par 18.10
[7] Act 58 of 1962
[8] (1969) 7 DLR (3d) 307 (OHC)
[9] Notes on South African Income Tax, 2021, *P Haupt*, at p 26
[10] SILKE: South African Income Tax, 2021, *M Stiglingh*, at p 30
[11] SILKE: South African Income Tax, 2021, *M Stiglingh*, at p 30
[12] Unravelling your residencies – exchange control, tax and citizenship, *S Delport & M Nxele*

be discussed below. The Currency and Exchange Manual for Authorised Dealers (dated 8 July 2021), on the other hand, distinguishes between a "Resident" and a "Non-Resident". "Resident" means any person who has taken up permanent residence or is domiciled in South Africa [13], whilst a "Non-resident" means a person whose normal place of residence or domicile is situated outside the Common Monetary Area (CMA), which consists of South Africa, Lesotho, Namibia and eSwatini [14].

The Currency and Exchange Manual for Authorised Dealers furthermore states that individuals who cease to be resident for tax purposes and who are no longer active on the database of SARS are referred to as "South African non-tax residents"[15].

Exchange control

Exchange control measures are set in place to regulate the flow of capital in and out of South Africa. The South African Reserve Bank is in charge of regulating exchange control through banks that are authorised foreign exchange dealers. The Reserve Bank is there to protect South Africa's foreign currency reserves, which largely consists of gold bullion, currency balances and amounts owed to South African banks by banks abroad[16]. In protecting South Africa's reserves, the South African Reserve Bank has exchange controls in place, which prevents a tax resident and non-tax residents from taking money out of South Africa without its permission.

Treasury has authorised dealers, which are in most instances banks, to handle transactions in respect of foreign exchange. The South African Reserve Bank issued the Currency and Exchange Manual for Authorised Dealers which lists the various authorised dealers and further provides guidelines to Authorised Dealers on how certain transactions should be dealt with. This manual is updated by the South African Reserve Bank on an ongoing basis.

1. Definitions

"TCS" and "TCS PIN": For purposes of this section, it also important to know the abbreviation or phrase "TCS PIN". TCS stands for Tax Compliance Status and is a system that enables an individual to authorise any third party (an organisation or government) to view your tax status online via

[13] SARB: Currency and Exchange Manual for Authorised Dealers 2021, at p 18
[14] SARB: Currency and Exchange Manual for Authorised Dealers 2021, at p15 & 17
[15] SARB: Currency and Exchange Manual for Authoorsied Dealers 2021, at p 84
[16] Fundamentals of Financial Planning, 2018, *M Botha, L du Preez, W Geach, B Goodall, J Palframan, L Rossini & P Rebenowitz*, at p 435

eFiling. An individual needs to inform SARS when he takes up permanent residency in another country, which will result in such an individual ceasing to be a South African tax resident. Once you cease to be a South African tax resident, you are required to request a TCS for emigration from SARS before being allowed to transfer any South African sourced funds abroad. Such individuals will be issued with a TCS PIN letter in terms of the TCS system.

An Authorised Dealer must be provided with the client's TCS PIN to verify the applicant's tax status via SARS eFiling, prior to effecting any transfers of South African sourced income abroad[17]. It is furthermore important to note that a TCS PIN can expire and if a TCS PIN has expired, the Authorised Dealer must request the client to apply to SARS for a new TCS PIN. This system protects the taxpayer's confidentiality, and no other info is accessible to a third party. The TCS PIN enables you to authorise the third party to access your status via eFiling[18].

2. Pre-approved transactions available to South African Residents

The South African Reserve Bank has pre-approved certain transactions which a resident is permitted to enter into. These transaction must in some instances be done via an Authorised Dealer, which may place and administrative burden on the transaction. Examples in this regard are:

- Each individual of 18 years and older may take up to R 10 million rand per calendar year out of South Africa, provided that they obtain a tax clearance certificate from SARS[19]. This is known as the 'foreign investment allowance' or 'foreign capital allowance'. This is done via an Authorised Dealer and subject to a TCS PIN verifying the taxpayer's tax compliance status and a green bar-coded South African identity document or Smart identity document card being available.
- In addition to the foreign investment allowance, a 'single discretionary allowance' of R 1 million per calendar year may be used by persons of 18 years and older for legal purposes abroad. These funds may be transferred out of South Africa, whether a person travels overseas or not. No tax clearance from SARS is required[20]. The only requirement is a valid green bar-coded South African identity document or smart identity document card[21].

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[17] Supra 24
[18] https://www.sars.gov.za/individuals/manage-your-tax-compliance-status/ - Manage your Tax Compliance Status
[19] Premiums & Problems, Edition 121, 2020, p F3
[20] Notes on South African Income Tax 2020, *P Haupt*, at p 15
[21] SARB: Currency and Exchange Manual for Authorised Dealers 2021, at p 93

- ❑ A ‘travel allowance’ in the amount of R 200 000 is available for persons, per calendar year, under the age of 18.

3. South African non-tax resident

A person ceases to be a South African tax resident when he/she is no longer ordinarily resident in South Africa, or if he/she is no longer resident based on the physical presence test. An individual can furthermore inform SARS if it is the individual’s intention to become ordinarily resident in another country. It is however important to note that when an individual’s South African tax residency ends, it does not mean that you do not have any further tax obligations in South Africa. In such circumstances the individual will still be required to complete the necessary SARS tax return with regards to any South African source income.

South African non-tax residents (i.e. South Africans who have ceased to be residents for tax purposes) who transfer more than R10 million offshore are subject to a more stringent verification process by SARS. They require approval from the Financial Surveillance Department and, furthermore, such transfers trigger a risk management test which includes verification of the client’s tax status and the source of the funds, as well as further assessments prescribed by the Financial Intelligence Centre Act (Act No. 38 of 2001)[22]. It is furthermore important to note that a TCS PIN letter, which contains the client’s tax number and which verifies the client’s tax compliance status concerning the amount requested to be transferred[23] must accompany the application to the Financial Surveillance Department.

South African non-tax residents who receive an inheritance or life insurance policy benefits of up to R10 million do not need to apply to SARS for a Manual Letter of Compliance – Transfer of Funds. For amounts above R10 million, a Manual Letter of Compliance – Transfer of Funds, is required from SARS[24].

4. Non-residents

It is interesting to note that cash bequests in a will, which is distributed to a non-resident from a resident deceased estate, may be transferred abroad provided that the Liquidation and Distributions Account is available. The Liquidation and Distribution Account must furthermore bear

[22] SARB: Currency and Exchange Manual for Authorised Dealers 2021, at p 85
[23] Supra 22
[24] SARB: Currency and Exchange Manual for Authorised Dealers 2021, at p 86

a reference number provided by the Master of the High Court[25]. This makes it quite easy to distribute cash legacies abroad to non-residents or residents living abroad.

In this regard it would appear that the reference to a non-resident in this instance refers to a person who has never been a resident in South Africa for tax purposes, as the inheritance of a person who has ceased to be a South African resident will be subject to the additional requirements discussed in 3 above.

Local Tax Implications

1. Life insurance policies with a beneficiary nomination

Life insurance policies payable to a beneficiary is included in deceased's estate in terms of section 3(3) of the Estate Duty Act[26] as deemed property. The amount to be included as deemed property is the amount recoverable under the policy of insurance by the beneficiary, less the aggregate amount of any premiums or consideration proved to the satisfaction of the Commissioner to have been paid by the beneficiary, together with interest at six percent per annum calculated on the premiums or consideration from date of payment to the date of the death of the life assured[27].

It is important to mention that some life insurance policies can be excluded as deemed property under section 3(3) of the Estate Duty Act, and this will include policies recoverable by a surviving spouse or child under a duly registered ante-nuptial or postnuptial contract,[28] policies taken out by a partner to acquire a deceased's interest in a partnership or share in a company [29] and certain "key-man policies"[30]. However, for purposes of this article it is assumed that the proceeds of the life assurance policies are estate dutiable and that none of the aforementioned exclusions is applicable.

In terms of section 11(b)(ii) of the Estate Duty Act, the person entitled to the proceeds of a domestic policy of insurance on the life of the deceased is liable for the estate duty attributed to that policy[31]. It is important to note that although section 11 determines the persons liable for the

[25] Supra 24
[26] Act 45 of 1955
[27] Section 3(3)(a) of the Estate Duty Act No. 45 of 1955
[28] Section 3(3)(a)(i) of the Estate Duty Act No. 45 of 1955
[29] Section 3(3)(a)(iA) of the Estate Duty Act No.45 of 1955
[30] Section 3(3)(a)(ii) of the Estate Duty Act No. 45 of 1955
[31] Notes on South African Income Tax 2020, *P Haupt*, at p 1019

estate duty, section 12 provides that the estate duty is recoverable by the commissioner from the executor[32]. The executor will therefore collect the estate duty attributed to the policy proceeds from the beneficiary. Should the beneficiary fail to pay the estate duty, as discussed above, the executor will be able to collect the proceeds via civil procedure from the beneficiary[33].

2. Bequest in a will

In terms of section 11(a) of the Estate Duty Act, the executor is liable for the estate duty on any other property in the estate. Therefore, in most instances, where the estate duty is levied on property of the deceased falling under section 3(2), the deceased estate will be liable for the estate duty[34].

In instances where the deceased estate is liable for the estate duty, the liability for the duty must be paid from property in the estate, firstly from the residue and only if there is insufficient liquidity, the balance of the liability must be recovered from legacies, unless the deceased's will specified otherwise[35].

The Options available to the client

Therefore, the question that needs to be answered, is what the options are for clients with children living abroad. Should clients make such children the beneficiaries on the life insurance policies, or should they rather make the policy proceeds payable to their deceased estates and bequeath the proceeds via their wills? The following factors will influence the decision of the client:

1. The beneficiary working/living abroad

If the beneficiary is temporarily working or living abroad, he/she may, depending on the provisions of a possible double tax agreement, still be regarded as being "ordinarily resident" in South Africa in terms of the definitions of "resident" in the Income Tax Act. Such a beneficiary will, in all likelihood, still have an active bank account in South Africa.

In such an instance the client can consider making the relevant person a beneficiary on the life insurance policy. On the death of the client, the policy benefits would be paid into the

[32] Meyerowitz On Administration of Estate and Their Taxation, 2010, *D Meyerowitz*, par 30.24
[33] Meyerowitz On Administration of Estate and Their Taxation, 2010, *D Meyerowitz*, par 30.14
[34] Meyerowitz On Administration of Estate and Their Taxation, 2010, *D Meyerowitz*, par 30.14
[35] Meyerowitz On Administration of Estate and Their Taxation, 2010, *D Meyerowitz*, par 30.14

beneficiary's South African bank account upon acceptance thereof. This would especially be convenient if the life insurance contract stipulates that the policy benefits will only pay out in South Africa in South African Rand.

The beneficiary can make use of the foreign investment/capital allowance to transfer the amount abroad if the policy benefits are required abroad.

There will be no executor's fees payable on the policy proceeds, as the policy pays out directly to the beneficiary[36].

One instance where it would be advisable for a client to make the policy proceeds payable to his/her deceased estate, is where the client wants to make the proceeds payable to the beneficiary's (living abroad) descendants, in the event of the descendant predeceasing the client. This will however entail that the client structure his will accordingly.

2. The beneficiary is a non-tax resident

If a person has, for example, emigrated to another country, he/she will not be regarded as a South African resident anymore. If such person is the beneficiary on a domestic policy held by a South African resident, it could cause an administrative burden. The beneficiary, as a non-tax resident, may need to open a bank account, if the life insurance policy contract only provides for payment to a South African bank account in South African currency.

In such an instance, consideration should be given to rather making the policy proceeds payable to the resident's deceased estate and to restructure the client's will to provide for a cash bequest to the relevant person. This will remove the burden of having to open a South African bank account. It is however important to note that there will be executor's fees payable on the proceeds of the life insurance policy if there is no beneficiary nomination, resulting in the proceeds being payable to the estate[37].

[36] Premiums & Problems, Edition 121, 2020, p E56
[37] Premiums & Problems, Edition 121, 2020, p E56

3. The Hybrid situation: child is working/ living abroad, but might immigrate within the next few years

In these circumstances, the client will not be sure whether the beneficiary/heir will emigrate or not. The beneficiary/heir might furthermore wish to rather utilise the proceeds of the life insurance policy to purchase an asset in South Africa, for example a holiday home.

In this scenario, the client could consider to make such person the beneficiary on the policy. If the beneficiary has not formally emigrated and still holds a South African bank account, the proceeds could be paid into the account to utilise as he/she deems fit.

The client can also provide in his will that the proceeds of the above-mentioned life insurance policy, if paid to the estate, be bequeathed to the relevant person. In the event that the person emigrates, and the policyholder dies thereafter, the beneficiary could reject the policy benefits, which will then pay out to the deceased estate[38]. The policy proceeds will therefore accrue to the person via the client's will. However, if the person accepts to beneficiary nomination, he acquires a vested right to the proceeds, which will result in the policy benefits not being paid to the deceased's estate. The bequest therefore falls away, as the policy proceeds did not pay out to the estate. The provisions of the will would thus have to be correctly drafted in this regard.

Conclusion

As highlighted above: there are various factors that need to be considered when structuring a client's life insurance portfolio and last will and testament where there are beneficiaries or heirs living abroad. Careful consideration should be given to all relevant facts and administrative requirements when advising a client on structuring their life insurance policies and last will and testament.

The financial advisor should furthermore take note of the provisions of policy contracts of different life insurance companies, as well as relevant business decisions taken by such companies concerning the payment of policy benefits to foreign beneficiaries.

It is also important to plan for adjusted circumstances, as the beneficiary or heir might currently anticipate returning to South Africa after working or living abroad, but subsequently have a change of mind. This could have an effect on the original advice provided to the client in relation

[38] Warricker NNO v Liberty Life Association of Africa LTD 2003 (6) SA 272 (W)

to such beneficiary or heir and may thus necessitate a revision of the financial plan done for the client.

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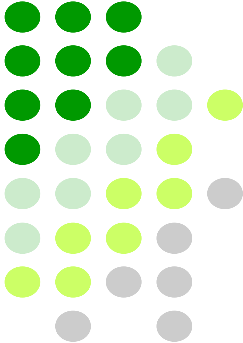

Income Tax

Apportionment of Capital Gain on Primary Residence

Chantel Strauss CFP®
B. Com Law, LLB, Adv PG Dip in Fin Plan
Legal Adviser Specialist
Personal Finance: Pretoria

Introduction

For the past 20 years, income tax on taxable capital gains (more commonly known as capital gains tax or "CGT") became a well-known term for the public. As from 1 October 2001 all capital gains, that accrued on the disposal of a capital asset subject to capital gains tax, during the financial year, must be included in the income tax return of the person or entity, who disposed of this asset[1].

The taxable capital gain will be included in the income tax calculation at a 40% inclusion rate for a natural person, deceased estate or special trust and at 80% for a company or normal trust. The taxable capital gain will be taxed at the tax rate applicable to the relevant taxpayer.

The Eighth Schedule to the Income Tax Act, No. 58 of 1962 ("hereinafter referred to as "the Act") contains certain exclusions from capital gain made at disposal or deemed disposal of an asset. One of these exclusions is the primary residence exclusion. If a person or his or her spouse used a residence as their primary residence, at the date of disposal, they can use the primary residence exclusion of up to R2 million from the capital gain made on the disposal of the property[2].

Capital gains tax

At the disposal of an asset, the capital gain or capital loss need to be calculated. When an asset is disposed of and the proceeds exceeds the base cost of such asset, a capital gain will be realised. On the other hand, if an asset is disposed of for less than its base cost, it will result in a capital loss.

Definition of an Asset

In terms of Paragraph1 of the Eighth Schedule to the Act, an asset is defined as:

- ❑ Movable or immovable property;
- ❑ Corporeal or incorporeal;
- ❑ Including rights or interest of any nature to or in any property;
- ❑ Excluding any currency.

Disposal or Deemed Disposal

In terms of Paragraph 11(1) of the Eighth Schedule to the Act a disposal includes the following:

[1] As defined in Paragraph 1 of the Eighth Schedule of the Income Tax Act No.58 of 1962;
[2] This exclusion also applies to a primary residence held by a special trust.

Any event, act, forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset, including:

- The sale of an asset;
- The donation of an asset;
- The expropriation, conversion, grant, cession, exchange of an asset;
- Any alienation or transfer of ownership of an asset;
- the forfeiture of an asset;
- the termination of an asset;
- the redemption, cancellation, surrender, discharge, relinquishment, release, waiver, renunciation, expiry or abandonment of an asset;
- the scrapping, loss or destruction of an asset;
- the vesting of an interest in an asset of a trust in a beneficiary;
- the distribution of an asset by a company to a shareholder;
- the granting of an option;
- the renewal or extension of an option;
- the decrease in value of a person's interest in a company, trust or partnership as a result of a "value shifting arrangement".

Who is liable for capital gains tax

In terms of the Act, a distinction is made between a Resident and Non-Resident of South Africa.

Resident:

Will be taxed on the 'capital gain' made on the disposal of all assets worldwide.

Non-Resident:

The following assets will be subject to Capital Gains Tax ("CGT") on the sale or disposal of an asset, if the assets are capital of nature:

- Fixed (immovable) property situated in South Africa
- Any interest or right in immovable property situated in South Africa
- Assets effectively connected with a South African permanent establishment of the non-resident person.[3]

[3] Paragraph 2 of the Eighth Schedule to the Income Tax Act; Notes on the South Africa Income Tax 40th Edition 2021, Pg. 658

Basic formula for capital gains or capital loss

The basic formula to calculate Capital Gain or Capital loss on the disposal of an asset is as follows:

Proceed on the disposal of an asset

Less: Base cost of the asset

= Capital gain or capital loss on the disposal of the asset

Proceeds

When an asset is disposed of the first step in calculating the capital gain or capital loss is to determine the proceeds received or accrued on the disposal of the asset.

In terms of Paragraph 35 of the Eighth Schedule to the Act, the proceeds from the disposal of an asset is equal to the amount received by or accruing to the taxpayer in respect of the disposal or any amount that is treated as having been received by or accrued to the tax payer in respect of the disposal or deemed disposal.[4]

With reference to specific inclusions as receipts and accruals are:

- The amount the creditor discharged or reduced the debt with that was owed to them;
- All amounts received or accrued from the lessor of property by the lessee for improvements made to the property;
- Any amount received or accrued to a person by way of value shifting arrangement. A value shifting arrangement is where an asset was disposed of and immediately before the disposal the market value of the interest was less than the market value immediately after disposal.

Base cost

The next step in calculating the capital gain or capital loss of an asset, will be to determine the base cost of the asset. To calculate the base cost of an asset the following expenses should be added:

- Acquisition cost: cost with regards to the acquiring or disposing of the asset; VAT; improvement costs to the property and any legal costs incurred.
- Business Assets: All current expenses incurred in respect of business assets can be included in the base cost.

[4] Notes on the South Africa Income Tax 40th Edition 2021, Pg. 689

- Shares and Unit trusts: Up to one third of any interest incurred on a loan taken to purchase shares or unit trusts will form part of the base cost.[5]

If an asset was acquired on or after 1 October 2001, the base cost of the asset is the purchase price plus any allowable expenses.

If an asset was acquired before 1 October 2001, the base cost of the asset is the value as valuated on 1 October 2001, plus any expenditure incurred on or after 1 October 2001[6]. The other methods that may be used to determine the base cost, is the 20% of the proceeds method or the time-apportionment method. After applying all the methods to determine the base cost, the base cost, which is the most beneficial, may be used in the calculation of the capital gain.

Example: *Determine the base cost of the asset:*

A property was bought on 1 May 1983 for the amount of R200,000. On the 1st of October 2001 the property was valued for R450,000. On 30 March 2021 the property was sold for an amount of R6,700,000.

Proceed as on 1 March 2021……………………………………………………………..R6,700,000

Base Cost……………………………………………………………………………………..(R3,278,947)

Capital Gain……………………………………………………………………………………R3,421,053

Base cost based on the four Methods:

1. *Value as on 1 October 2001……………R 450,000*
2. *20% of Proceed Method………………..R1,340,000 (R6,700,000x 20%)*
3. *Time-apportionment Method*

The "Time-Apportionment Basis" (TAB) formula is as follow: $Y = B + \frac{[(P - B) \times N]}{T + N}$

B = Expenditure incurred before 1/10/2001

P = Proceed on disposal

N = Number of years from date of acquiring the asset up to 30 September 2001(Part of a year is treated as a full year)

[5] Old Mutual Premiums and Problems 123 Edition
[6] Paragraph 20 of the Eighth Schedule of the Income Tax Act No.58 of 1962

T = Number of years from 1 October 2001 until date of disposal of the asset (Part of a year is treated as a full year)

Period from 1 May 1983 to 30 September 2001 is 18 years and 4 months (N)

Period from 1 October 2001 to 1 March 2021 is 19 years and 6 months (T)

$$Y = R200{,}000 + \frac{[(R6{,}700{,}000 - R200{,}000) \times 19]}{20 + 19}$$

Y = R3,366,666.67

Therefore, the base cost to be used to calculate the capital gain will be R3,366,666.67.

Net capital gain

All capital gains for the year of assessment must be added together and all capital losses for the year of assessment must be deducted from the capital gain. If the capital gain exceeds the capital loss for the year of assessment a natural person and a special trust will have an annual exclusion of R40,000 per annum that may be deducted from the capital gain. This is called the aggregated capital gain. If there were any capital losses from the previous year of assessment, this loss must be deducted from the aggregated capital gain. This is called the "net capital gain".

Example for Net Capital Gain

Capital gain for year of assessment	R650, 000
Less: Capital losses for the year of assessment	(R100, 000)
Capital gain	R 550, 000
Less: Annual Exclusion (Natural persons or special trusts)	(R 40, 000)
Aggregated capital gain for year of assessment	R510, 000
Less Assessed capital loss from previous year of assessment	(R 90, 000)
Net Capital Gain	R420, 000

Taxable capital gain

In terms of Section 26A of the Income Tax Act, all "taxable capital gain" must be included in the taxable income of a person or legal entity for the year of assessment.[7]

The taxable capital gain is calculated by multiplying the net capital gain with the inclusion rate applicable to the taxpayer.

Taxpayer	***Inclusion Rates:***
Natural person	*40%*
Deceased or Insolvent estates	*40%*
Special Trusts	*40%*
Individual policy holder of an insurer	*40%*
Companies	*80%*
Close Corporations	*80%*
Inter Vivos and Testamentary Trusts (excluding special trusts)	*80%*

Example: The Taxable Capital Gain for an individual

Net Capital Gain……………………………………………………………………………………..R420,000

Inclusion Rate @ 40% (R420,000 X 40%)

= Taxable Capital Gain……………………………………………………………………………..R168,000

The taxable capital gain will be included in the taxable income of the taxpayer for the year of assessment.[8] The taxable income will be taxed at the marginal tax rate of the relevant taxpayer. The marginal tax rate for taxpayers may change annually when the budget speech is announced.

Person or Entity	**Marginal Tax Rate**
Natural person	18% - 45%

[7] Notes on the South Africa Income Tax 40th Edition 2021, Pg. 657
[8] Section 26A of the Income Tac Act No. 58 of 1962

Registered Special Trust	18% – 45%
Registered business entity	28%
Registered Trusts other than special trusts	45%

Exclusions from capital gains tax

Annual exclusion

In terms of Paragraph 5 of the Eighth Schedule of the ITA, a natural person and a 'special trust' currently qualifies for an annual exclusion of R40,000 per annum. Where a natural person dies in a year of assessment, the allowable annual capital gains exclusion for such person is R300,000.

The annual exclusion of R40 000 is not a deduction from the capital gain, but it is a reduction of the capital gain.[9] Before the 40% inclusion rate is applied to a person's capital gains, the annual exclusion reduces a person's total capital gain.

Primary residence exclusion[10]

On date of disposal of interest in a primary residence held by a natural person or special trust with a market value of R2,000,000 or less, this property may be disregarded from capital gain. The reason for disregarding this property for capital gain is because the first R2,000,000 net capital gain on a primary residence will be excluded for capital gains tax.

If the market value of the primary residence, on date of disposal is R2,000,000 or more, the first R2,000,000 on the net capital gain of the primary residence, will be excluded from the capital gain. This exclusion is not a deduction for taxable capital gains purposes, it is merely excluded for capital gains purposes. Therefore, if the capital gain is less than R2,000,000 on disposal of the primary residence, only the value of the capital gain amount will be excluded.

Example:

If Mr B made a capital gain on disposal of his primary residence of R1,400,000, the primary residence exclusion will be limited to R1,400,000 and not R2,000,000.

[9] Notes on South African Income Tax 40th Edition, P. Haupt pg. 660
[10] Paragraph 44 to 51A of the Eighth Schedule of the Income Tax Act No.58 of 1962

A 'primary residence' is:

- A residence
- In which a natural person or special trust holds an *interest*
- Which that person or the beneficiary of that special trust (or the spouse)
- Ordinary resides or resided in as his or her main residence
- And uses or used it mainly for domestic purposes.[11]

A residence is:

- any structure
- including a boat, caravan, or mobile home
- which is used as a place of residence by a natural person
- together with any appurtenance belonging to it and enjoyed with it.[12]

An 'Interest' is:

- Any *real or statutory right; or*
- *A* share *in a share block company which owns the residence; or*
- *A* right *of use or occupation*
- Excluding *a right under a mortgage bond*
- And *excluding a right or interest of whatever nature in a trust or an asset of a trust, other than a right of lessee who is not a connected person in relation to that trust."*[13]

Interest held by a natural person or special trust:
When a person has the usufruct in a primary residence, this usufruct will qualify as interest held in the property and the primary residence exclusion may apply if the owner (bare dominium holder) is a natural person. If the 'owner' (bare dominium holder) is a trust, the primary residence exclusion will not apply at the disposal of the interest in the primary residence.

Ordinarily resides or resided in as their main residence:
For a residence to qualify as a primary residence, it must be the main residence that is or was resided in by the natural person as their main residence and used mainly for domestic purposes.

[11] Notes on South African Income Tax 40th Edition, P. Haupt pg. 726
[12] Notes on South African Income Tax 40th Edition, P. Haupt pg. 725
[13] Notes on South African Income Tax 40th Edition, P. Haupt pg. 726

To qualify for the primary residence exclusion, it is not a requirement for the person to be living in the residence at date of disposal.

Example:

Mr Jones bought a property at Ballito on 1 November 1995 for the amount of R200,000. This property was used for their primary residence. On 15 March 2021 this property was sold for R8,500,000. Mr Jones did not dispose of any other assets in the 2021/2022 year of assessment. His capital gain is calculated as follows:

Proceeds		R8,500,000
Less: Base Cost		(R2,115,385)
apital Gain		R6,384,615
Less: Exclusions		(R2,040,000)
- Primary Residence	(R2,000,000)	
- Annual Exclusion	(R40,000)	
Nett Capital Gain		R4,344,615
Taxable capital gain at inclusion rate of 40%		R1,737,846

(R4,344,615 x 40%)

Base Cost:

20% of market value	R1,700,000
Valuation on 1 October 2001	Not Applicable
Base Cost TAB	R2,115,385
Acquisition cost	R200,000

Time Apportionment: $Y = B + \frac{[(P - B) \times N]}{T + N}$

B = R200,000

P = R8,500,000

N = 6

T = 20

$Y = R200{,}000 + \frac{[(R8{,}500{,}000 - R200{,}000) \times 6}{20 + 6}$

Y = R2,115,384.62

Persons married in community of property

When a person is married in community of property and the primary residence is the property in their joint estate, and one spouse dispose their primary residence, it will be deemed that both spouses have disposed their primary residence in equal shares.

Example:

Mr and Mrs X is married in community of property. Their primary residence with a market value of R6,000,000 is disposed by way of sale on 1 June 2021. It was acquired for R2,000,000 on 20 April 2004. The capital gain of R4,000,000 will be included in both parties' taxable capital gain in equal shares. Mr X did not dispose of any other assets in the 2021/2022 year of assessment.

Mr X's taxable capital gain will be calculated as follows:

Proceeds	R3,000,000	(R6 000 000 ÷ 2)
Less: Base Cost	R1,000,000	(R2 000 000 ÷ 2)
Capital gain	R2,000,000	
Less: Primary residence exclusion (1/2)	(R1,000,000)	(R2 000 000 ÷ 2)
Less: Annual Exclusion	(R 40,000)	
Net Capital Gain	R 960,000	
Taxable Capital Gain:	**R 384,000**	(R960,000 x 40% inclusion rate)

If the primary residence is not a property of a joint estate, the person who owns the property will be liable for the capital gains tax on date of disposal. An example of this would be if the property was donated or inherited on condition this property is excluded from the joint estate.

Example:

Mr A inherited a house from his mother in 2015 and her will provided that this property must be excluded from any community of property of Mr. A. The value of the property on date of acquisition was R3,000,000. Mr and Mrs A are married in community of property and used this house as their primary residence. On 4 December 2021 Mr A sold the house for R8,000,000. Mr A did not dispose of any other assets in the 2021/2022 year of assessment.

The taxable capital gain of Mr. A is calculated as follows:

Proceeds from sale of the property.. R8,000,000

Base Cost on acquisition from the estate... (R3,000,000)

Capital Gain……		R5,000,000
Less Exclusions……		(R2,040,000)
Primary residence exclusion…….	R2,000,000	
Annual Exclusion……	R 40,000	
Net Capital Gain……		R2,960,000
Taxable capital gain included @ 40% inclusion rate……		**R1,184,000**

Ownership of more than one person of a property, where not all of the owners use the property as a primary residence

On disposal of a primary residence a natural person or a special trust may deduct a maximum of R2,000,000 from the capital gain made on disposal of the property.

In terms of Paragraph 45 of the Eighth Schedule, the apportionment exclusion may only be applicable if the holder of the interest in the primary residence is more than one natural person or special trust jointly.

The exclusion may further only be used if the property served as the primary residence of the owner.

Example:

On date of disposal of a residence, the two owners of the property was the son (60%) and the mother (40%). The mother used the property as her primary residence at date of disposal. The primary residence exclusion in respect of the capital gain of the 40% ownership of the mother is not limited to R800,000 (R2,000,000 x 40%). At date of disposal, the mother will be able to use the full R2,000,000 exclusion for capital gain made in respect of the 40% ownership on disposal of the property, provided that the capital gain in respect of her portion of the ownership is R2 000 000 or more. If the capital gain is less than R2,000,000, the value of the capital gain will serve as the primary residence exclusion.

Let us assume that the residence was purchased in 2005 by the mother and the son for R3 000 000. The son contributed R1 800 000 to the purchase price and the mother R1 200 000. The mother used the property as her primary residence, until it was sold in July 2021 for R10 000 000. Neither the mother nor the son disposed of any other assets in the 2021/2022 year of assessment.

The taxable capital gain of the **mother** is calculated as follows:

Proceeds from sale of the property....................................... R4,000,000 (R10 000 000 x 40%)

Base Cost on acquisition from the estate.............................. (R1,200,000)

Capital Gain... R2,800,000*

Less Exclusions... R2,040,000)

Primary residence exclusion........R2,000,000*

Annual Exclusion........................R 40,000

Net Capital Gain.. R760,000

Taxable capital gain included @ 40% inclusion rate.................. R304,000

* If the capital gain made by the mother was less than R2,000,000, the mother would only be able to exclude the value of the capital gain as the primary residence exclusion.

The taxable capital gain of the **son** is calculated as follows:

Proceeds from sale of the property....................................... R6,000,000 (R10 000 000 x 60%)

Base Cost on acquisition from the estate.............................. (R1,800,000)

Capital Gain... R4,200,000

Less Exclusions... (R 40,000)

Annual Exclusion........................R 40,000

Net Capital Gain.. R4,160,000

Taxable capital gain included @ 40% inclusion rate.............. R1,664,000

If the owners of a primary residence are a natural person and a non-natural person such as a company, only the natural person can claim the primary residence exclusion.

Example:

A company and individual is the owners of a property. The company is the owner of 60% in a property and the natural person is the owner of 40% in the property. The natural person uses the property as his primary residence. On date of disposal, only the individual may exclude up to R2,000,000 from the capital gain made in respect of his 40% ownership on disposal of the primary residence, provided that the capital gain in respect of his portion of the ownership is R2 000 000 or more. If the capital gain is less than R2,000,000, the value of the capital gain will serve as the primary residence exclusion. The company will not be entitled to the primary residence exclusion on disposal of its 60% ownership in the property, and it will likewise not be entitled to the R40 000 annual exclusion applicable to natural persons.

Let us assume that the residence was purchased in 2005 by the individual and the company for R3 000 000. The company contributed R1 800 000 to the purchase price and the individual R1 200 000. The individual used the property as his primary residence, until it was sold in July 2021 for R10,000,000. Neither the individual nor the company disposed of any other assets in the 2021/2022 year of assessment.

The taxable capital gain of the individual is calculated as follows:

Proceeds from sale of the property..................................... R4,000,000 (R10 000 000 x 40%)

Base Cost on acquisition from the estate................................ (R1,200,000)

Capital Gain.. R2,800,000*

Less Exclusions.. (R2,040,000)

Primary residence exclusion........R2,000,000*

Annual Exclusion........................R 40,000

Net Capital Gain.. R760,000

Taxable capital gain included @ 40% inclusion rate................ R304,000

* If the capital gain made by the individual was less than R2,000,000, the individual would only be able to exclude the value of the capital gain as the primary residence exclusion.

The taxable capital gain of the company is calculated as follows:

Proceeds from sale of the property..................................... R6,000,000 (R10 000 000 x 60%)

Base Cost on acquisition from the estate.............................. (R1,800,000)

Capital Gain.. R4,200,000

Less Exclusions...(R0)

Net Capital Gain... R4,200,000

Taxable capital gain included @ 80% inclusion rate................. R3,360,000

Apportionment in respect of periods not ordinarily resident in the primary residence:

For a person to qualify for the primary residence exclusion, it is not necessary for the property to be occupied at date of disposal. If the property was not occupied as the primary residence from date of acquisition (after 1 October 2001) to date of disposal, this person will qualify for a partial exclusion.[14] This partial exclusion is subject to Paragraph 48 of the Eighth Schedule to the Act.

[14] Paragraph 47 subject to Paragraph 48 of the Eighth Schedule in the Income Tax Act No. 58 of 1962

In terms of Paragraph 48 the following absences from the residence will not be seen as an absence (provided that the absence does not exceed 2 years) if:

- ❑ At the time the residence was that person's primary residence, it had been offered for sale, and vacated due to the acquisition or intended acquisition of a new property;
- ❑ The residence was being erected on land acquired for the purpose in order to be used as that person's primary residence;
- ❑ The residence had been accidentally rendered uninhabitable; or
- ❑ The death of that person.[15]

Example: Primary residence not occupied at date of disposal

Mr Bentley bought a property at Cape Town on 1 November 1960 for an amount of R100,000. This property was used for holiday purposes. In 1998, Mr Bentley and his wife moved to the Cape Town property and lived in it. From 30 June 2010, Mr. Bentley decided to move to a retirement village and rent out his property. On 31 March 2021 this property was sold for R8,000,000.

- Proceeds (P) = R8,000,000
- Years prior 1/10/2001 (N) = 41
- Years after 1/10/2001 (T) = 20
- Base Cost = B + [(P-B) x N]/(T + N)
  = R100,000 + [(R8,000,000 – R100,000) x 41]/(+20+41)
  = R5,409, 836

- Capital Gain = R2,590,164
- Portion of period this property was used as primary residence on/after 1/10/2001 = (8 x 12) + 9= 105 months
- Total amount of months this property was held on/after 1/10/2001 = (19 x 12) + 6 = 234 months

Total capital gain	R2,590,164
Less: Portion attributable to business use (R2,590,164 x 129 / 234)	(R1,427,911)
Portion of capital gain attributable to primary residence	R1,162,253
Less: Primary residence exclusion	(R1,162,253)
Add back: Capital gain attributable to business use	R1,427,911
Less: Annual Exclusion	(R 40,000)
Capital Gain	R1,387,911
Included @ 40%	R 555,164

[15] Notes on South African Income Tax 40th Edition, P. Haupt pg. 726

Apportionment for Non-Residential Use

When a portion of a primary residence is used for carrying on a trade for any duration after 1 October 2001, the primary residence exclusion will still be applied. The primary residence exclusion will however be limited and will only be applicable to the portion of the property used for residential purposes and not the portion that is used for trading purposes.[16]

Example:

Mrs. Rich bought a property on 1 March 2005 for the amount of R800,000 and used it as her primary residence. On 1 May 2020, because of Covid-19 lock down, she started using 30% of this property as her office. On 31 May 2021 she sold her property for R3,000,000. Her capital gain is calculated as follows:

Proceeds……………………………………………………………………………………,,,. R3,000,000

Base Cost……………………………………………………………………………………(R 800,000)

Gain…………………………………………………………………………………….. R2,200,000

Less: Portion attributed to business use: (R2,200,000 x 30%) x 13/195……… R 44,000)

- (1 May 2020 – 31 May 2021 = 1 year (12 months) + 1 month = 13 months

- (1 March 2005 – 31 May 2021 = 16 years (16 x 12 months) + 3 months = 195 months

Portion of gain attributable to primary residence………………..……………………. R2,156 000

Primary Residence Exclusion (limited to the **smaller** of above calculated primary residence gain or R2,000,000)……………………………………………………………………… (R2,000,000)

Capital Gain……………………………………………………………………… R 156,000

Add back the capital gain attributed to business use………………………… R 44,000

Capital gain……………………………………………………………………… R 200 000

Less Annual Exclusion………………………………………………………………… (R 40,000)

Capital Gain……………………………………………………………………… R 160,000

[16] Paragraph 49 of the Eighth Schedule of the Income Tax Act No. 58 of 1962

It is important to take note that a residence must comply with the provision of Paragraph 44 to qualify for the exemption. In terms of Paragraph 44, a residence must have been used mainly for the residential purposes of the natural person, for part of the period during which the natural person had an interest on/after 1 October 2001.[17]

Conclusion

The primary residence exclusion is a very useful concession in reducing capital gains tax on disposal of a primary residence. As can however be noted from this article, there are various factors that could lead to a reduction or annihilation of the value of the primary residence exclusion, including the use of a portion of the property for non-residential purposes, the type of ownership or co-ownership in the residence and periods when the property is not used as a primary residence. It is therefore important for financial planners to take not of these factors when clients are seeking advice on the tax consequences of the disposal of a primary residence.

[17] Pg 729 Notes on South African Income Tax 40th Edition

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To give or not to give… Understanding Section 18A of the Income Tax Act

Suzelle Jooste CFP®

BA, LLB, Adv PG Dip in Fin Plan, Adv Certificate in Trust Law, Dip in Labour Law, Admitted Attorney

Legal Advisor Manager

Personal Finance: Johannesburg

Introduction

The Covid-19 pandemic has had a huge impact not just in South Africa, but worldwide. Economies and individuals, already suffering, are stretched to the limit to make ends meet. Both during and after the lockdown retrenchments were effected by businesses just to try and survive the pandemic and keep their doors open. The international Charities Aid Foundation (CAF) published an annual report called the World Giving Index (WGI)[1]. This report is the world's largest survey of charitable endeavours, and it offers a glimpse of global trends in generosity. The annual report analyses data from the past decade, to uncover trends in people's generosity through times of economic crisis, economic recovery, and geopolitical unrest[2]. To collect this data, the report surveyed over 1.3 million people in 128 countries[3]. Three aspects of giving behaviour are covered by the report to measure charitable giving namely[4]:

- Helping strangers
- Donating money to a charity and
- Volunteering time to organizations.

South Africa's overall ranking was 45th, and of those surveyed 18% reported having donated to charities, 63% reported helping a stranger, and 25% reported volunteering time at an organisation[5].

I found this report and its data and findings very interesting and believe that if individual taxpayers truly understand the tax relief offered to them, South Africans' donations to charities may increase. This article is an attempt to create awareness amongst financial planners, and to empower them to advise their clients on the benefits of financial donations to charities.

South African perspective

The South African Government has recognised that certain charitable organisations are dependent on the generosity of the South African public. The government allows a tax deduction for certain donations to encourage the generosity of the public[6]. The eligibility to issue receipts is restricted to specific organisations that are approved by the Commissioner of Inland Revenue,

[1] www.worldpopulationreview.com/country-rankings/most-charitable-countries
[2] www.worldpopulationreview.com/country-rankings/most-charitable-countries
[3] www.cafonline.org; CAF World Giving Index, 10th Edition, October 2019
[4] www.worldpopulationreview.com/country-rankings/most-charitable-countries
[5] www.worldpopulationreview.com/country-rankings/most-charitable-countries
[6] www.sars.gov.za; Basic guide to Section 18A Approval (Issue 3), 17 March 2020, p2

and these organisations must use the donations to carry on or fund specific public benefit activities in South Africa.

Section 18A and relevant definitions

Section 18A(1)(a) of the Income Tax Act[7] provides as follows:

18A. *Deduction of donations to certain organisations.*—

(1) Notwithstanding the provisions of section 23, there shall be allowed to be deducted in the determination of the taxable income of any taxpayer so much of the sum of any bona fide donations by that taxpayer in cash or of property made in kind, which was actually paid or transferred during the year of assessment to—

(a) any—

(i) public benefit organisation contemplated in paragraph (a)(i) of the definition of "public benefit organisation" in section 30(1) approved by the Commissioner under section 30; or

(ii) institution, board or body contemplated in section 10(1)(cA)(i),

which—

(aa) carries on in the Republic any public benefit activity contemplated in Part II of the Ninth Schedule, or any other activity determined from time to time by the Minister by notice in the Gazette for the purposes of this section;

(bb) complies with the requirements contemplated in subsection (1C), if applicable, and any additional requirements prescribed by the Minister in terms of subsection (1A); and

(cc) has been approved by the Commissioner for the purposes of this section;

Section 18A thus allows a deduction of the sum of bona fide donations of cash or property in kind made by a taxpayer, during the year of assessment to public benefit organisations. The public benefit organisations must however be approved by the Commissioner for the purposes of section 18A in the Income Tax Act. Although the Act does not specifically provide that an organisation must be approved by the Commissioner for purposes of a Section 18A deduction, such approval is inferred since the Commissioner must issue a reference number for purposes of a section 18A deduction, and this reference number must also appear on the section 18A receipt that is issued to donors[8].

[7] Act 58 of 1962
[8] www.sars.gov.za; Basic guide to Section 18A Approval (Issue 3), 17 March 2020

Public benefit organisation[9] – *means " a "public benefit organisation" constituted as either a "non-profit company" as defined in section 1 of the Companies Act 71 of 2008, a trust or an association of persons incorporated, formed or established in South Africa approved by the Commissioner under section 30(3), carrying on PBAs (public benefit activities) in Part II in South Africa, and also approved by the Commissioner for purposes of section 18A under section 18A(1)(a)(i);"*

Public benefit activities:[10]

A public benefit activity is defined as follows:[11]

Public benefit activity means "*a "public benefit activity" listed in Part I*[12] *and any other activity determined by the Minister by notice in the Government Gazette to be of a benevolent nature, having regard to the needs, interests and well-being of the general public;"*

The Ninth Schedule to the Income Tax Act is divided into two Parts, namely Part I and Part II. Part I lists several public benefit activities for purposes of approval as a public benefit organisation under section 30 of the Act. The public benefit activities that's been approved by the Minister for purposes of Section 18A are listed under Part II. Not all the Public Benefit activities that are listed in Part I are included in Part II.

The categories of the Public Benefit activities listed in Part II are:

- ❑ Welfare and Humanitarian
- ❑ Health Care
- ❑ Education and Development
- ❑ Conservation, Environment and Animal Welfare
- ❑ Land and Housing

The Minister may approve additional public benefit activities from time-to-time and will publish same by notice in the Government Gazette. The Minister may also, by regulation, prescribe

[9] www.sars.gov.za; Basic guide to Section 18A Approval (Issue 3), 17 March 2020, Glossary; "Public benefit organization" is defined in section 30(1) of the Income Tax Act 58 of 1962.

[10] www.sars.gov.za; Basic guide to Section 18A Approval (Issue 3), 17 March 2020, p 4

[11] www.sars.gov.za; Basic guide to Section 18A Approval (Issue 3), 17 March 2020, Glossary; Public benefit activity" is defined in section 30(1) of the Income Tax Act 58 of 1962

[12] Of the 9th Schedule to the income Tax Act 58 of 1962.

additional requirements that a public benefit organisation must comply with before any donation made to that public benefit organisation will be allowed as a section 18A deduction.

Types of donations:

(a) Cash

Donations can be cash or property in kind that was actually paid or transferred by the donor to the donee in a year of assessment.

According to the Basic Guide to Section 18A Approval by SARS[13], the following payments or transfers are not donations and do not qualify for a Section 18A deduction:

- Amounts paid to attend a fundraising event for example a charity golf day or dinner
- Donation of memorabilia to be auctioned to raise funds
- Payment of school fees, school entrance fees or compulsory school levies
- Payment for raffle or lottery tickets
- Successful bidding for goods auctioned to raise funds
- If a lessor provides free rent, water, and electricity to a lessee (that is a Section 18A-approved organisation)
- The payments of debt owed by a section 18A organisation
- Prizes and sponsorships donated for a charity golf day
- Tithes and offerings to churches
- Payments made by post-dated cheques

(b) Property in kind

This is a donation of property in a form other than in cash. It may include the following[14] (this is a non-exhaustive list):

- Trading stock forming part of the trade conducted by the taxpayer (for example livestock or produce donated by a farmer and goods such as computers, food, furniture, medical supplies, and motor vehicles).
- An asset that is not trading stock, but it is used by the taxpayer in conducting the taxpayer's trade. Examples include computers, delivery vehicles, furniture etc.

[13] www.sars.gov.za; Basic guide to Section 18A Approval (Issue 3), 17 March 2020, p 11
[14] www.sars.gov.za; Basic guide to Section 18A Approval (Issue 3), 17 March 2020, p 12

- An asset that is not trading stock and is not used in the business of the taxpayer. Examples include installed carpets or cupboards, security fencing and buildings such as classrooms etc.

A donation of property in kind must be used by the section 18A-approved organisation in carrying on any public benefit activity in Part II in South Africa.

It is important to note that a donation of a service such as time, skill or effort will not qualify as a deduction for purposes of section 18A, since a service is not a donation of property made in kind. As an example, an artist who renders a service free of charge to a section 18A organisation will therefore not qualify for a tax deduction for the value of the service so provided[15].

Receipts in terms of Section 18A

A receipt in terms of Section 18A may only be issued for an eligible donation that is solely and exclusively used for public benefit activities as contemplated in Part II[16] in South Africa. SARS requires that Section 18A organisations create their own receipts, and they must ensure that all the required details appear on the receipt.

To be a valid Section 18A receipt, the following must be reflected on the receipt:[17]

- The date or dates that the donation/donations is/were received
- The name and address of the organisation that issued the section18A receipt
- The name and address of the donor
- The amount of the cash donation
- If not a cash donation, but a donation of assets in kind, then the nature of the donation and the value of the donation.
- The reference number that the Commissioner issued to the section 18A-approved organisation.

An example of a section 18A receipt is attached to this article, as provided by the Basic Guide to Section 18A Approval, Third Edition[18].

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[15]www.sars.gov.za; Basic guide to Section 18A Approval (Issue 3), 17 March 2020, p 12
[16] Of the 9th Schedule to the Income Tax Act 58 of 1962.
[17] www.sars.gov.za; Basic guide to Section 18A Approval (Issue 3), 17 March 2020, p 13
[18] www.sars.gov.za; Annexure F of the Basic guide to Section 18A Approval (Issue 3), 17 March 2020, p 39

Allowable deduction in terms of Section 18A

The donation deduction is available to all taxpayers, and therefore may include individuals, trusts, companies, and close corporations. The donation must be actually paid or transferred to the section 18A-approved organisation during the year of assessment. The deduction is limited to an amount which does not exceed 10% of the taxable income of the taxpayer, before the deductions under this section or a deduction for foreign taxes paid under section 6quat(1C), and excluding any taxable income from any retirement fund lump sum on death, retirement or withdrawal benefit or severance benefit, but includes the taxable portion of any capital gain[19]. Donations that are made in excess of the 10 % taxable income may be carried forward and transferred in the next year of assessment, still subject to the 10 % limitation[20]. The allowable deduction in respect of donations made by a portfolio of a collective investment scheme is calculated by a formula provided in section 18A of the Income Tax Act[21].

Donations tax

Donations Tax is a tax on the transfer of assets provided for in terms of section 54 to 64 of the Income Tax Act. Donations tax is payable in respect of the value of all property donated on or after 16 March 1988. Since 1 March 2018, donations tax is levied at a rate of 20 % on the aggregated value of property donated, that does not exceed 30 million rand, and at a rate of 25 % on the value exceeding 30 million rand[22]. A natural person enjoys an annual exemption of 100 000 rand of property donated [23].

In terms of Section 56(1) there are certain exemptions from donations. A few examples of exempt donations are:

- ❑ A donation to spouse in terms of s registered Ante nuptial contract or post nupitlal agreement;
- ❑ A donation to or for the benefit of the spouse;
- ❑ A donation mortis causa (a donation made in contemplation of death);
- ❑ A donation under which the benefit only passes to the donee on the death of the donor;

[19] Section 18A(1) of the Income Tax Act, 58 of 1962; Notes on South African Income Tax, Phillip Haupt, 2020, p 158

[20] Section 18A(1) of the Income Tax Act, 58 of 1962; Notes on South African Income Tax, Phillip Haupt, 2020, p 158

[21] Act 58 of 1962. The details of this formula will not be discussed in this article.

[22] Premiums and Problems, Edition 123, 2021, page E5.

[23] Section 56(2)(b) of the Income Tax Act

- A donation by or to the Government, municipalities, approved tax-exempt public benefit organisations. As discussed above, donors making donations to public benefit organisations where the activities of such organisation qualify in terms of Part II of the Ninth Schedule[24].

Conclusion

The World Giving Index report found[25] that there is no ‘magic bullet’ answer to tell them what makes a country generous. The top performing countries all represent a wide range of geographies, religions, cultures, and levels of wealth – but what all the countries have in common is simply an inspiring willingness to give. It is my opinion that South Africa’s ranking in giving may partially be influenced by the fact that South African taxpayers are not always aware of the tax benefits of donating to charitable organisations. The aim of this article is to assist financial planners in answering questions of clients who want to live by the *Ubuntu* philosophy. The CAF World Giving Index [26] describes *Ubuntu* as the capacity in an African culture to express compassion, reciprocity, dignity, humanity, and mutuality in the interest of building and maintaining communities with justice and mutual caring. Although a tax benefit should not be the primary factor in motivating a person to live by the principles of *Ubuntu*, it is a welcome incentive for those assisting others in dire need.

[24] Notes on South African Income Tax, Phillip Haupt, 2020, p 848
[25] www.cafonline.org; CAF World Giving Index, 10th Edition, October 2019
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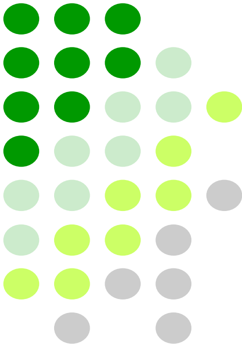

Retirement Planning

Important Considerations for GEPF members approaching retirement

Natalie Dillon-van Acker CFP®
BCom. LLB, Adv. PG Dip in Fin Plan
Legal Advisor Advanced
Personal Finance: Eastern Cape

Introduction

The Government Employee's Pension Fund (GEPF) is governed by Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996). The GEPF is unlike private sector funds that are governed by a set of rules that has been registered with the Registrar of Pension Funds in terms of the Pension Funds Act.[1]

The GEPF rules, which are embodied in schedule 1 of the Government Employees Pension Law[2] do not allow a member to purchase an income from an insurer at retirement. The member must either retire from the GEPF or, in order to purchase a pension income from an insurer, resign from the GEPF before reaching retirement age, and transfer the retirement interest to a retirement annuity, preservation or another pension fund, and retire from the transferred fund. Members of the GEPF often feel overwhelmed and very uncertain when approaching retirement age and are unsure of which option is the best for them.

The uncertainty is caused by several factors for example:

- whether one's money is safe in the GEPF,
- the tax implications relating to any lump sum being taken and
- the fact that the GEPF pension income stops with the death of the members' surviving spouse if there are no eligible children[3], to name but a few

Often, a client is advised to resign from the GEPF to take full advantage of the pre-1 March 1998 tax free benefits which may be applied less favorable if the client retires from the GEPF. While this may be sound advice in certain circumstances, there are several other factors that should be considered and presented to the client. These factors are often over-looked and the decision is made by the client on the basis of income tax benefits only.

This article aims to illustrate the importance of considering more than just the potential income tax benefits of resigning from the GEPF to 'fully utilize' the tax benefits relating to the pre 1998 years of service.

[1] Pension Funds Act 24 of 1956
[2] Proclamation No. 21 of 1996
[3] The GEPF pays annuities (child pensions) to the eligible children of members or pensioners who passes away on or after 1 June 2018, regardless of whether there is a surviving spouse of the deceased member or not.

Important tax considerations: Taxation of lump sum benefits from GEPF

Where a member of the GEPF has pre-1 March 1998 years of service, the portion of the lump sum attributable to the pre-1 March 1998 years of service will pay out tax-free. The remaining portion of the lump sum payable will be taxed according to the tax table applicable to retirement fund lump sum benefits or retirement fund lump sum withdrawal benefits, as the case may be.

The taxable portion of the lump sum being taken is calculated in terms of the formula prescribed in Paragraph 2A of the Second Schedule of the Income Tax Act (the Paragraph 2A formula)[4], in terms of which:

A = B/C x D, where

'A' is the taxable portion of the lump sum[5]

'B' is the number of completed years of service after 1 March 1998

'C' is the total number of completed years of service

'D' is the lump sum benefit payable to the member

Once the taxable portion has been calculated, income tax is calculated on the taxable portion of the lump sum according to the tax table applicable to retirement fund lump sum benefits or retirement fund lump sum withdrawal benefits, as the case may be.

Estate Duty

In terms of Section 3(2)(i) of the Estate Duty Act[6], any benefit payable by an approved retirement fund to a deceased person as a result of death of that person, is exempt from estate duty.

However, Section 3(3)(e) of the Estate Duty Act[7] has a specific inclusion that provides that any contributions made by a deceased person to an approved South African retirement fund that were allowed as a deduction[8] in determining the taxable portion of a lump sum benefit payable to the deceased person are to be included as deemed property in the deceased's estate

[4] Income Tax Act 58 of 1962

[5] Subject to further deductions allowed in terms of paragraph 5 and 6 of the Second Schedule of the Income Tax Act 58 of 1962

[6] Act No 45 of 1955

[7] Act No 45 of 1955

[8] Paragraph 5 of the Second Schedule to the Income Tax Act, 1962

General important advice aspects relating to GEPF Fund members

From an advice perspective, and in addition to the taxation of lump sums from the GEPF and estate duty discussed above, it is also important to remember the aspects discussed below when advising GEPF members on the options available to them.

A GEPF member who retires directly from the fund must be made aware of the following:

- The GEPF is a defined benefit fund which means that the pension a member is entitled to is calculated based on a formula and there is a contractual obligation on the GEPF to meet this payment;
- The medical aid subsidy to which the member is entitled while a member of the GEPF is retained by the retiring member and by the surviving spouse in the event of the member's death[9];
- The pension paid to the surviving spouse of the deceased member ceases at death of the surviving spouse and there is no benefit, other than an eligible child's benefit, where applicable, payable to the heirs of the deceased member or deceased member' spouse[10];
- The income due to the member or his surviving spouse increases annually and will continue until the date of death of the person entitled to the income – the member is thus not exposed to any investment risk;
- In certain instances, where a member of the GEPF has reached a certain age, he may not have the option to resign and transfer to another approved retirement fund, his only option will thus be to retire from the GEPF[11];
- The pension may not be transferred out of the GEPF to another approved retirement fund upon reaching retirement age;
- Where the pensioner emigrates, he cannot access the retirement fund benefit, he has to continue receiving an income from the fund and such income will need to be remitted off-shore;

[9] Paragraph 2 PSCBC Resolution 3 of 1999

[10] Rule 14.6 of the Government Employees Pension Rule and Law

[11] A member of the GEPF who has already reached the age of 60, where the retirement age is 60, will not be permitted to resign from the fund and will have no choice but to retire directly from the GEPF. The member's retirement age will be dictated by the legislation governing their particular sector of public service as provided for in Section 16 of the Public Service Act, 1994

A GEPF member who elects to resign from employment and transfers the retirement benefit to a preservation fund or retirement annuity fund, and retire from such fund, must be made aware of the following:

- The medical aid subsidy is lost (this must be taken into account when presenting a client with income options from an annuity purchased with an insurer);
- The member can elect to purchase a life annuity or a living annuity at retirement;
- Where the member purchases a living annuity from a long-term insurer, the pension payable to the retired member can be left to whomever the retired member chooses by way of nominating a beneficiary on the annuity contract. Where the member elects to purchase a traditional life annuity, the income will generally cease at death of the annuitant if a single life annuity is purchased, and the capital is lost[12];
- Where a life annuity is purchased, the retiree could opt for a guaranteed period for which the income is paid (the pension will pay for the specified guaranteed period) or for a joint and survivorship annuity (the pension will pay until the death of the specified joint annuitant, i.e. usually the surviving spouse);
- Resignation and transfer to a preservation fund may not be allowed in certain circumstances. This is dictated by the government sector in which the member worked and is generally the case where the member is aged 60 or older, or within a certain period of retirement age;

These are all factors that need to be considered in addition to the tax considerations discussed above.

Income from GEPF compared to income from purchased pension

The GEPF is a defined benefit fund. As a result, the income that a retiring member receives when retiring from the GEPF is calculated in terms of the relevant formulas prescribed in the fund rules.

The distribution of benefits at death of the pensioner are dealt with in the fund rules. The rules provide that if a pensioner dies and is survived by a spouse, the surviving spouse will receive a 'spouse's pension'[13]. The spouse's pension is equal to half of the annuity which the pensioner

[12] Note that the life insurance cover is often used to ensure that the capital is not lost – a portion of the annuity income is used to pay the premium on the risk policy and the annuitant nominates beneficiaries on the life cover. This life cover can either be stand alone cover or cover that is provided as part of the annuity product purchased from an insurer,

[13] Rule 14.6.2 Government Employees Pension Rule and Law

received on the date of his or her death. If the retiring member elected to take a reduced annuity or gratuity[14], the spouse's pension will be increased to three quarters of the annuity which the pensioner received at date of death.
An eligible child's pension, determined in terms of the rules of the fund, is also payable to eligible children. If there is no surviving spouse or eligible children, the benefits cease.

Where a member of the GEPF elects to resign, transfer to a preservation fund and retire from the preservation fund, the member will need to either purchase a living annuity or a life annuity. A life annuity provides a guaranteed income for life while a living annuity allows the member to elect an income of between 2.5% and 17.5% of the capital on an annual basis (i.e. on anniversary of the living annuity), but the member carries the investment risk.

At death of the pensioner, the nominated beneficiary on a living annuity has the option to commute the benefit into a lump sum or to continue to receive an income, or to take the benefit in the combined form of a lump sum and an annuity.

It is critical that, when a member of the GEPF is seeking advice on their retirement/resignation from the fund, the financial advisor needs to present all possible scenarios to the member in order for him to be in a position to make an informed decision.

An example of such presentation would be as follows:
Mr Curry is a member of the GEPF and is approaching retirement age.

Option 1
If Mr Curry remains with the GEPF, he will receive a lump sum gratuity of R 342 464 (ignore income tax implications on lump sum as the example is to compare the income element) and a GEPF income for life of R7 752.

Option 2
If Mr Curry elects to resign from employment and transfer his GEPF benefit to a preservation fund, he is entitled to a withdrawal benefit of R1 425 810 that can be transferred tax-free to the preservation fund from where he will purchase a pension with an insurer on retirement from such fund.

[14] Rule 14.2.2 Government Employees Pension Rule and Law

If Mr Curry purchases a life annuity with a 4% escalation, he will receive a pension of R7 741 and if Mr Curry purchases a living annuity and elects a drawdown rate of 8.8%, he will receive a pension of R7 752. Mr Curry is unmarried and has no children,
While it appears that Mr Curry will receive a pension of +/- R7 700 regardless of which option he follows, there are several additional factors that need to be considered.

Medical Aid Subsidy
One of the most important considerations is the medical aid subsidy discussed in the preceding paragraph. If Mr Curry opts for option two and resigns from the GEPF to purchase a living or life annuity with an insurer, the cost of a medical aid must be 100% funded from the income paid to Mr Curry. If MR Curry opts for option one and remains with GEPF, he will continue enjoying the financial benefit of the medical aid subsidy that he received.

Income at death
In terms of the GEPF rules, you are unable to nominate a beneficiary for proceeds at death after retirement. As a result, the capital will be lost. In this instance, Mr Curry has no spouse or dependants so this will not be as relevant to him. If he, however, had a spouse or dependants, this would be an important consideration, but the payment of the spouse's pension and/or eligible child's pension by the GEPF must be taken into account.

Consideration must also, for example, be given to the loss of the capital benefit at Mr Curry's death if he elects to retire from the GEPF. In this instance, Mr Curry has no heirs and it is highly likely that a guaranteed income is more important to him than having capital available at his death.

To some, the benefits of a guaranteed income and the medical aid subsidy offered to government employees outweigh the benefits of possibly maximising the pre 1-March 1998 tax-free portion on accrual from a retirement annuity fund or preservation fund, and having capital to leave to beneficiaries. To others, having control over your investment choice and being able to leave any remaining capital to dependants/heirs is more important than the medical aid subsidy and guaranteed income.

Each case should be assessed on its own specific circumstances.

The pre 1998 tax free portion of a lump sum and retirement from GEPF

Where a member of the GEPF elects to retire directly from the fund, the retiring member[15] is entitled to a gratuity which is calculated in terms of the fund rules[16]. The Paragraph 2A formula[17] is used to determine the taxable (post 1998) portion of the lump sum.

This is best illustrated by way of a practical example.

Jack joined the GEPF on 1 March 1993, he retires from the fund on 1 March 2021 and the gratuity due to him is R3 200 000.

The paragraph 2A[18] formula is used to determine the taxable portion of the gratuity:

A = B/C x D

A = 23/28 x R3 200 000

A = R2 628 571 taxable portion (the tax-free portion is thus R571 429)

Income Tax calculated according to the tax table applicable to retirement fund lump sum benefits on R2 628 571 amounts to R698 786 [R130 500 + (36% x (R2 628 571- R1 050 000))], assuming that Jack had not previously received taxable lump sums from other retirement funds or severance benefits form an employer.

The net lump sum payable to the member will be R2 501 214 (R3 200 000 lump sum minus the total tax liability of 698 786).

In addition to the lump sum, the retiring member will also be entitled to a monthly income determined in accordance with the rules of the fund. At Jack's death, his spouse will be entitled to an income that has also been determined in terms of the rules based on certain election that Jack made at his retirement[19].

[15] Assuming that the retiring member has more than 10 years pensionable service
[16] Schedule 1 Rules of the Government Employees Pension Fund, Rule 14.3
[17] Paragraph 2A of the Second Schedule of the Income Tax Act 58 of 1962
[18] Second schedule of the Income Tax Act 58 of 1962
[19] Rule 14.2.2 and Rule 14.6

There is no estate duty payable on the benefit remaining in the fund[20], but the net lump sum is now voluntary money in Jack's hands and will as such be an asset in his deceased estate which will be subject to estate duty.
Jack retains his medical aid subsidy and is comfortable that he will not 'outlive' his retirement capital as his income is guaranteed by the fund until his death.

Resignation from GEPF

Where a member of the GEPF resigns and transfers to a preservation fund or retirement annuity fund, the member retains the pre 1998 tax-free benefit and the tax-free benefit is calculated on the full value at date of transfer.

The resigning member is entitled to a benefit[21] of either a gratuity[22] or a transfer benefit to an approved retirement fund equal to the aggregate of the gratuity and the difference between the member's actuarial interest and the gratuity[23].

Where the benefit is transferred to an approved retirement fund, the rules of the receiving fund shall apply to the benefit and these rules must specify that any subsequent lump sums payable to the member or his beneficiaries shall be limited to one third of the transfer benefit.[24]

With regard to the retention of the pre-1 March 1998 tax-free benefit, it is important to take note of the provisions of the Taxation Laws Amendment Act of 2018[25]. With effect from 1 March 2018, the pre March 1998 tax-free benefit is only allowed as a deduction in respect of the first fund to which the benefit is transferred from the GEPF and for one subsequent transfer to another fund thereafter.

Note that this is different to the situation where the member retires from the GEPF directly since the pre-1 March 1998 tax-free portion is applied to the gratuity being received and not to the full fund value.

[20] subsidy
[21] Rule 14.4.1(a) Government Employees Pension Rule and Law
[22] Calculated at 75% of his or her final salary multiplied by the period of pensionable service, and increased by ten percent for each full year of pensionable service between 5 and 15 years.
[23] Rule 14.4.1(b) Government Employees Pension Rule and Law
[24] Rue 14.4.1(b)(ii) Government Employees Pension Rule and Law
[25] Act 23 of 2018

Resignation and transfer to Retirement Annuity Fund

Where a member of the GEPF elects to resign and transfer their resignation benefit to a retirement annuity fund, the member will be entitled to take a maximum lump sum of 1/3 of the RA value at date of retirement.

If we use the same facts in the example above, but assume that Jack elected to resign from the GEPF and transfer his R9 600 000 benefit to an RA, the taxable portion of the maximum lump sum of R3 200 000 will be calculated according to paragraph 5(1)(e) read with paragraph 2A of the Second Schedule to the Income Tax Act[26]. If we assume that Jack immediately retires form the retirement annuity fund after transfer to the retirement annuity fund, and that the total retirement interest in the retirement annuity fund is R9 600 000, the situation will look as follows:

Step 1: Transfer to the retirement annuity fund

The transfer to the retirement annuity fund will not attract income tax and the pre-1 March 1998 tax-free portion will be preserved on the full amount transferred to the retirement annuity fund.

Step 2: Retirement from the retirement annuity fund

When Jack retires from his RA, he takes the R3 200 000 (maximum one third) maximum lump sum allowed and the tax is calculated as follows:

A = B/C x D, where:-

B = 23 years (years of membership in the GEPF from 1 March 1998 to date of resignation),

C = 28 years (total years of membership in the GEPF), and

D = R9 600 000 (note – the total amount transferred to the retirement annuity fund is used here)

The taxable portion (A) of the transfer value is R7 885 714 (23/28 x R9 600 000).

The tax-free portion is thus R1 714 286 (R9 600 000 minus taxable portion of transfer value, i.e. R7 885 714), which amount will serve as a deduction upon retirement from the retirement annuity fund.

On accrual of the lump sum of R3 200 000, the taxable portion will thus be:

R3 200 000 minus R1 714 286 = R1 485 714.

Tax in terms of the tax table applicable to retirement fund lump sum benefits will be R287 357 [R130 500 + (36/100 x (R1 485 714 – R1 050 000))]

[26] Act 58 of 1962

The net lump sum payable to the retiring member will be R2 912 643 (R3 200 000 – R287 357).

Jack will thus have received R411 419 (R2 912 643 – R2 501 214) more in this example as opposed to him retiring directly from the GEPF.
While the net lump sum received is the bigger than if Jack had retired directly from the GEPF, careful attention must be paid to the comparison between the income that the GEPF can offer and the income that can be generated from the remaining 2/3 of the retirement interest in the retirement annuity fund that will be used to purchase a pension with an insurance company.

The client needs to be made aware of all relevant factors that should influence his decision to retire from the GEPF or transfer to a retirement annuity[27].

Resignation from GEPF and transfer to a Pension Preservation fund

Since one withdrawal is allowed from a preservation fund prior to retirement[28], the transfer of the retirement interest in the GEPF to a preservation fund is often the preferred route for 'retiring' GEPF members. It is important to mention, though, that the total allowable lump sum is limited to 1/3 of the retirement interest in the fund, i.e. up to a maximum of 1/3 of the retirement interest is allowed as withdrawal, but if the full 1/3 is taken as a withdrawal, no further lump sum is available to the client at retirement[29].

Often the advice given to clients is to withdraw the full 'vested benefit'[30] amount to ensure that the client benefits from being able to access their full pre-1 March 1998 tax-free portion.

Applying the facts in the example of Jack above, but assuming that he transfers the benefit of R9 600 000 to a preservation fund, Jack will have an additional option available to him;

- To retire directly form the preservation fund without electing to make his one withdrawal, or
- To take one withdrawal from the preservation fund and retire later, after the withdrawal

From the calculation above, we have ascertained that Jack's 'vested benefit' is R1 714 286. Should Jack thus elect not to make a withdrawal from the preservation fund and only retire from

[27] See the discussion below under 'Other important aspects to consider from an advice perspective'
[28] Practice Note RF1/2012 and definition of a pension preservation fund in Section 1 of the Income Tax Act
[29] Rule 14.4.1(b)(ii) Government Employee Pension Rule and Law. Note that different retirement fund interpret and thus apply this rule differently.
[30] The vested benefit is the pre-1 March 1998 tax-free portion calculated on the full fund value that is transferred to the preservation fund from the GEPF

it and take a 1/3 lump sum, the net lump sum available to him be the same as for retirement from the retirement annuity fund after resigning from the GEPF, as shown in the previous calculation.

Should Jack elect to make use of his one withdrawal prior to retirement from the preservation fund, and withdraws his full vested pre-1March 1998 benefit in the amount of R1 714 286, it will pay out tax-free.

Assuming he retires immediately from the preservation fund, he will be entitled to a lump sum equal to 1/3 of the fund value less the withdrawal already taken[31] (R3 200 000 – R1 714 286). Since the full 'vested benefit' has been used, this lump sum of R1 485 714 will be taxed according to the tax table applicable to retirement fund lump sum benefits. The tax will be R287 357 [R130 000 + (36/100 x (R1 485 714 – R 1 050 000))], leaving a net lump sum of R1 198 357.

In this scenario, Jack would have received a total net lump sum of R2 912 643 (R1 198 357 + R1 714 286). This is again R411 419 more than if he had retired directly from the GEPF.

Where the retiring GEPF member has more than one third of his total years' service pre 1 March 1998, the result is different and the member may well lose a portion of the 'vested benefit' since the total lump sums that he is entitled to take is limited to 1/3 of the value.

If we look at the effect if we keep Jack's pension value at R9 600 000 ***but change his total years' service*** 42 years with 19 of these years before 1 March 1998 and 23 Years after 1 March 1998, it is clear that a GEPF member with many more years' service prior to a March 1998, may well lose a portion of the 'vested benefit' since the total lump sums that he is entitled to take is limited to 1/3 of the value and the years

The 'vested benefit' is calculated as follows:

A = B/C x D, where:-

B = 23 years,

C = 42 years, and

D = R9 600 000 000 (note – the full benefit value is used here)

The taxable portion (A) is R5 257 143 (23/42 x R9 600 000).

[31] Note that this limitation on the 1/3 is the interpretation of several life insurance companies on guidance from SARS, there are life insurance companies who do not apply the 1/3 limitation to the total lump sums allowed.

The tax-free portion is thus R4 342 857.

Jack transfers to a preservation fund and elects to make a withdrawal to the value of the full 'vested benefit'. The allowed lumpsum, however, is limited to 1/3 of the value - i.e. R3 200 000.

Since the 'vested benefit' is greater than the R3 200 000 lump sum, the full lump sum will be tax free. The remaining portion (R1 128 858) of the 'vested benefit' is, however, lost (If Jack's total years of service pre 1 March 1998 was equal to 1/3 of his total years' service, his tax free 'vested benefit' would be equal to the maximum lump sum allowed of 1/3 of retirement capital and no portion of the 'vested benefit' would not be lost).[32]

The net voluntary capital available to Jack will be R3 200 000 (tax free withdrawal) with R6 400 000 available to purchase a life annuity or living annuity.

If Jack had retired directly from the GEPF, and we assume his gratuity to be R3 200 000, the tax-free portion of the lump sum will be R1 447 619[33] and the tax payable on the taxable portion would amount to R273 643[34]. This would leave a net amount of voluntary capital of R2 926 357 subject to estate duty as opposed to the R3 200 000 above that is subject to estate duty if the maximum of 1/3 is taken as a lump sum[35].

The possible **difference in estate duty** can also not be seen in isolation as an argument for or against resigning and transferring to a preservation fund or retiring directly from the GEPF. Factors such as more liquidity in the client's estate as well as the fact that the money can now be bequeathed in terms of the client's last will and testament, should be weighed up against the risk that is now being taken by the client in terms of him potentially outliving his capital[36], the possibility that the income from the GEPF may be more than what can be generated from a living/life annuity and the loss of medical aid benefits on resignation. Again, the advantages and

[32] 14/42 x R9 600 000 = R3 200 000
[33] R3 200 000 – (23/42 x R3 200 000)
[34] R130 500 + (36/100 x (R1 447 619 – R1 050 000)
[35] Please note that this is merely for illustrative purposes and done on the assumption that the gratuity received form the GEPF will be equal to the lump sum received from the preservation fund. In practice the gratuity received form the GEPF is based on formulas provided in the GEPF rules and will thus not necessarily be equal to the one third value if the member resigns and transfers his retirement interest to a preservation fund (or other approved fund).
[36] If a living annuity option is chosen

disadvantages of retiring directly from the GEPF or facilitating a transfer process to allow the purchase of a life/living annuity from an insurance company also need to be considered.

Conclusion

One of the roles of a financial advisor is to provide the client with all advice that is relevant to their specific circumstances. When dealing with a client who is a member of the GEPF, it is critical that all options, as well as implications of these options available to the client, are presented to him in such way that the income tax and estate duty implications as well as other important aspects to consider, as discussed above, are understood.

While the tax implications may indicate that it is more beneficial to resign and transfer the benefit to a retirement annuity fund or preservation fund, It must be noted that there is not only one correct answer to the question of whether to retire from the GEPF directly, or to resign and transfer the retirement interest. The advice/recommendation will depend entirely on the client's personal financial circumstances, need to eliminate investment risk, desire to leave a legacy etc.

Once a decision made by the client has been effected, it is legally impossible to reverse such decision. It is thus critically important that financial advisors recognise that there is no 'one size fits all' solution and that a thorough analysis should be undertaken of each client's specific circumstances and needs. A proposal should be presented to the client to allow him to be in a position to make an educated decision about his 'exit options' from the GEPF.

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Public Sector Retirement Funds: The Taxation of Lump Sums, Transfers to Approved Funds and Aspects related to Divorce

Carl Muller CFP®
BLC, LLB, LLM (Tax Law), Adv PG Dip in Fin Plan.
Legal Advisor Advanced
Personal Finance **Legal**

Introduction

The treatment of retirement savings in public sector retirement funds is in some instances unique when it comes to the taxation of lump sums, the transfer of a retirement interest to another approved fund and the effect of a divorce of a fund member. This article highlights some of the salient issues surrounding these aspects.

What constitutes a Public Sector (Retirement) Fund?

The term "*public sector fund*" is defined as follows in paragraph 1 of the Second Schedule to the Income Tax Act[1] (hereinafter referred to as "the Act"):

"public sector fund" means a fund referred to in paragraph (a), (b) or (d) of the definition of "pension fund" or paragraph (a), (b) or (d) of the definition of "provident fund" in section 1 (1)"

Paragraph (a) of definition of "*pension fund*" and paragraphs (a), (b) & (c) of the definition of "*provident fund*" in section 1 of the Act includes the following funds:

- Any pension or dependants' fund or pension scheme established by Iqw, other than Government Employees Pension Fund (hereinafter referred to as the GEPF);
- Any pension, provident or dependants' fund or pension scheme for the benefit of the employees of any municipality or local government or municipal entity (that complies with certain requirements[2];

Paragraph (b) of definition of "*pension fund*" further broadens this definition to include any pension fund established for the benefit of employees of a control board, as defined in section 1 of the Marketing of Agricultural Products Act[3], or for the Development Bank of Southern Africa, if the rules of such fund are in all material aspects identical to those of the GEPF.

Paragraph (d) of the definition of "pension fund" in section 1 of the Act brings the GEPF into the sphere of a "*public sector fund*".

[1] Act 58 of 1962
[2] As set out in paragraph (a)(iii) of the definition of pension fund and paragraph (c) of the definition of provident fund in section 1 of the Act.
[3] Act 47 of 1996

Some public sector funds are defined benefit funds[4] (for example the GEPF), whereas other public sector funds constitute defined contribution fund[5] (for example the Transnet Retirement Fund).

Taxation of lump sums received from public sector retirement funds – calculation of tax-free portion related to pre-1March 1998 membership

Before 1 March 1998, retirement fund lump sum benefits received by members of public sector funds upon withdrawal, retirement or death were not taxed. From 1 March 1998, these lump sum benefits became taxable, but the portion thereof related to pre-1 March 1998 service was "reserved" and remains non-taxable.

This is currently achieved via the formula prescribed in Paragraph 2A of the Second Schedule to the Act, which can be summarised as follows:

A = B/C x D, where

A = the **taxable** portion of the lump sum;

B = the number of **completed**[6] years of service as a member of the public sector fund after 1 March 1998;

C = the total number of **completed** years of service as a member of the public sector fund; and

D = the lump sum payable to the member.

Pre-retirement withdrawal from a public sector fund, where membership of fund commenced before 1 March 1998

The taxable portion of a lump sum received on withdrawal from a retirement fund (including a public sector fund) is taxed as follows – this tax table[7] applies to retirement fund lump sum

[4] Although a member and/or employer may contribute to a defined benefit fund, the benefit to which the member is entitled is not based on the "contributions plus growth" method. The benefit is based on the member's final salary and calculated by using a formula that is incorporated in the rules of the fund. A defined benefit fund thus guarantees the payment of a defined quantifiable benefit. See the South African Financial Planning Handbook 2021, Botha et al, LexisNexis, p 965.

[5] In the case of a defined contributions fund, the contributions made by the member and/or employer are defined as a percentage of the member's pensionable salary. The benefit that the member will be entitled upon exit from the fund will be dependent on the contributions paid to the fund, investment performance and costs deducted. See the South African Financial Planning Handbook 2021, Botha et al, LexisNexis, p 965.

[6] It would appear, from members' statements, that the GEPF works with portions of a year (e.g. 6.5 years) when illustrating the calculation, but this method is, in my opinion, incorrect as Paragraph 2A refers to "completed" years of service.

[7] Paragraph 8(a) of Schedule 1 of the Rates and Monetary Amounts and Amendment of Revenue Laws (Administration) Act 22 of 2020.

withdrawal benefits (this table does not apply to withdrawals of a fund member from a pension or provident fund as a result of a bona fide retrenchment[8]):

Taxable Amount	**Rate of tax**
R0 – R25 000	0% of the **taxable** amount
R25 001 – R660 000	18% of the **taxable** amount above R25 000
R660 000 – R990 000	R114 300 + 27% of the **taxable** amount above R660 000
R990 001 and above	R203 400 + 36% of the **taxable** amount above R990 000

The cumulative effect of the above table over the lifetime of the member must however be borne in mind. This means that the following amounts received previously by the member will also have to be taken into account in calculating the ultimate tax liability[9]:

(i) Previous retirement fund lump sum benefits received from any pension, provident, retirement annuity or preservation fund on or after 1 October 2007; and

(ii) Previous retirement fund lump sum withdrawal benefits received from any pension, provident, retirement annuity or preservation fund on or after 1 March 2009; and

(iii) Severance benefits received from an employer in the event of retrenchment, or upon ceasing employment where the member was aged 55 or older, or upon disability.

Example 1: Tax on withdrawal in respect of lump sum received from a public sector fund where the member has pre-1March 1998 service

Joseph resigns from Transnet and his retirement fund lump sum withdrawal benefit in the Transnet Retirement Fund (a public sector fund) is R900 000. He opts not to transfer any portion thereof to another approved retirement fund and thus receives the benefit in cash. Joseph has not received any retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit or severance benefit before this date.

[8] A lump sum benefit received from a pension or provident fund as a result of the bona fide retrenchment of a member is taxed as a retirement fund lump sum benefit, and not a retirement fund lump sum withdrawal benefit. See the definition of "retirement fund lump sum benefit" in section 1 of the Act, read with paragraph 2(1)(a)(ii) of the Second Schedule to the Act.

[9] Paragraph 9(a)(i) of Schedule 1 of the Rates and Monetary Amounts and Amendment of Revenue Laws Act 19 of 2021. In this regard see Old Mutual Premiums & Problems, Edition 123, 2021, Editors S Cloete *et al*, page C45 for the steps to follow when doing such a calculation.

He became a member of the Transnet Retirement Fund on 1 March 1980 and resigned on 30 September 2021. He thus has a total of 41 years completed service with Transnet, of which 23 completed years are post 1 March 1998. This can be illustrated as follows:

1 March 1980	1 March 1998	30 September 2021
← 18 years → Tax-free		← 23 years → Taxable
← Total 41 years →		

How much income tax will Joseph pay if he takes the full amount in cash on 30 September 2021?

Answer

A = Taxable Amount

B = 23

C = 41

D = R900 000

Apply the formula discussed above:

23/41 x R900 000

= R504 878.05 – post 1 March 1998 portion, which is **taxable** in terms of the tax table applicable to retirement fund lump sum **withdrawal** benefits.

The **tax-free** portion is therefore: R900 000 – R504 878.05 = R395 121.95.

If Josef has not made any contributions that were not allowed as a tax deduction, the taxable amount of R504 878.05 will thus be taxed as follows in terms of the tax table applicable to retirement fund lump sum withdrawal benefits:

= 18% of the amount above R25 000

= 18% of (R504 878.05 – R25 000)

= 18% of R479 878.05

= R86 378.05

Joseph will thus receive the following amount after the deduction of tax:

R900 000 – R86 378.05

= R813 621.95

Clients may however require financial planners to calculate the maximum amount that they may be allowed to take on such withdrawal without paying any tax, and to transfer the balance to an approved fund. This amount is calculated by using the so-called "***reverse" formula.*** The "reverse" formula is not contained in the Income Tax Act, but is merely a mathematical equation. It entails reversing B and C contained in the formula prescribed in paragraph 2A of the Second Schedule to the Act, and multiplying it with the amount still available to be taxed at the 0% tax rate. In this regard, bear in mind that the receipt of previous retirement fund lump sum benefits, retirement fund lump sum withdrawal benefits and severance benefit would have an effect on the 0% tax rate if it accrued on or after the dates indicated above.

Example 2: Tax on withdrawal in respect of lump sum received from a public sector fund where the member has pre-1 March 1998 service – maximum lump sum without paying tax

If Joseph in **Example 1** had required to withdraw the maximum lump sum without being taxed and transfer the balance to a preservation fund (or any other approved fund), how much would he be able to take?

Answer:

Here we would apply the so-called ***reverse formula:***

41(C) ÷ 23 (B) x R25 000 (the amount taxed at 0% rate in terms of the table applicable to retirement fund lump sum withdrawal benefits)

= R44 565.22 (maximum lump sum that he could opt for on withdrawal without paying tax thereon)

Let us double **check if the answer is correct**

Applying the formula on the lump sum taken:

23(B) ÷ 41(C) x R44 565.22(D) = R25 000 (taxable portion)

R25 000 taxed at 0% = R0

NB: The above calculation is based on the fact that Joseph had not previously received one or more taxable lump sums from any retirement fund or severance benefits, on or after the dates mentioned above, that would have resulted in his R25 000 tax rate of 0% being depleted or reduced. In this example the full R25 000 is thus still available to be taxed at 0%.

If Joseph had for example retired form a retirement annuity in 2019 and received a taxable lump sum of R13 000, it would mean that, as far as withdrawals are concerned, he still has R12 000 (R25 000 – R13 000) left to be taxed at 0%. In this instance the maximum cash lump sum that he could opt for without paying tax on withdrawal, is:
41(C) ÷ 23 (B) x R12 000 (the remaining amount to be taxed at 0% rate in terms of the table applicable to retirement fund lump sum withdrawal benefits)
= R21 391.30 (maximum lump sum that he could opt for on withdrawal without paying tax thereon).

If Joseph had however retired form a retirement annuity in 2019 and received a lump sum of R25 000 or more, it would mean that, as far as withdrawals are concerned, he does not have any amount left to be taxed at 0%. In this instance any cash lump sum that he opts for would be taxable: it would consist of a non-taxable portion (calculated pre-1 March 1998 portion) and a taxable portion (calculated post 1 March 1998 portion). Using the "reverse method" illustrates this point:
41(C) ÷ 23 (B) x R0 (the remaining amount to be taxed at 0% rate in terms of the table applicable to retirement fund lump sum withdrawal benefits)
= R0 (i.e. any amount that he opts on withdrawal would be taxable).

Transfers from public sector retirement funds to other retirement funds – general aspects

Pre-retirement public sector fund transfers to pension, provident and retirement annuity funds

Where the retirement interest in a public sector fund was transferred to another fund before **1 March 2006**, the pre-1 March 1998 tax-free portion was not preserved, as the Act did not make provision for this.

From 1 March 2006, the Act was amended, via the 2007 Taxation Laws Amendment Act[10], to provide for the "preservation" of the tax-free portion when the member exited a public sector fund on withdrawal (i.e. prior to retirement or death), and the retirement interest was transferred to a pension, provident or retirement annuity fund. The pre-1 March 1998 tax-free portion would

[10] Act 8 of 2007, section 52(1)(d)(bb)(B)

then serve as a tax deduction when a lump sum benefit is paid **on withdrawal** (i.e. before retirement or death) by such a pension, provident or retirement annuity fund[11]. The 2007 Taxation Laws Amendment Act[12] that effected this change, provided that the section "*shall be deemed to have come into operation on 1 March 2006 and shall apply in respect of any lump sum benefit received or accrued on or after that date*". It thus appears to indicate that the deduction will apply to all amounts received or accrued on exit from the fund (to which the benefit was transferred) in such circumstances, irrespective of whether the transfer from the public sector fund occurred before or after 1 March 2006. The South African Revenue Service however interprets the amendment to **only apply where the transfer from the public sector fund occurred on/or after 1 March 2006**.

Example 3: withdrawal from approved fund where transfer to approved fund from public sector fund occurred before 1 March 2006

Where a member transferred (approved transfer – see discussion below) a benefit from a public sector fund to a pension, provident, or retirement annuity fund **before** 1 March 2006, but receives a lump sum payment on **withdrawal** from such other fund on, or after 1 March 2006, the deduction in respect of the pre-1 March 1998 tax-free portion will not be allowed. The full lump sum received on withdrawal with this be taxable.

If the transfer from the public sector fund to the pension, provident or retirement annuity fund in this example had occurred **on or after 1 March 2006**, the tax-free pre-1 March 1998 portion would have been preserved and thus available as a tax deduction against the lump sum accruing on withdrawal.

The 2009 Taxation Laws Amendment Act[13] amended paragraph 5 of the Second Schedule to provide for the preservation of the pre1-March 1998 tax-free portion in public sector funds from **1**

[11] The Explanatory Memorandum to the 2007 Taxation Laws Amendment Bill provides that "*Legislative amendments are proposed to preserve the tax-free portion of membership before 1 March 1998. The tax-free payout of public pension fund interest before 1 March 1998* ***will apply to both*** ***retirement lump sum benefits*** ***and withdrawal benefits*** *from a private sector fund provided the fund interest was "rolled over" from a public sector fund*". This was however **not** reflected in the 2007 Taxation Laws Amendment Act, as it only amended paragraph 6 (dealing with deductions against lump sum benefits on withdrawal) of the Second Schedule to the Act to this effect, and not paragraph 5 (dealing with deductions against lump sum benefits on retirement and death).

[12] Act 8 of 2007, section 52(1)(d)(bb)(B)

[13] Act 17 of 2009, Section 61(1)

March 2009 where a lump sum accrues to the member upon **retirement or death** subsequent to a transfer from a public sector fund to another approved fund.

The 2009 Taxation Laws Amendment Act[14] that effected this change, similarly provided that the section "*is deemed to have come into operation on 1 March 2009 and applies in respect of any lump sum benefit accrued on or after that date*". It thus also appears to indicate that the deduction will apply to all lump sums that accrued on retirement or death from the fund to which the benefit was transferred, irrespective of whether the transfer from the public sector fund occurred before or after 1 March 2009. As with the 2007 amendment, the South African Revenue Service however interprets the amendment to **only apply where the transfer from the public sector fund occurred on/or after 1 March 2009**.

Example 4: Lump sum accruing from approved fund on retirement or death where the transfer to approved fund from public sector fund occurred before 1 March 2009

Where a member transferred (approved transfer – see discussion below) a benefit from a public sector fund to a pension, provident, or retirement annuity fund **before 1 March 2009**, but a lump sum payment accrues from such fund on **retirement or death, on or after 1 March 2009**, the deduction in respect of the pre-1 March 1998 tax-free portion will not be allowed. The full lump sum accruing on retirement or death with this be taxable.

If the transfer from the public sector fund to the pension, provident or retirement annuity fund in this example had occurred on or after 1 March 2009, the tax-free pre-1 March 1998 portion would have been preserved and thus available as a tax deduction against the lump sum accruing on retirement on death.

Pre-retirement public sector fund transfers to preservation funds

Where the retirement interest in a public sector fund was transferred to a preservation fund before **1 March 2009**, the pre 1 March 1998 tax-free portion was not preserved.

The 2009 Taxation Laws Amendment Act[15], read with the 2010 Taxation Laws Amendment Act[16] amended the Act to provide for the preservation of the pre-1March 1998 tax-free portion where

[14] *Ibid*
[15] Act 17 of 2009, Section 61(1) and Section 62(1)
[16] Act 7 of 2010, Section 84(1)(b)

the interest was transferred to a preservation fund and a lump sum subsequently accrued to a member on withdrawal, retirement or death. The tax-free portion will thus similarly serve as a deduction when a lump sum benefit accrue to the member from such a preservation fund (i.e. on withdrawal, retirement or death).

As mentioned in the previous section, the 2009 Taxation Laws Amendment Act provided that the section "shall be deemed to have come into operation on 1 March 2009 and shall apply in respect of any lump sum benefit received or accrued on or after that date". It is again important to bear in mind that SARS interprets the amendment to only be applicable where the transfer from the public sector fund occurred on/or after 1 March 2009.

Example 5 – Transfer to preservation fund before 1 March 2009
The pre 1-March 1998 tax-free portion will not be preserved and the deduction will therefore **not** be allowed in respect of transfers from a public sector fun to a preservation fund that occurred **before 1 March 2009**, even if the lump sum accrues (on withdrawal, retirement or death) on or after **1 March 2009**.

If the transfer from the public sector fund to the preservation fund (approved transfer – see discussion below) in this example had occurred **on or after 1 March 2009**, the tax-free pre-1 March 1998 portion would have been preserved and thus available as a tax deduction against the lump sum accruing on **withdrawal, retirement on death**.

Pre-retirement public sector fund transfers to pension, provident, retirement annuity and preservation funds – preservation of pre-1March 1998 tax-free portion on the second transfer
Before **1 March 2018**, the preservation of the pre-1 March tax-free portion was only allowed where the member transferred the interest from the public sector fund to another fund. If the member made a subsequent transfer from the fund to which the interest was originally transferred, the pre–1 March 1998 tax-free portion was lost upon the second transfer, resulting in a lump sum accruing (on withdrawal, retirement or death) to the member from the seconds' fund that the interest was transferred to, being fully taxable.

From 1 March 2018[17], the pre-1March 1998 tax-free portion is preserved as a deduction in respect of lump sum payments accruing from the first fund to which the transfer is effected from the public sector fund, and also in respect of lump sums accruing after one subsequent transfer to another fund thereafter.

If it is transferred to another fund after the transfer to the second fund (i.e. on a third transfer), the tax-free portion is lost to the member. Any lump sum that accrues to the member (on withdrawal, retirement or death) would then be fully taxable – no deduction would be allowed in respect of the pre 1-March 1998 portion related to the public sector fund.

It is further important to note that it is the view of SARS that in order to preserve the pre-1 March 1998 portion on such subsequent (second) transfer, **both the second transfer and the accrual of the lump sum** (i.e. on withdrawal/retirement/death) **has to occur on or after 1 March 2018**.

Example 6 – Practical effect of the 2018 amendment

Where a member had effected the second **transfer before 1 March 2018** from a public sector fund to a pension, provident, retirement annuity or preservation fund and a **lump sum accrues** (on withdrawal, retirement or death) **on or after 1 March 2018**, the deduction in respect of the pre-1 March 1998 tax-free portion will **not** be available to him/her.

If the transfer from the public sector fund to the pension, provident, retirement annuity or preservation fund (approved transfer – see discussion below) in this example had occurred on or after 1 March 2009, the tax-free pre-1 March 1998 portion would have been preserved and thus available as a tax deduction against the lump sum accruing on **withdrawal, retirement on death.**

Pre-retirement public sector fund transfers to pension, provident, retirement annuity and preservation funds – tax-free transfers

The following transfers of a retirement interest upon withdrawal from a retirement fund are allowed to take place tax-free (so-called **approved transfers**) **before1 March 2021**. From a tax perspective, this means that although the lump sum is deemed to have accrued to the member

[17] Paragraphs 5 and 6 of the Second Schedule to the Act were amended in this regard via section 63(1)(b) and section 64(1)(b) of the Taxation Laws Amendment Act 17 of 2017.

on withdrawal from a retirement fund, a tax-deduction[18] is allowed against the lump sum transferred on withdrawal, thus resulting in no tax being payable on the transfer amount:

From	To
Pension Fund Pension Preservation Fund	Pension Fund Pension Preservation Fund Retirement Annuity Fund
Provident Fund Provident Preservation Fund	Provident Fund Provident Preservation Fund Pension Fund Pension Preservation Fund Retirement Annuity Fund
Retirement Annuity Fund	Retirement Annuity Fund

From 1 March 2021, with the onset of the annuitisation regime for provident and provident preservation funds, the following tax-free transfers are allowed[19]:

From	To
Pension Fund Pension Preservation Fund Provident Fund Provident Preservation Fund	Provident Fund Provident Preservation Fund Pension Fund Pension Preservation Fund Retirement Annuity Fund
Retirement Annuity Fund	Retirement Annuity Fund

Summary: transfers from public sector funds (other than GEPF) to other retirement funds

The relevant aspects surrounding the transfer of the interest in a public sector fund to a pension, provident, retirement annuity or preservation fund are summarised in this table. The GEPF and other funds with rules that are in all material aspects identical to that of the GEPF, are excluded from this table, as there are certain aspects that are unique to these funds – in this regard, see the discussion below.

[18] Paragraph 6(1)(a) of the Second Schedule to the Act, before the amendments effected by Section 50(1)(a) of the 2019 Taxation Laws Amendment Act 34 of 2019.

[19] Paragraph 6(1)(a) of the Second Schedule to the Act, after the amendments effected by Section 50(1)(a) of the 2019 Taxation Laws Amendment Act 34 of 2019.

SUMMARY: TRANSFERS FROM PUBLIC SECTOR FUNDS (OTHER THAN GEPF) TO OTHER RETIREMENT FUNDS			
DATE OF TRANSFER	**FUND TRANSFERRED TO**	**TAX-FREE TRANSFER**	**VESTING OF PRE-1 MARCH 1998 TAX-FREE PORTION**
Before 1 March 2006	Approved transfer	Yes	No
From 1 March 2006	Approved transfer to fund **other than preservation fund**	Yes	Yes – on first approved transfer but only in respect of accrual on **withdrawal** from fund transferred to (and **not** on retirement or death)
	Approved transfer to **preservation fund**	Yes	No
From 1 March 2009	Approved transfer to **all types of funds** (including preservation funds)	Yes	Yes – on first approved transfer. Tax-free portion vested for accrual of lump sum on **withdrawal, retirement and death**.
From 1 March 2018	Approved transfer	Yes	Yes – on approved transfer from public sector fund and on **second approved transfer**
Before 1 March 2006 to 28 February 2021	Unapproved transfer (pension to provident fund). Unapproved transfer from pension or pension preservation fund to provident preservation fund **not** allowed.	No	No, as transfer amount would have been taxed (calculated pre-1 March 1998 portion would not be taxable).
From 1 March 2021	Transfer from pension fund or pension preservation fund to provident fund or provident preservation fund now also approved transfer.	Yes	Yes – on approved transfer from public sector fund and on second approved transfer

Transfers from public sector funds to approved funds where the pre-1 March 1998 tax-free portion is preserved: Taxation upon withdrawal from the fund that benefit was transferred to

Where the pre-1 March 1998 tax-free portion in a public sector fund is preserved upon transfer to another retirement fund, as discussed above, the calculated pre-1 March 1998 tax-free portion will serve as a deduction against a lump sum received upon exit (i.e. on retirement, withdrawal or death) from the fund to which the benefit was transferred. Here it is important to note that the pre-1March 1998 portion that will serve as this deduction will be calculated, upon transfer, on the **full amount transferred** from the public sector fund to another retirement fund.

The deduction applies to a withdrawal from the fund that the benefit of the public sector fund was transferred to, is provided for in Paragraph 6(1)(b)(v) of the Second Schedule to the Act:

WITHDRAWAL OR RESIGNATION: WINDING UP: DEDUCTIONS

6. (1) The deduction to be allowed for the purposes of paragraph 2(1)(a)(ii) or (b) is an amount equal to—

(b) in any other case, so much of the aggregate of—

(v) ***any other amounts*** *in respect of which the formula in paragraph 2A applies,* ***which have been—***

(aa ***paid into a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund for the person's benefit by a public sector fund****; and*

(bb) transferred into a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund directly from a fund contemplated in sub-subitem (aa) for the person's benefit, less the amount represented by symbol A when applying that formula[20]*,*

less the amount represented by symbol A when applying that formula,

Where a benefit is transferred from a public sector fund to a pension preservation, provident preservation, pension, provident or retirement annuity fund, and a subsequent withdrawal is made, or the client retires from the fund transferred to, and is not able to use the full pre-1 March 1998 portion, the balance of this tax-free portion may not be used as a deduction against lump sums from other funds of which the person may be a member – in this regard also see Example 8 below.

[20] Paragraph (bb) allows for the pre-1 March 1998 tax-free portion to be preserved on the 2nd transfer, where such 2nd transfer takes place on/after 1 March 2018, as discussed earlier in the article.

Example 7 – Tax: preservation of pre-1 March 1998 tax-free portion upon transfer from a public sector fund to an approved fund, where-after a withdrawal is made from the approved fund

Josef resigns from Transnet and his withdrawal benefit in the Transnet Retirement Fund is R900 000. He became a member of the Transnet Retirement Fund on 1 March 1980 and resigned on 30 September 2021. He thus has a total of 41 years completed service with Transnet, of which 23 completed years are post 1 March 1998. What amount will he be able to receive tax-free if he transfers the full amount to a preservation fund on 30 September 2021, and makes a withdrawal from the preservation fund after transfer?

1 March 1980	1 March 1998	30 September 2021
← 18 yrs → Tax-free		← 23 yrs → Taxable
← Total 41 years →		

Answer:

The transfer to the preservation fund will occur tax-free, as it is an approved transfer. The pre-1 March 1998 tax-free portion will be preserved on the **full transfer amount**. Therefore:

A = Taxable Amount

B = 23

C = 41

D = R900 000 (transfer amount)

Apply Formula : 23/41 x R900 000

= R504 878.05 – post 1 March 1998 portion, which is **taxable**

The **tax-free** portion therefore is thus: R900 000 – R504 878.05 = R395 121.95

The result is that Joseph will be able to withdraw an amount of R395 121.95 from the preservation fund as a lump sum without paying any tax thereon:

= R0 (taxable)

Question:

What if Joseph first had taken the amount of R395 121.95 as a cash lump sum from the Transnet Retirement Fund, and then transferred the balance from the Transnet retirement fund to a preservation fund?

Answer:

Apply Formula : 23(B)/41(C) x R395 121.95 (D – i.e. lump sum accruing on cash withdrawal)
= R221 653.78 – post 1 March 1998 portion, which is taxable
Tax on R221 653.78:
= 18% of taxable amount above R25 000
= 18% of (R221 653.78 – R25 000)
= 18% of 196 653.78
= R35 397.68 tax payable

The balance of R504 878.05 (R900 000 – R395 121.95) would be transferred tax-free to the preservation fund as it is an approved transfer. The tax-free pre-1 March 1998 portion preserved on this amount would be:
Apply Formula : 23(B)/41(C) x R504 878.05 (D – the balance being transferred to the preservation fund)
= R283 224.27 – post 1 March 1998 portion, which is taxable

The tax-free pre-1 March 1998 portion "preserved" in the preservation fund to serve as a deduction upon the accrual of a lump sum (on withdrawal, retirement or death) from the preservation fund would be:
R504 878.05 – R283 224.27 = R221 653.78

Transfers from the GEPF (and public sector funds of which the rules of are in all material aspects identical to those of the GEPF) to other retirement funds

There are certain aspects provided for in the rules of the GEPF that need to be highlighted.

Transfers from the GEPF upon resignation: the position before 1 March 2006

Where a member of the GEPF withdraws from this fund (e.g. on resignation), the benefit that the member is entitled to may consist of two elements[21]:

(i) A cash resignation benefit; and

(ii) The difference between the member's benefit in (a) and the member's accrued actuarial interest[22] in the fund, if any.

Before 1 March 2006, the cash resignation portion was deemed to have accrued to the member[23] and this became taxable on resignation from the GEPF even if the member transferred the retirement interest in the GEPF to another approved fund. The effect of this was as follows:

(i) The cash resignation benefit portion of the transfer amount was taxed[24] (as it was deemed to accrue to the member) which would mean that the pre-1998 portion thereof would accrue tax-free.

(ii) The balance of the amount (difference between the member's cash resignation benefit and the member's accrued actuarial interest in the fund, if any) would be transferred tax-free to an approved fund, but the pre 1 March 1998 portion was not preserved upon transfer to such approved fund. Therefore, upon exit of the fund transferred to, the member would not be entitled to a deduction of the pre-1 March 1998 tax-free portion against the accrual of a lump sum, as it would not have been preserved due to the transfer occurring before 1 March 2006.

Another effect of this was that a member of the GEPF could not transfer his/her GEPF benefit to a pension preservation fund upon withdrawal. The reason for this is that the cash resignation portion was deemed to accrue to the member and taxed (as discussed above). It was thus regarded to be a member contribution[25], and a preservation fund may only receive transfers from other funds (member contributions to preservation funds are not allowable[26]).

[21] Rule 14.4.1 (a) , Proc 21 of 19 April 1996: Rules of the Government Employees Pension Fund
[22] As defined in Rule 1 of the Rules of the Government Employees Pension Fund and calculated in terms of Rule 14.4.2 of the Rules of the Government Employees Pension Fund.
[23] Confirmed in undated letter from GEPF to Old Mutual, received by Old Mutual on 5 April 2007.
[24] Also see Momentum Legal Update 15 of 2018, Public Sector Fund Benefits, H Joubert.
[25] Confirmed in undated letter from GEPF to Old Mutual, received by Old Mutual on 5 April 2007.
[26] Paragraph (b) of the definition of *pension preservation fund* in section 1 of the Act.

Transfers from the GEPF upon resignation: the position from 1 March 2006

Discussions were held between the GEPF and the South African Revenue Service (SARS), where SARS expressed concern regarding the fact that the accrual of the cash resignation benefit portion upon withdrawal from the GEPF was governed by the Government Employees Pension Law[27] and not the Income Tax Act[28]. From 1 March 2006, SARS did not view the cash resignation benefit portion as accruing to the member on transfer to another fund. Therefore:

(i) A tax-free transfer to a pension, pension preservation or retirement annuity fund was thus allowable from 1 March 2006. Bear in mind, as discussed above, that tax-free transfers from a pension fund, and by implication from the GEPF, to a provident and provident preservation fund is also allowable in respect of transfers occurring from 1 March 2021[29]; and

(ii) Preservation of the tax-free pre-1 March 1998 portion was introduced in respect of transfers from the GEPF to pension and retirement annuity funds from 1 March 2006 (see the general discussion on transfers to public sector funds above). The preservation of the pre-1 March 1998 tax-free portion should also occur upon the transfer to a provident or provident preservation fund in respect of transfers from 1 March 2021, as the transfer would be tax-free. Prior to 1 March 2021 a transfer from the GEPF to a provident fund would have been taxed, resulting in the pre-1 March 1998 tax-free portion being applied at that stage and thus not being reserved in the provident fund; and

(iii) Preservation of the tax-free pre-1 March 1998 portion was introduced in respect of transfers from the GEPF to pension preservation funds from 1 March 2009 (see the general discussion on transfers to public sector funds above). The preservation of the pre-1 March 1998 tax-free portion should also occur in respect of transfers from the GEPF to provident preservation funds occurring on or after 1 March 2021. Transfers from the GEPF to provident preservation funds would not have been allowed before 1 March 2021, as such transfers would have been taxed and thus viewed as a member contribution to the provident preservation fund. Provident preservation funds are only allowed to receive approved transfers from other funds as indicated above. Member contributions to provident preservation funds are thus not

[27] Proclamation 21 of 1996

[28] See footnote 24 *supra*.

[29] "Approved retirement fund" is defined as follows in the Government Employees Pension Law:
"approved retirement fund" means a fund other than a related fund, which has been registered as a pension fund organisation in terms of the Pension Funds Act, 1956 (Act No. 24 of 1956) and which has been approved as a pension fund, retirement annuity fund or provident fund in terms of the Income Tax Act, 1962 (Act No. 58 of 1962). The omission of a pension preservation fund and provident preservation fund in the definition appears to be a legislative error, as transfers to preservation funds are allowed in practice.

permissible[30]. The definition of a provident preservation fund further did not make provision for transfers from pension funds prior to 1 March 2021.

Summary: transfers from GEPF (and public sector funds of which the rules of are in all material aspects identical to those of the GEPF) to other retirement funds

DATE OF TRANSFER	FUND TRANSFERRED TO	TAX-FREE TRANSFER	VESTING OF PRE-1 MARCH 1998 TAX-FREE PORTION
Before 1 March 2006	Pension or retirement annuity fund	(i) Cash resignation benefit taxed (ii) Actuarial interest (difference) tax-free	No
	Provident fund	Full transfer amount taxed	
Before 1 March 2006	Preservation fund: transfer not allowed	Not applicable	Not applicable
From 1 March 2006	Pension or retirement annuity fund	Yes	Yes – On first transfer but only in respect of accrual on **withdrawal** from fund transferred to (and not on retirement or death)
	Pension preservation fund	Yes	No
	Provident preservation fund: transfer not allowed	Not applicable	Not applicable

[30] Paragraph (b) of the definition of *provident preservation fund* in section 1 of the Act.

From 1 March 2009	Pension, retirement annuity or pension preservation fund	Yes	Yes – on first approved transfer. Tax-free portion vested for accrual of lump sum on **withdrawal, retirement and death** from fund transferred to.
From 1 March 2018	Pension, retirement annuity or pension preservation fund	Yes	Yes – on transfer from GEPF and on second transfer
From 1 March 2021	Pension, provident, retirement annuity, pension preservation or provident preservation fund	Yes	Yes – on transfer from GEPF and on second transfer

Transfers from GEPF: Rule 14.4.1

Rule 14.4.1 of the Rules of the GEPF provides as follows in respect of transfers from the GEPF to other retirement funds:

"*Such transfer shall be made subject to the rules of the approved retirement fund specifying that, with reference to the transfer benefit, any subsequent lump sum benefit payable by that fund or any successor fund to the member and/or his beneficiaries shall be limited to one- third of the said transfer benefit, with interest. The balance of the member's transfer benefit with interest, after deduction of any lump sum payment referred to above, shall be applied for the purchase of an annuity, albeit immediately or upon the member's ultimate retirement*."

The term "transfer benefit" is defined as follows[31] in the rules of the GEPF:

"transfer benefit" for purposes of the Annexure to the rules shall mean a transfer benefit to an approved retirement fund payable in terms of the provisions of the Annexure equal to the aggregate of—

[31] Rule 1 of the Government Employees Pension Fund, Proclamation 21 of 19 April 1996.

(i) a gratuity calculated at 7,5% of the member's final salary multiplied with the period of his or her pensionable service, and increased by ten percentage points for each full year of pensionable service between 5 and 15 years of pensionable service, which amount shall become an entitlement of the member on the condition that he or she deposits the amount into the approved retirement fund immediately upon becoming entitled thereto; and

(ii) the difference between the member's actuarial interest in the Fund and the amount referred to in paragraph (i), if any,

subject to such transfer being subject to the rules of the approved retirement fund specifying that, with reference to the transfer benefit, any subsequent lump sum benefit payable by that fund or any successor fund to the member and/or his beneficiaries shall be limited to one- third of the said transfer benefit, with interest. The balance of the member's transfer benefit with interest, after deduction of any lump sum payment referred to above, shall be applied for the purchase of an annuity, albeit immediately or upon the member's ultimate retirement.

The requirements of Rule 14.4.1 are repeated in Section D of the GEPF Transfer Form (which aspect is again highlighted where the client and "fund representative"[32] sign the form)":

D) PLEASE TAKE NOTE OF THE FOLLOWING IMPORTANT INFORMATION
If the rules of the Approved Fund make provision for a cash withdrawal it will be limited to one third of the transfer value(interest included) and the balance of the transfer value (interest included) must be utilized for the purchase of any annuity for the member at retirement.

I ______ the undersigned, declare that all particulars furnished on this form are true and correct and that I informed the member of the conditions and implications of his or her choice (including section D of this form) to transfer to an Approved Retirement Fund.

The above provisions thus require the following aspects to be adhered to where a benefit is transferred from the GEPF to an approved fund, which will be of particular relevance in respect of a transfer to a preservation fund:

[32] In practice this portion of the form is often signed by the GEPF member's financial planner as "fund representative".

(i) The full benefit has to be transferred to the preservation fund (or other approved fund), i.e. the member will not be allowed to take a portion as a cash lump sum and transfer the balance to the preservation fund (or other approved fund).

(ii) If the ex-GEPF member elects to make a withdrawal from a preservation fund before retirement, such withdrawal will be limited to one-third of the fund value in the preservation fund. It appears that the GEPF holds the view is that the words "with interest" includes investment growth in the fund that the benefit was transferred to[33].

(iii) In the event of the member taking the full one-third of the fund value as a withdrawal after the transfer, the rule provides that the member will not be allowed to opt for a further lump sum on retirement, i.e. the member will have to annuitise the full remaining amount on retirement. If the member makes a withdrawal that is less than one-third of the fund value before retirement, the balance of the one third as at the date of withdrawal, plus growth thereon, would thus still be available to be taken as a lump sum on retirement.

It however appears that in practice, the GEPF is not enforcing compliance with the rule strictly, resulting in different preservation funds not applying Rule 14.4.1 in the same fashion:

(i) The first group of preservation funds applies the rule strictly as set out in the discussion above; and

(ii) The second group of preservation funds allows for a maximum cash withdrawal amount equal to a third of the fund value, and then allows the ex-GEPF member to access a maximum of one-third of the remaining fund value as a cash lump sum upon retirement; and

(iii) The third group of preservation funds allows for a full fund value as a cash withdrawal before retirement if the member wishes to do so.

The first issue that thus needs to be canvassed is the viability of different interpretations of the rule by various preservation funds. In my view, Rule 14.4.1 is quite clear that the total allowable lump sum benefit, that an ex-GEPF member is entitled to, is limited to a value equal to one third of the transfer benefit with interest, and that it compels the member to use the balance to purchase an annuity with the balance on retirement.

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[33] Rule 14.4.1 also contains the following sentence: "*Interest shall be added to the transfer benefit to account for any delay in payment thereof to the approved retirement fund*". This appears to indicate that the reference to interest is interest paid by the GEPF as a result of a delay in payment to the funds that the resignation benefit is transferred to, and not to investment growth in the fund transferred to. As noted in the article, this is however not the way that the GEPF interprets the rule.

The second aspect that needs to be considered is whether Rule 14.4.1 is in conflict with the definitions of a pension preservation fund and provident preservation fund in section 1 of the Income Tax Act, which definitions allow for a full pre-retirement withdrawal of the interest from such a fund. In my opinion, we need to distinguish between the following two scenarios:

(i) As far as the "normal" allowable withdrawal from a pension preservation fund is contained, paragraph (c) of the definition of a pension preservation fund provides as follows[34]:

"*(c) with the exception of amounts transferred to any other pension fund, pension preservation fund or retirement annuity fund, not more than one amount contemplated in paragraph 2 (1) (b) (ii) of the Second Schedule is allowed to be paid to the member during the period of membership of the fund or any other pension preservation fund*"

It is my view that the above provision merely provides that not more than one withdrawal (per transfer into such pension preservation fund) is allowed. It contains is no stipulation that the rules of a pension preservation fund must allow for a full pre-retirement withdrawal, or even that the rules must allow for a withdrawal at all. It merely prohibits more than one withdrawal from the preservation fund.

(ii) As far as a withdrawal based on emigration, ceasing to be a South African resident based on 3 years continuous non-residency or departure from South Africa on expiry of a visa is concerned, paragraph (c)(ii)[35] of the definition of a pension preservation fund provides:

"*(ii) a member* ***shall****, prior to his or her retirement date,* ***be entitled to the payment of a lump sum benefit*** *contemplated in paragraph 2 (1) (b) (ii) of the Second Schedule where a member—*

(aa) (A) is a person who is or was a resident who emigrated from the Republic and that emigration is recognised by the South African Reserve Bank for purposes of exchange control in respect of applications for that recognition received on or before 28 February 2021 and approved by the South African Reserve Bank or an authorised dealer in foreign exchange for the delivery of currency on or before 28 February 2022; or

(B) is a person who is not a resident for an uninterrupted period of three years or longer on or after 1 March 2021; or

(bb) departed from the Republic at the expiry of a visa obtained for the purposes of—

[34] Paragraph (c) of the definition of a "provident preservation fund" in section 1 of the Income Tax Act contains a similar provision.

[35] Paragraph (c)(ii) of the definition of a "provident preservation fund" in section 1 of the Income Tax Act contains a similar provision.

(A) working as contemplated in paragraph (i) of the definition of "visa" in section 1 of the Immigration Act, 2002 (Act No. 13 of 2002); or

(B) a visit as contemplated in paragraph (b) of the definition of "visa" in section 1 of the Immigration Act, 2002 (Act No. 13 of 2002), issued in terms of paragraph (b) of the proviso to section 11 of that Act by the Director General, as defined in that Act;"

In this instance, the language used indicates that the member is entitled to the payment of a lump sum benefit on emigration, three years continuous non-residence or departure from South Africa on expiry of a visa. It thus appears to contradict Rule14.4.1 of the GEPF to the extent that it only allows for a withdrawal benefit up to a third of the fund value in any circumstances. It could however possibly be argued that the GEPF legislation should take preference in that it constitutes legislation of a specified nature (i.e. only applicable to GEPF members), as opposed to the legislation contained in the Income Tax Act that is of a more general nature (the definition of a "pension preservation fund" in the Income Tax Act is applicable in respect of transfers from all other pension or provident funds).

The Pension Funds Adjudicator ruled as follows in the matter of HJ Meyer v Old Mutual Wealth Preservation Fund and Old Mutual Investment Services (16 May 2019), where a dispute arose on this issue[36]:

"*The first respondent is compelled to act in accordance with the restriction rule from the GEPF, the provisions of the Income Tax Act and its rules. Therefore, this Tribunal is not in a position to accede to the complainant's request regarding the second withdrawal from his funds*."

It is however doubtful whether the validity of the rule will withstand constitutional scrutiny if challenged. In the Matter of Wiese v Government Employees Pension Fund and Others[37], the Court found the following in its judgment on the constitutionality of the rules of the GEPF not making provision for the "clean break" principle where a member of the GEPF was divorced, and the Court awarded a pension interest (or part thereof) to the spouse of such member (see discussion on the GEPF and divorce matters below):

"*[17] There are of course sound arguments why pension fund members and their former spouses should not be permitted to withdraw pension benefits - the so called 'preservation principle' -* ***but, given that the 'clean break' principle is now applied to the divorced spouses of private***

[36] Paragraph 5.10 of the determination.

[37] (16893/09) ZAWCHC 110; [2011] 4 All SA 280 (WCC)

pension fund members, there appears to be no rational reason why this should be withheld from their counterparts on divorce from a member of the Fund (or any other public pension fund, for that matter).

[18] ***The prejudice arising out of this differentiation is obvious. The former class of persons can gain immediate access to their share of their former spouse's pension interest, and can obtain an immediate cash payment in respect thereof or transfer such benefit to another pension fund. By contrast, the divorced spouse of a member of the Fund (and other funds not governed by the PFA) can only gain access to his/her share of a former spouse's pension fund interest when an exit event occurs which, of course, may be many years away***. *During that period the divorced spouse is denied the benefits of any growth in his/her share of the pension interest."*

In my opinion, the principles highlighted above could *mutatis mutandis* be applied to the provisions of Rule 14.4.1 in that:

(i) Although the preservation of retirement benefits are encouraged, there should be no reason for an ex-member of the GEPF to be prohibited from withdrawing the full benefit from a preservation fund in light of the fact that such a full withdrawal will be allowed for ex-members of other pension or provided funds. It could also be argued that the rule leads to an anomaly in that a member resigning from a government institution is allowed to withdraw the full benefit as a lump sum on exit from the GEPF, but upon transfer to a preservation fund the withdrawal is limited to one third of the fund value.

(ii) The inconsistent treatment of ex-members of the GEPF is further highlighted in that, if a member of the GEPF had made a pre-retirement withdrawal of one third of the fund value from the preservation fund, such member will not be allowed to receive a further lump sum on retirement from the preservation fund. This prohibition does not exist for ex-members of other pension funds who elected to transfer a retirement benefit to a preservation fund.

(iii) The prejudice resulting from Rule 14.4.1 is thus obvious: ex-members of funds other than the GEPF will have full access to the funds invested in a preservation fund via a pre-retirement withdrawal, whilst the access of ex-members of the GEPF is limited to one third of the fund value.

Example 8: Transfer from the GEPF to a preservation fund with subsequent withdrawal – the effect of Rule 14.4.1

Josef resigns from a government department and his withdrawal benefit in the GEPF is R900 000. He became a member of the GEPF on 1 March 1980 and resigned on 30 September 2021. He thus has has a total of 41 years completed service with the government department, of which 23 completed years are post 1 March 1998. What amount will he be able to receive tax-free if he transfers the full amount to a preservation fund on 30 September 2021, and makes a withdrawal from the preservation fund directly after transfer?

1 March 1980	**1 March 1998**	**30 September 2021**
← 18 yrs → **Tax-free**		**← 23 yrs →** **Taxable**
← Total 41 years →		

Answer

The transfer to the preservation fund will occur tax-free. The pre-1 March 1998 tax-free portion will be preserved on the full transfer value. Therefore:

A = Taxable Amount

B = 23

C = 41

D = R900 000

Apply Formula : 23/41 x R900 000

= R504 878.05 – post 1 March 1998 portion, which is taxable

Tax-free portion therefore is: R900 000 – R504 878.05 = R395 121.95

However, if GEPF Rule 14.4.1 is applied strictly by the administrators of the preservation fund, Joseph will only be able to take a maximum of one third of the fund value as a lump sum.

The result of this is the following: As the withdrawal from the preservation fund is made directly after transfer, and if we assume the full fund value is still R900 000, Joseph will be able to withdraw an amount of R300 000 (one third of R900 000) from the preservation fund as a lump sum.

He will thus receive the amount of R300 000 without paying any tax thereon:

R300 000 (lump sum taken) – R300 000 (deduction under Paragraph 6(1)(b)(v) of the Second Schedule to the Income Tax Act
= R0 (taxable)

Note:
As Joseph had withdrawn the full one third of the fund value as a lump sum, he would not be able to take a lump sum upon retirement from the preservation fund in the event of Rule 14.4.1 being applied strictly by the fund.

This means that the balance of the tax-free pre-1 March 1998 portion of R95 121.95 (R395 121.95 – R300 000 lump sum taken) would effectively be lost for Joseph. He would not be able to deduct this balance of R95 121.95 from lump sums received from other funds that he may be a member of (e.g. a retirement annuity fund or the pension or provident fund of e new employer).

Retirement, retrenchment and death of a member of a public sector fund, where membership of fund commenced before 1 March 1998

The lump sum accruing to a member on retirement, death or retrenchment will also be partially exempt from income tax, where such person became a member of such fund prion to 1 March 1998. The formula to determine the taxable portion if such lump sum, as provided for in paragraph 2A of the Second Schedule to the Act, would thus also be applicable in these circumstances.

The taxable portion of a lump sum received on retirement, death or retrenchment from a retirement fund (including a public sector fund) is taxed as follows:

Taxable Amount	**Rate of tax**
R0 – R500 000	0% of the **taxable** amount
R500 001 – R700 000	18% of the **taxable** amount above R500 000
R700 001 – R1 050 000	R36 000 + 27% of the **taxable** amount above R700 000
R1 050 001 and above	R130 500 + 36% of the **taxable** amount above R1 050 000

As with lump sums accruing on withdrawal, the cumulative effect of the above table over the lifetime of the member must however be taken into account. This means that the following

amounts received previously by the member will also have to be taken into account in calculating the ultimate tax liability[38]:

(i) Previous retirement fund lump sum benefits received form any pension, provident, retirement annuity or preservation fund on or after 1 October 2007; and

(ii) Previous retirement fund lump sum withdrawal benefits received form any pension, provident, retirement annuity or preservation fund on or after 1 March 2009; and

(iii) Severance benefits received form an employer in the event of retrenchment, or upon ceasing employment where the member was aged 55 or older, or upon disability.

Example 9: Tax on retirement in respect of lump sum received from a public sector fund where the member has pre-1March 1998 service

Sam retires from the GEPF on 1 March 2021. He has been a member of the fund since 1 March 1983 (a total of 38 years). He receives a lump sum benefit of R2 500 000. Calculate the tax payable on the lump sum.

1 March 1983 1 March 1998	1 March 2021
← 15 years → **Tax-free**	**← 23 years →** **Taxable**
← Total 38 years →	

Answer:

Formula: $A = \frac{B}{C} \times D$

= 23 ÷ 38 x R2 500 000

= R1 513 157.89 (taxable portion)

Vested portion prior to 1 March 1998 = R2 500 000 – R1 513 157.89

= R986 842.11 (tax-free portion)

[38] Paragraph 9(b)(i) of Schedule 1 of the Rates and Monetary Amounts and Amendment of Revenue Laws Act 19 of 2021.In this regard see Old Mutual Premiums & Problems, Edition 123, 2021, Editors S Cloete *et al*, page C44 for the steps to follow when doing such a calculation.

Tax Payable on lump sum:
= R130 500 + 36% of taxable amount above R1 050 000
= R130 500 + 36% of (R1 513 157.89 – R1 050 000)
= R130 500 + 36% of R463 157.89
= R130 500 + R166 736.84
= R297 236.84 (tax payable)

Clients may however require financial planners to calculate the maximum amount that they will be able to take on retirement without paying any tax, in order to use the balance to purchase a compulsory annuity[39]. This can be calculated by using the "reverse" formula, i.e. the mathematical equation discussed above. It entails reversing B and C contained in the formula prescribed in paragraph 2A of the Second Schedule to the Act, and multiplying it with the amount still available to be taxed at the 0% tax rate. In this regard, bear in mind that the receipt of previous retirement fund lump sum benefits, retirement fund lump sum withdrawal benefits and severance benefits would have an effect on the 0% tax rate if it accrued on or after the dates discussed above.

Example 10: Tax on retirement in respect of a lump sum benefit received from a public sector fund where the member has pre-1March 1998 service – maximum lump sum without paying tax

Simon retires from the Transnet Retirement Fund and his total benefit is R9 000 000. He became a member of the Transnet retirement Fund on 1 March 1987 and retires on 30 September 2021. He thus has has a total of 34 years completed service with Transnet, of which 23 completed years are post 1 March 1998. He has not previously received any lump sums from retirement funds (i.e. on retirement or withdrawal), or any severance benefits. What the maximum lump sum amount that he will be able to receive without paying any tax thereon?

1 March 1987	1 March 1998	30 September 2021
← 11 yrs →	**← 23 yrs →** **B in formula**	

[39] This will of course only be possible with defined contribution funds where the members are able to opt for the amount to be taken as a lump sum. In the case of defined benefit funds, the value lump sum benefit is calculated via a formula provided for in the rules of the fund.

Tax-free	Taxable
← Total 34 years → C in formula	

In this instance we will apply the "reverse formula" to establish the answer:
C (total completed years of service) ÷ B (completed years of service after 1 March 1998) x R500 000 (the amount left to be taxed at 0% on retirement)

Answer

34 (total years of service) ÷ 23 (completed years of service post 1 March 1998) x R500 000 (amount available to be taxed at 0%)
= R739 130.43 (he would be able to take this as it is less than one third of the total fund value of R9 000 000)
If we test the answer with the prescribed formula:
A = B/C x D
= 23/34 x R739 130.43
= R500 000 (taxable amount)
R500 000 is taxed at 0% (no prior retirement/withdrawal lump sums or severance benefits)
= R0 tax payable
If Simon in our example had previously received a taxable lump sum withdrawal from a fund on/after 1 March 2009 (or on retirement on/after 1 October 2007 or received a severance benefit on or after 1 March 2011) in the amount of R200 000, it would mean that he had used R200 000 of his 0% tax rate applicable to retirement. He would thus have R300 000 (R500 000 – R200 000) left to be taxed at 0%. If he then wanted to take the maximum lump sum without paying tax, the calculation would look as follows:
34 (total years of service) ÷ 23 (completed years of service post 1 March 1998) x R300 000 (amount available to be taxed at 0%)
= R443 478.26

Pre-retirement date transfers from public sector funds to approved funds where the pre-1 March 1998 tax-free portion is preserved: Taxation upon retirement from fund that benefit was transferred to

As alluded to earlier, the pre-1 March 1998 tax-free portion in a public sector fund is preserved upon transfer to another retirement fund and the calculated pre-1 March 1998 tax-free portion will serve as a deduction against a lump sum received upon exit (i.e. on retirement, withdrawal or death) from the fund to which the benefit was transferred. The pre-1March 1998 portion that will serve as this deduction will be calculated, upon transfer, on the **full amount transferred** from the public sector fund to another retirement fund.

The deduction (applicable to a lump sum accruing from the fund that the benefit of the public sector fund was transferred to) on retirement or death, is provided for in Paragraph 5(1)(e) of the Second Schedule to the Act:

"BENEFITS ACCRUING UPON RETIREMENT AND BENEFITS DEEMED TO HAVE ACCRUED IMMEDIATELY PRIOR TO PERSON'S DEATH: DEDUCTIONS

"5. (1) The deduction to be allowed for the purposes of paragraph 2 (1) (a) is an amount equal to so much of— (b) in any other case, so much of the aggregate of—

(e)any other amounts in respect of which the formula in paragraph 2A applies, which have been—

(i) paid into a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund for the person's benefit by a public sector fund; and

(ii) transferred into a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund directly from a fund contemplated in subitem (i) for the person's benefit,

***less** the amount represented by symbol A when so applying that formula,"*

Example 11: Pre-retirement date transfer from a public sector fund to an approved fund where the pre-1 March 1998 tax-free portion is preserved: Taxation upon retirement from fund that benefit was transferred to

Thandi resigned from a public sector fund on 1 March 2009 and transferred her full benefit of R1 000 000 to a retirement annuity fund.

She had a total of 30 years membership in the public sector fund and 11 years of these were post 1 March 1998 (1 March 1998 to 1 March 2009). What will happen Thandi retires from the retirement annuity fund in future?

Answer:

Formula : 11/30 x R1 000 000 = R366 666.67 (taxable) portion post March 98

Pre-1 March 1998 portion: R1 000 000 – R366 666.67 = R633 333.33 (tax-free portion)

When she retires from her retirement annuity fund in the future, R633 333.33 of the lump sum will be tax-free and this amount may be deducted from the lump sum taken on retirement to calculate the taxable portion.

Note:

If the total retirement interest in the retirement annuity fund is less than R1 899 999.99 (R633 333.33 x 3), she will not be able to take the full R633 333.33 as a lump sum. If the retirement interest in the retirement annuity fund is, for example, R1 800 000 when Thandi retires, she will only be allowed to take R600 000 (one third of R1 800 000) as a lump sum. The tax implication will be:

R600 000 lump sum on retirement – R600 000 (deduction in terms of paragraph 5(1)(e) of the Second Schedule to the Act)

= R0 (no amount taxable).

The remaining vested pre-1 March 1998 tax-free portion of R33 333.33 (R633 333.33 – R600 000) will be lost, as she will not be allowed to apply it against lump sums accruing to her from other funds that she may be a member of.

Post-retirement date transfers from public sector funds to approved funds where the pre-1 March 1998 tax-free portion is preserved: Taxation upon retirement from fund that benefit was transferred to

The Act makes provision for a tax-free transfer of a member's interest in a pension or provident fund to a retirement annuity, pension preservation or provident preservation fund, on or after the member of the pension or provident fund has reached normal retirement age, but before such member has elected to retire form the pension or provident fund[40]. In the case of a transfer of

[40] The definition of "pension fund" and "provident fund" in section 1 of the Act, read with paragraph 6A of the Second Schedule to the Act.

the retirement interest of a member a pension or provident fund who has already reached normal retirement age to a preservation fund, no pre-retirement withdrawal from such preservation fund will be allowable, unless it is a withdrawal emanating from emigration, cessation of residence or expiry of a visa[41]. The rules of the relevant pension or provident fund must however make provision for such a transfer on or post normal retirement age.

The question that arises is whether the tax-free pre-1 March 1998 portion of such a transfer from a public sector fund will be preserved in these circumstances, if the rules of a public sector fund allows for a transfer to a retirement annuity or preservation fund after its members reach normal retirement age. If it were indeed allowable, the calculated pre-1 March 1998 portion would thus be utilised as a deduction against a lump sum benefit upon exiting the retirement annuity or preservation fund.

Here it is necessary to interpret the language used in paragraph 5(1)(e) of the Second Schedule to the Act:

"5. (1) The deduction to be allowed for the purposes of paragraph 2 (1) (a) is an amount equal to so much of— (b) in any other case, so much of the aggregate of—

(e)any other amounts in respect of which the formula in paragraph 2A applies, which have been—

(i) paid into a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund for the person's benefit by a public sector fund; and

(ii) transferred into a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund directly from a fund contemplated in subitem (i) for the person's benefit,

less the amount represented by symbol A when so applying that formula,"

The language used in paragraph 5(1)(e(i) does not differentiate between a transfer from a public sector fund to a preservation or retirement annuity fund before and on/after reaching normal retirement age (in the public sector fund). It would thus seem that the pre-1March 1998 tax-free portion would be preserved upon a transfer from a public sector fund occurring on or after a member's normal retirement age (as per the rules of the public sector fund), where the public sector fund allows for this. If this interpretation is correct, it would create an arbitrage opportunity

[41] The definition of "pension preservation fund" and "provident preservation fund" in section 1 of the Act.

for members, as the pre-1March 1998 tax-free portion would be calculated on the full retirement interest transferred from the public sector fund to the retirement annuity or preservation fund, and not only on the lump sum received directly from the public sector fund on retirement. It is however uncertain whether the South African Revenue Service holds a similar view in this regard.

Example 12: Preservation of pre-1 March 1998 tax-free portion on transfer to a preservation or retirement annuity fund on/after the member of the public sector fund has reached normal retirement age

Percy reaches normal retirement age of a defined contribution public sector pension fund and retires. His total retirement interest in the fund is R9 000 000. He became a member of the public sector on 1 March 1987 and retires on 30 September 2021.

He thus has a total of 34 years completed membership of the public sector fund, of which 23 completed years are post 1 March 1998. He has not previously received any lump sums from retirement funds (i.e. on retirement or withdrawal), or any severance benefits. He decides to take the maximum allowable amount (R3 000 000) as a lump sum. How much income tax will he pay?

1 March 1987	1 March 1998 30 September 2021
← 11 yrs → **Tax-free**	**← 23 yrs →** **B in formula** **Taxable**
← Total 34 years → **C in formula**	

Answer:

23 (completed years of service post 1 March 1998) ÷ 34 (total years of service) x R3000 000 (lump sum received)

= R2 029 411.76 (taxable post 1-March 1998 portion of lump sum)

Tax payable on R2 029 411.76 :

= R130 500 + 36% of the **taxable** amount above R1 050 000

= R130 500 + 36% of (R2 029 411.76 – R1 050 000)

= R130 500 + 36% of R979 411,76

= R130 500 + R352 588.23

= R483 088.23 tax payable

If Percy in this example had, after reaching normal retirement age, first transferred his total benefit of R9 000 000 to a preservation fund (tax-free transfer as per paragraph 6A of the Second Schedule) and retired immediately thereafter form the preservation fund, the calculation would look as follows:

23 (completed years of service post 1 March 1998) ÷ 34 (total years of service) x R9000 000 (full retirement interest transferred to preservation fund)

= R6 088 235.29 (taxable post 1-March 1998 portion of lump sum)

The tax-free pre-1March 1998 portion preserved in the preservation fund would thus have been:

R9 000 000 – R6 088 235.29 = R2 911 764.71

If he then immediately retired from the preservation fund after the transfer took place, the tax calculation would look as follows:

R3 000 000 (one third of value in preservation fund) – R2 911 764.71 (tax-free pre-1March 1998 portion preserved in the preservation fund)

= R88 235.29 (taxable portion of lump sum)

Tax on R88 235.29:

0% (it is below R500 000)of R88 235.29

= R0

He would thus receive the R3 000 000 lump sum without paying any tax after transferring his interest in the public sector fund to the preservation fund, as opposed to paying tax of R483 088.23 on the same lump sum if he had retired directly from the public sector fund.

Note:

The above comparison would only be applicable if:

(i) The rules of the public sector fund allow for a transfer to a preservation fund upon the member reaching the normal retirement age of the public sector fund; and

(ii) If the South African Revenue Service interprets the legislation to provide that the pre 1-March 1998 tax-free portion is preserved upon transfer from a public sector fund on or after reaching normal retirement age.

Divorce: Application of pre-1March 1998 tax-free portion in public sector funds in respect of non-member spouses

The spouse (non-member spouse) of a member of a public sector fund with pre-1 March 1998 service will be entitled to the exemption of the pre-1 March 1998 tax-free portion where a pension interest (or part thereof) is awarded to such non-member spouse in a divorce order granted on or after 13 September 2007[42]. This is possible due to amendments made to the Income Tax Act via the 2012 Taxation Laws Amendment Act[43]. The pension interest so awarded is deemed to have accrued to the non-member spouse on:

(i) The date on which it becomes due and payable to the non-member spouse[44]; or

(ii) The date on which it is transferred to another retirement fund (approved transfer)[45].

The pre-1 March 1998 portion of the divorce award, is calculated as follows:

A = B/C x D

Where:

A = taxable portion of lump sum

B = number of completed years of service post 1998 to date that award is due and payable or transferred to another fund

C = total completed years of service to date award is due and payable or transferred to another fund

D = value of award.

Where the non-member elects to take the award as a cash lump sum, it will be taxed according to the table applicable to retirement fund lump sum **withdrawal** benefits in the hands of the non-member spouse.

[42] Where a divorce order was granted before 13 September 2007 and is due and payable after 1 March 2012, no tax will be payable by the non-member spouse who elects to receive the award as a cash lump sum. Paragraph 2(1) (b)(iA) of the Second Schedule to the Income Tax Act.

[43] Act 22 of 2012

[44] Paragraph 2(2)(a) of the Second Schedule to the Income Tax Act.

[45] Paragraph 2(2)(b) of the Second Schedule to the Income Tax Act.

Example 13: Divorce award to non-member spouse electing to take award in cash, where member spouse has pre-1March 1998 service

(iii) John became a member of the Transnet Retirement Fund on 1 February 1990. The value of his pension interest on date of divorce (1 December 2015) was R2,000 000. Sue was awarded 40% of the interest (R800 000). Sue elects to take the whole award in cash and the award becomes due and payable on 5 March 2016. How much tax will she pay?

1 Feb 1990	1 March 1998 5 March 2016
← 8 yrs → **Tax-free**	**← 18 yrs →** **B in formula** **Taxable**
← Total 26 years → **C in formula**	

Answer:

Therefore applying the Par 2A formula to Sue's award:

18 (competed years after 1 March 1998, i.e. to 5 March 2016)/26 (total completed years of service on date of election: 1 February 1990 to 5 March 2016) x R800 000

= R553 846 (taxable portion of lump sum).

The amount of R553 846 will be taxed according to the tax table applicable to retirement fund lump sum **withdrawal** benefits:

= 18% of the amount above R25 000

= 18% of R528 846

= R95 192.31.

She will thus receive an amount of R704 807.69 (R800 000 – R95 192.31) nett of tax.

A related issue that needs to be canvassed is whether the pre-1 March 1998 tax-free portion will be preserved in the event of an approved transfer[46] of a divorce award to another retirement fund.

[46] See the discussion in respect of tax-free transfers above. The tax-free transfers to an approved fund by a non-member spouse, who was awarded a pension interest (or portion thereof) in a divorce matter, operates on the same principles.

Paragraph 5(1)(e)[47] of the Second Schedule to the Act provides as follows:

"*5. (1) The deduction to be allowed for the purposes of paragraph 2 (1) (a) is an amount equal to so much of— (b) in any other case, so much of the aggregate of—*

*(e)**any other amounts in respect of which the formula in paragraph 2A applies**, which have been—*

*(i) **paid into a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund for the person's benefit** by a public sector fund; and*

(ii) transferred into a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund directly from a fund contemplated in subitem (i) for the person's benefit,

less the amount represented by symbol A when so applying that formula,"

It is my view that the language used is clear that:

(i) The deduction applies in respect of any amount of which the formula in paragraph 2A applies, where

(ii) This amount has been transferred (approved transfer) to another retirement fund (pension, provident, retirement annuity or preservation fund) for a person's benefit.

The provision thus does not limit the preservation of the pre-1 March 1998 tax-free portion to transfers by a members of a public sector fund, and should thus by implication include the transfer of a pension interest awarded in divorce proceedings to a non-member spouse. The Explanatory Memorandum to the 2012 Taxation Laws Amendment Bill[48] also indicates that it was the intention of the legislature to put the non-member spouse on equal footing with the member-spouse in this regard:

"*Furthermore, it is proposed that the exemption for pre-1998 years of service be **fully retained by both ex-spouses**. Hence, **both the member and the member's ex-spouse will retain the relief to the extent the retirement fund pay-out relates to pre-1998 years of service**.*[49]"

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[47] The language used in paragraph 6(1)(b)(v) of the Second Schedule (dealing with the deduction in respect of the allowable deduction in respect of lump sum accruing on withdrawal from the fund that the benefit was transferred to) to the Act are in all material aspects identical.

[48] Explanatory Memorandum on The Taxation Laws Amendment Bill, 2012, 10 December 2012.

[49] Explanatory Memorandum On The Taxation Laws Amendment Bill, 2012 10 December 2012, page 8.

Example 14: Divorce award to non-member spouse electing to do an approved transfer to another fund, where member spouse has pre-1March 1998 service

John became a member of the Transnet Retirement Fund on 1 February 1990. The value of his pension interest on date of divorce (3 February 2016) was R2,000 000. Sue was awarded 40% of the interest (R800 000). Sue elects to transfer the full award to a pension preservation fund, and the transfer is effected on 5 March 2016. How much tax will she pay?

1 Feb 1990	1 March 1998	5 March 2016
← 8 yrs → Tax-free		← 18 yrs → B in formula Taxable
← Total 26 years → C in formula		

Answer:

The transfer to the preservation fund will occur tax-free.

The pre-1 March 1998 portion of the award will be preserved to serve as a deduction when Sue:

(i) withdraws a lump sum; or

(ii) retires and opts to take a lump sum (limited to one third of the fund value as we are dealing with a transfer from a pension fund); or

(iii) dies and her beneficiaries and/or dependants opt to take a lump sum.

Therefore applying the Par 2A formula to Sue's award:

18 (competed years after 1 March 1998, i.e. to 5 March 2016)/26 (total completed years of service on date of transfer: 1 February 1990 to 5 March 2016) x R800 000

= R553 846 (taxable portion of lump sum).

Therefore, the tax-free portion that is preserved is as follows: R800 000 (divorce award) - R553 846 = R246 154.

This amount may thus be applied as a deduction against a lump sum received from the preservation fund, i.e.

(i) Sue would be able to withdraw a lump sum of R246 154 from the preservation fund without paying any tax. If Sue had not received any other lump sums from another retirement fund on retirement on or after 1 October 2007; or received any other lump sums from another retirement fund on withdrawal on or after 1 March 2009; or received a severance benefit from an employer on or after 1 March 2011, she could add R25 000 to this amount without paying any tax (the R25 000 would be taxable, but at 0%); or

(ii) Sue would be able to receive a lump sum of R246 154 from the preservation fund on retirement without paying any tax. If Sue had not received any other lump sums from another retirement fund on retirement on or after 1 October 2007; or received any other lump sums from another retirement fund on withdrawal on or after 1 March 2009; or received a severance benefit from an employer on or after 1 March 2011, she could add R500 000 to this amount without paying any tax (the R500 000 would be taxable, but at 0%) bearing in mind that the lump sum taken on retirement may not exceed one third of the fund value; or

(iii) Sue's dependants/beneficiaries would be able to receive a lump sum of R246 154 from the preservation fund on retirement without any tax being payable. If Sue had not received any other lump sum from another retirement fund on retirement on or after 1 October 2007; or received any other lump sum from another retirement fund on withdrawal on or after 1 March 2009; or received a severance benefit from an employer on or after 1 March 2011, her dependants/beneficiaries could add R500 000 to this amount without paying any tax (the R500 000 would be taxable, but at 0%).

Divorce – specific provisions applicable to the GEPF

The GEPF and the "clean break" principle – the position before 1 April 2012

The GEPF is not governed by the Pension Funds Act[50] but by the Government Employees Pension Law of 1996. In 2007 the Pension Funds Act was amended to provide for the "clean break" principle to apply to retirement funds where the member spouse is divorced and a pension interest (or part thereof) was awarded to a non-member spouse. In terms of this amendment, the non-member spouse had immediate access to the pension interest awarded to him/her in divorce proceedings and did not have to wait for the member spouse to exit the fund (i.e. on withdrawal, retirement or death).

[50] Act 24 of 1956

As no similar changes were made to the Government Employees Pension Law, the ex-spouse of a GEPF member still had to wait for member to exit the GEPF before being able to access the pension interest so awarded.

In Wiese v GEPF [51] ,the Court found that the Government Employees Pension Law was unconstitutional insofar as it fails to afford former spouses of members of GEPF the same rights and advantages as are afforded to former spouses of funds subject to the Pension Funds Act.

The GEPF and the "clean break" principle – 2012 amendments to the Government Employees Pension Law & Rules

In light of the Wiese judgment, the Government Employees Pension Law and Rules were amended from 1 April 2012 to make provision for the "clean break" principle in relation to persons who are divorced from GEPF members.

The amended rules provided that the amount of the divorce award paid to the non-member spouse was regarded as a debt due by the member ("the divorce debt approach") to the GEPF. Interest was further levied by the GEPF on such "divorce debt".

GEPF members had the opportunity to settle a portion or all of that debt over their period of membership, but if an unsettled amount remained when the member exited the GEPF, the debt was deducted from the benefits payable to the member.

On the retirement of a member of GEPF, the divorce debt was first offset against the member's gratuity entitlement (lump sum). In the event of the gratuity being less than the outstanding divorce debt, the member would not receive any lump sum payment on retirement, and the balance of the debt was recovered by reducing the member's annual annuity (pension income).

The GEPF and the "clean break" principle – 2019 amendments to the Government Employees Pension Law & Rules

The "divorce debt" approach was challenged in the High Court in the matter of Crafford v Government Employees Pension Fund and Others[52]. The applicant claimed that the "divorce

[51] (16893/09) ZAWCHC 110; [2011] 4 All SA 280 (WCC)
[52] Draft Financial Matters Amendment Bill, 2018, Page 22

debt" approach resulted in a "forced loan", infringed upon her constitutional rights to equality and social security and that it imposed an unjustifiable burden on members of the GEPF.

Due to the prejudice suffered by members of the GEPF as a result of the "divorce debt" approach, it was replaced with a reduction of a member's years of pensionable service ("the service reduction approach") by an amendment of the GEPF Law and subsequent changes to the GEPF Rules. As alluded to earlier, the GEPF is a defined benefit fund, and the benefits of members are thus calculated via formulas prescribed in GEPF Rules. A reduction in years of pensionable service will thus have the effect that member's benefits are accordingly reduced.

The practical effect of this amendment can be summarised as follows:

(i) Where the divorce of a member of the GEPF is granted on or after 1 August 2019 and former spouse of the member is paid a divorce award, the member's benefit would be reduced in terms of "service reduction" approach; and
(ii) Where the divorce of a member of the GEPF was granted before 1 August 2019 and former spouse of member was paid a divorce award, the member had a choice:
   - If the GEPF member wanted the "divorce debt" approach to be applied, the member had to notify the GEPF of this choice on or before 22 May 2020; and
   - If the GEPF member did not provide the notification as discussed in the previous bullet, the member's benefit would by default be reduced in terms of the "service reduction" approach.

The question that arises, is how the "service reduction" approach as a result of a divorce award effect the formula[53] to calculate the pre-1 March 1998 tax-free portion, in the event of the member having service years before this date.

It would appear that "B" in the formula remains unchanged as it represents "*the number of completed years of employment of the member after 1 March 1998*[54]". The "service reduction" approach does however appear to have an effect on "C" in the formula, as it represents: "**where the number of completed years of employment of a person who is or was a member of a fund are in terms of the rules of that fund taken into account for the purpose of determining the amount**

[53] Paragraph 2A of the 2nd Schedule to the Income Tax Act
[54] Paragraph 2A(b)(i) of the 2nd Schedule to the Income Tax Act

of the benefits payable to any person by the fund, **the total number of completed years of employment so taken into account[55]".**

In other words, on a strict interpretation of the language used, only the number of years taken into account to calculate the benefit is taken into account for purposes of C in the formula. It thus seems to indicate that that C would be reduced where the member was divorced, and the "service reduction" method is used to calculate the benefit of the member on exit (i.e. on withdrawal, retirement or death) from the fund.

My opinion is that this could never have been the intention of the legislature. Such an approach would prejudice the member, as the post-1 March 1998 taxable portion of the formula ("B") would remain the same, but the total of service years ("C") would be reduced. I suspect that we are dealing with an instance of the rules of the GEPF being amended, without making relevant adjustments in the Income Tax Act to cater for the amendment,

It could further lead to absurd results in applying the formula on this basis, as illustrated in the example below.

Example 15: Divorce award to non-member spouse – tax implications of member's exit in lieu of the

John became a member of the GEPF on February 1990. The calculated value of the pension interest in the GEPF on date of divorce was R2,000,000. Sue was awarded 50% of the interest (R1 000,000). John resigns from employment on 5 March 2020 (immediately after the divorce) and elects to take the benefit as a lump sum. John's **actual** years of service is 30 years:

1 Feb 1990	1 March 1998	5 March 2020
← 8 yrs →	**← 22 yrs →**	
← Total 30 years →		

[55] Paragraph 2A(c)(i) of the 2nd Schedule to the Income Tax Act

Answer:

Let us assume that John's service years are reduced by 50%, i.e. to 15 years (it would have been 30 years: March 1990 to 5 March 2020) and the pre-tax value of the lump sum is R1 000 000.

Therefore, if we apply the Par 2A formula to John's lump sum benefit using the reduced number of years:

22 (competed years after 1 March 1998, i.e. to March 2020)/15 (total completed years of service in terms of the reduced number of years of service) x R1 000,000 = **R1 466 667** (taxable portion of lump sum).

This would mean that the taxable portion of John's award is **higher than the actual lump sum he receives**: He receives a lump sum of R1 000 000, whist the taxable portion thereof is calculated to be R1 466 667.

Let us compare the above to the taxable portion of the lump sum (same amount) that Sue received in the same time frame, based on John's actual years of service:

22 (competed years after 1 March 1998, i.e. to March 2020)/30 (total completed years of service) x R1 000 000 = **R733 333.33** (taxable portion of lump sum).

Note:

It is submitted that the above approach leads to an absurdity and could never have been the intention of the legislature. It is my view that in John's instance, the actual total years of service (30) should likewise be used to represent "C" in the calculation.

The GEPF and divorce – the effect of Rule 14.4.1 on the divorce award of the non-member spouse

The question arises whether Rule 14.4.1 would apply to a pension interest awarded to an ex-spouse of a member of the GEPF, where such non-member spouse opts to transfer the divorce award to a preservation fund. To put it differently, would the maximum withdrawal from the preservation fund by the non-member spouse also be limited to a maximum of one-third of the fund value?

My opinion is that Rule 14.4.1 would not be applicable in such an instance, for the following reasons:

(i) The preamble of Rule 14.4.1 provides:

"14.4 Subject to rule 14.10 ***benefits on resignation or discharge***

14.4.1 ***A member who resigns from his or her employer's service or is discharged*** *from his or her employer's service because of misconduct or ill-health occasioned by his or her own doing of for a reason not specifically mentioned in the rules and who is not entitled to receive benefits provided elsewhere in the rules, is entitled, a benefit calculated as the higher of—"*

In my view, this introductory portion of Rule 14.4.1 indicates that it is only applicable to a member resigning or being discharged, and not to a non-member spouse being awarded a pension interest in divorce proceedings.

(ii) Rule 14.4.1 however indicates that the rule is applicable to the beneficiaries of the member: *"Such transfer shall be made subject to the rules of the approved retirement fund specifying that, with reference to the transfer benefit, any subsequent* ***lump sum benefit payable by that fund*** *or any successor fund* ***to*** *the member and/or his* ***beneficiaries*** *shall be limited to one third of the said transfer benefit, with interest."*

The term "beneficiary" is defined in section 1 of the Government Employee Pension Law: "*beneficiary" means the dependant or nominee of a member or pensioner, as the case may be;"*

This reference thus relates to beneficiaries or dependants in the event of the member dying, and not to the non-member spouse in divorce proceedings.

GEPF rule 14.10.8, dealing with divorce proceedings, further clearly provides that a former spouse of a GEPF member is not deemed to be a beneficiary:
"14.10.8 A former spouse is not a member or beneficiary in relation to the Fund and is only entitled to interest, as determined by the Board, from the expiry of the period referred to in rule 14.10.4 until payment or transfer thereof, but not to any other interest or growth."

Conclusion

When financial planners are advising clients in respect of aspects related to public sector funds, it is important to take note of the unique issues surrounding these funds. These features should be carefully explained to clients and properly documented in client advice records.

Complaints often emanate from the following issues:

(i) Liquidity of funds: the application of Rule 14.4.1 of the GEPF upon transfer to a preservation fund, especially where the rule is strictly enforced.

(ii) Loss of the pre-1 March 1998 tax benefit: this is particularly relevant where a second transfer was effected before 1 March 2018 after exit from the public sector fund, or where a third transfer is done after 1 March 2018.

(iii) Treatment of the pre-1 March 1998 tax benefit: the tax consequences of transferring the full benefit to a preservation fund and then making a withdrawal, as opposed to making a part-withdrawal from a public sector fund and thereafter transferring the benefit to a preservation fund.

(iv) Resignation and transfer from a public sector fund before reaching normal retirement age: here it is important to take note of benefits that may be lost (e.g. medical benefits) as a result of not retiring from the public sector upon reaching retirement age.

Where financial planners are uncertain about the implications of a member exiting a public sector fund, or a non-member being awarded a pension interest from such a fund, a legal adviser or other subject matter expert should be consulted to ensure that clients are correctly advised.

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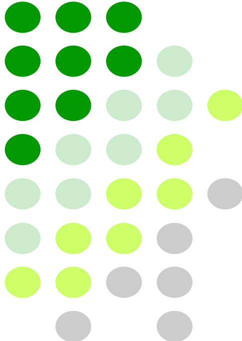
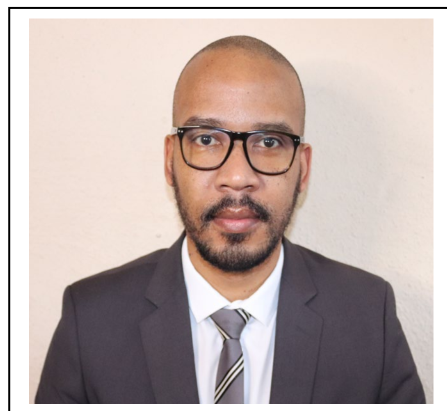


General

The Road to Recognition: The Status Quo of Muslim Marriages in South Africa



Eugene Mpikwane CFP®
LLB, PG in Fin Plan, Adv. PG Dip in Estate Planning
Legal Advisor Specialist
Personal Finance: Free State

Introduction

The Bill of Rights[1] protects, amongst other rights, cultural and religious rights and provides for the recognition of religious marriages by means of legislation[2]. Despite this, religious marriages are not governed by any legislation. A consequence of this is that spouses in Muslim marriages do not always enjoy the same default rights and legal standing as persons who were married in terms of the Marriage Act[3] or the Civil Union Act[4].

This apparent violation of constitutionally guaranteed rights[5] have prompted aggrieved parties to approach the courts for relief to rely on legal development via case law. Such instances of limited protection, although a step in the right direction, did not remedy the overall unequal treatment of spouses married under religious marriages compared to those married in terms of civil law.

In 2020 the Supreme Court of Appeal, in the matter of President v The Women's Legal Centre Trust[6], took the first step in rectifying the non-recognition of Muslim marriages and its consequences when it declared portions of certain Acts[7] as well as the common law inconsistent with the Constitution and provided that sections contained in other legislation[8] will be applicable to Muslim marriages. In respect of the Intestate Succession Act[9] and the Maintenance of Surviving Spouses Act[10], the Minister of Justice undertook to put necessary mechanisms in place to ensure that there is a procedure in place, by which the Master of the High Court may resolve disputes in relation to the validity of Muslim marriages and divorces.

[1] Chapter 2 of the Constitution of the Republic of South Africa, 1996.
[2] Section 15(3) of the Constitution of the Republic of South Africa, 1996.
[3] Act 25 of 1961.
[4] Act 17 of 2006.
[5] Section 9 of the Constitution provides that everyone must be treated equally and receive equal protection of the law. They should also not be discriminated against, directly or indirectly, based on race, gender, marital status, ethnic or social origin, colour, religion, conscience, belief, culture and language. Section 15 of the Constitution also provides everyone with the right to freedom of religion and belief. This allows everyone to follow their own religion and, when read with section 30 of the Constitution, to participate in their cultural life.
[6] President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others (Case no 612/19) [2020] ZASCA 177 (18 December 2020).
[7] Marriage Act 25 of 1961 and the Divorce Act 70 of 1979.
[8] Section 12(2) of the Children's Act 38 of 2005 for marriages concluded after the date of this Court order; section 3(1)(a), 3(3)(a), 3(3)(b), 3(4)(b) and 3(5) of the Customary Marriages Act 120 of 1998 for marriages concluded after the date of this Court order.
[9] Act 81 of 1987.
[10] Act 27 of 1990.

This article sets out a brief overview of two-decade post-apartheid journey of Muslim marriages fighting for recognition in South Africa to reach this landmark case.

Background

The Marriage Act[11] governs marriages of persons (one man and one woman) and it affords parties rights and protections as spouses. Muslim parties are allowed to solemnise their marriage in terms of the Marriage Act. However, due to their potentially polygamous nature, a marriage concluded in accordance with the Islamic faith alone is not recognised as a valid marriage[12]. As a result, women were denied spousal benefits such as the right to inherit via the legislation applicable intestate succession and to claim for maintenance in terms of the Maintenance of Surviving Spouses Act[13]. If parties wanted to enjoy the same legal rights and protection that civil marriages offer, they would have to conduct a separate civil ceremony in order for their marriage to be registered with the Department of Home Affairs ("DoHA). To encourage the registration of Muslim marriages, the DoHA certified over 200 Imams (Muslim clergy) across South Africa who conduct Nikkah ("marriage; marriage contract; matrimony, wedlock") ceremonies but who also sequentially conduct civil marriages, which are registered at the DoHA[14]. The proprietary consequences of a Muslim marriage that has been solemnised by an Imam, who is a marriage officer and also sequentially conducts a civil marriage, will be the same as that of a civil marriage in terms of the Marriage Act. In other words, such a marriage will be in community of property, unless the spouses entered into an ante-nuptial contract excluding the community of property regime. In such an instance, the marriage out of community of property will include the accrual system, unless it is specifically excluded by the parties in the ante-nuptial contract. However, Muslim marriages entered into in terms of the Marriage Act are treated as being out of community of property[15].

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[11] Act 25 of 1961.

[12] The Marriage Act recognised a valid marriage as one with "one husband and one wife". Polygamy was considered to be contra boni mores.

[13] 27 of 1990.

[14] Speech by Deputy Minister of Home Affairs, Ms Fatima Chohan (MP), Civil Marriages Programme at Masjidul Quds, Gatesville.

[15] Paragraph 9.1.1 of the order of Court in *President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others* 2021 (2) SA 381 (SCA); Issue Paper 41: Review of Aspects of Matrimonial Property Law, South African Law Reform Commission, page 6 (https://www.justice.gov.za/salrc/ipapers.htm).

It is important to remember that the Matrimonial Property Act[16] does not provide for or recognise polygamy. That would mean that if a couple in Muslim marriage choose to register their marriage in terms of this Act, any subsequent religious marriage of the husband cannot be registered in terms of civil law. In such a situation, the law would only recognise the first wife as an intestate heir.

The Civil Union Act[17] was promulgated in 2005, which presented same sex couples with an option to solemnise their marriages, and partners of the opposite sex are also allowed to conclude a civil union under this Act. This presented Muslim couples with another option of getting married, but this Act also does not allow for polygamous marriages.

Development of the common law

Section 8 of the Constitution places a duty on courts to develop the common law in order to give effect to the Bill of Rights, to the extent that legislation does not give effect to that right. This places the courts in an ideal position to recognise Muslim marriages.

In Ryland v Edros[18] the Court recognised a marriage which is solemnised in terms of the Islamic faith as a valid contract (of marriage). Although this case serves as a landmark case in the South African legal fraternity, it did not give legal recognition to Muslim marriages.

In the SCA matter of Amod v Multilateral Motor Vehicle Accidents Fund[19] the Court noted that there was an "important shift in the boni mores of the community that must manifest itself in a corresponding evolution in the relevant parameters of application in this area." The court went on to find that parties in a de facto monogamous Muslim marriage should be allowed the same damages as those in civil marriages. This case dealt only with the claim of a surviving spouse and did not give recognition to Muslim marriages.

Between 2004 and 2012 South African courts heard a number of cases dealing with the plight of Muslims, especially women and children, due to the non-recognition of Muslim marriages. These cases too only dealt with aspects of a Muslim marriage without deciding on its status as a recognised marriage:

[16] 88 of 1984.
[17] 17 of 2006.
[18] 1997 1 BCLR 77 (C).
[19] 1999 4 SA 1319 (SCA).

- In 2004 the Constitutional Court in Daniels v Campbell NO and Others[20] it was held that the surviving spouse (in monogamous marriage) could inherit in terms of the law of intestate succession and bring a claim maintenance claim against the husband's deceased estate. Similar to the Daniels outcome, the court in Hassam v Jacobs NO and Others[21] also expanded the application of the Intestate Succession Act[22] to apply to cases where the deceased was married in terms of Islamic law to more than one wife. The court also held that a spouse(s) in a Muslim marriage can also claim maintenance in terms of the Maintenance of Surviving Spouses Act.
- In Mahomed v Mahomed[23] and Hoosain v Dangor[24] the court granted an order for interim maintenance in terms of a Rule 43 application in the High Court, recognising that although the duty of support stems from common law, this duty does not preclude spouses married in terms of Islamic law.
- While most matters brought before court has dealt primarily with maintenance, very few related directly to retirement funds. In the matter of Tryon TY v Nedgroup Defined Contribution Pension and Provident Funds and Another,[25] the Pension Funds Adjudicator was asked to make a determination on a spouse's claim to the other spouse's pension interest, where the parties were married in terms of Muslim law. The adjudicator made a ruling in favour of the complainant and found that spouses married in terms of Muslim law may share in the other spouse's pension interest upon divorce. Accordingly, the fund was ordered to make payment to the non-member.[26]

While these cases gave the aggrieved parties the necessary relief, it still did not give full legal recognition to Muslim marriages.

[20] 2003 (9) BCLR 969 (C). In this case the wife was not recognised as the surviving spouse of her husband when he passed away without leaving a will. She was informed by the Master of the High Court that because they were married in terms of Muslim law, she had no right to benefit from her husband's estate. In 2003 she approached the courts and was successful. The court ordered that "both the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 should be amended to make provision for the term 'spouse' as to include a husband or wife married in accordance with Muslim rites in a de facto monogamous marriage".

[21] [2008] 4 All SA 350 (C).

[22] 81 of 1987.

[23] 2009 JOL 23733 (ECP).

[24] [2010] 2 All SA 55 (WCC).

[25] Unreported case no PFA/GA/8796/2011/TCM.

[26] The definition of spouse in the Pension Funds Act includes a permanent life partner or spouse or civil union partner of a member according to the Marriage Act, the Recognition of Customary Marriages Act or the Civil Union Act, or the tenets of a religion. A spouse in a Muslim marriage would therefore qualify for retirement fund benefits.

Legislative recognition of Muslim marriages

Marriage Bill

When the Project Committee of the South African Law Reform Commission (SALRC) was tasked to investigate Muslim marriages and related matters, it culminated in the draft Muslim Marriage Bill in 2003. The Bill was intended to deal the requirements of a valid Muslim marriage, its registration, proprietary consequences as well as it dissolution. However, the Bill received numerous concerns involving inter alia women's rights to equality which prompted the office of the South African Commission for Gender Equality to spearhead the drafting of an alternative Bill called the Recognition of Religious Marriages Bill. This Bill was general in application and provided for recognition of all religious marriages. For unknown reasons, this Bill was never passed into law. The Muslim Marriages Bill resurfaced in 2012 and again faced resistance, this time from the Muslim Lawyers Association who felt that a secular state should not be regulating religion.[27] The Bill has still not been passed and promulgated.

Income Tax Act, Estate Duty Act and the Transfer Duty Act

In 2001 the legislature took another step forward when it introduced a definition of "spouse" into the Income Tax Act, Estate Duty Act and the Transfer Duty Act. In terms of this definition, "spouse" means, in relation to any other person, a person who is the partner of that person:

- in a marriage or customary union recognized in terms of the laws of the Republic;
- in a union recognized as a marriage in accordance with the tenets of any religion; or
- in a same sex or heterosexual union which the Commissioner is satisfied is intended to be permanent.

In terms of this definition, spouses in Muslim marriages (and other religious marriages) enjoy the same tax relief as civil marriages, which include:

- No donations tax on donations between spouses.
- No transfer duty payable on the transfer of property between spouses on termination of the union, whether by death or break-up.
- No estate duty payable on any asset bequeathed to a spouse.
- No capital gains tax payable on the disposal of an asset, regardless of the manner of disposal, from one spouse to the other.

[27] South African Law Reform Commission. Project 59. *Islamic Marriages and Related Matters*. 2003.

Recent developments

As a result of the gap that exists in both the common law and legislation in terms of the recognition of Muslim marriages, the Women's Legal Centre (WLC) brought an application before the Western Cape High Court against the national executive and the legislature for their failure to recognise Muslim marriages as valid marriages in South African law. The Court unanimously found that the state had failed in its duty to recognise Muslim marriages. The court ordered that the legislation, which gives recognition to Muslim marriages, has to be enacted with two years from the date when the order was handed down. The President and the Minister of Justice appealed against the judgment and in a landmark judgment, the SCA held[28]:

- The failure by the State to take necessary legislative and other measures to recognise and regulate Muslim marriages is a breach of its duty under section 7(2) of the Constitution, which provides that the State must respect, promote and fulfil the rights in the Bill of Rights.
- The Marriage Act and the Divorce Act are inconsistent with the Constitution due to the fact they fail to fully recognise Muslim marriages and that they also do not regulate the consequences of such marriages.
- Other provisions of the Divorce Act were declared unconstitutional for the following reasons:
    - It does not allow a wife to approach a court to claim relief upon divorce by her husband in a Muslim marriage.
    - There is a distinction in the treatment between children born from Muslim marriages and children born from civil marriages upon divorce. A court has automatic supervision powers to ensure that the best interests of any minor child born from the (civil) marriage are protected. However, the courts are not involved in the dissolution of Muslim marriages and cannot play a supervisory role to ensure that the best interests of a minor child born out of such marriage are protected.
    - It does not provide for the redistribution of matrimonial property on the dissolution of a Muslim marriage, where it would be justified to do so.
- The definition of marriage in terms of the common law, which defines marriage as "the legally recognised voluntary union for life on one man and one woman to the exclusion of all others", was declared to be inconsistent with the Constitution and invalid to the extent that it excludes Muslim marriages.

[28] President of the RSA and Another v Womens Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others (612/19) [2020] ZASCA 177; [2021] 1 All SA 802 (SCA); 2021 (2) SA 381 (SCA) (18 December 2020).

- The declarations of constitutional invalidity are referred to the Constitutional Court for confirmation and are suspended for a period of 24 months to allow for existing legislation to be amended, or new legislation to be passed that will recognise and regulate Muslim marriages in South Africa.

In the interim, while the Constitutional Court considers the declaration of the constitutional invalidity, the SCA put in place some interim relief to allow spouses in a Muslim marriage to enjoy the same protection and benefit as civil marriages during divorce proceedings:

- Muslim marriages which have not yet been dissolved or are in the process of being dissolved at the date of the order (18 December 2020), may be dissolved in accordance with the Divorce Act as follows:
  - The entire Divorce Act will be applicable, except that that all Muslim marriages must be treated as if they are out of community of property (unless any agreements exist to the contrary).
  - In the case of polygamous Muslim marriages, courts must consider all relevant factors (such as any contracts or agreements) and must make any equitable order that it deems just. The courts may also join any person who has a sufficient interest in the matter (for example, the other spouse in the polygamous Muslim marriage).
  - Special protection to minor children in respect of consent to a marriage under section 12(2) of the Children's Act 38 of 2005 will also apply to Muslim marriages concluded after the date of this order. This means that a minor child above the minimum age cannot get married without him/her giving consent.

On 4 May 2021, the Green Paper on Marriages in South Africa (dated 20 April 2021) was published by the Minister of Home Affairs in the Government Gazette[29]. The purpose of this Paper is to attempt to harmonize all marriages in South Africa and the process is still ongoing. Issue Paper 41, entitled Review of Aspects of Matrimonial Property Law[30], drafted by the South African Law Reform Commission was published on 6 September 2021. This document likewise recognises the fact that the non-recognition of religious marriages in South Africa has left many women who are parties to such unions in an undesirable position[31].

[29] Government Gazette No. 44529, dated 4 May 2021.
[30] https://www.justice.gov.za/salrc/ipapers.htm.
[31] *Ibid* on page 24.

Conclusion

While there has not been much progress in terms of legislation since the dawn of democracy, the WLC-case shows a positive move towards allowing and providing for the full recognition of Muslim marriages in the future. However, until such time that full recognition is afforded, it is advisable that couples who wish to get married in terms of the Islamic faith should also enter into a civil marriage/union in order to enjoy the full protection of the law.

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Win with VPA

Maryke Marais CFP®
LLB, PG in Fin Plan, Adv. PG Dip in Estate Planning
Legal Advisor Advanced
Personal Finance: Free State

Introduction

An annuity can be broadly defined as a repetitive, periodical payment of a fixed amount of money which is chargeable against a person who is under an obligation to make such payments[1].

Annuities thus also include investment products purchased from insurance companies where the contracts have a life assured. Payments can either be for a fixed period or for the duration of the lifetime of the life assured.

A voluntary purchase annuity ("VPA") is an investment product which may be voluntarily purchased from an insurance company without there being a legal compulsion to do so. The investor will choose this product based on his individual needs.

A compulsory purchase annuity ("CPA") on the other hand, has to be purchased on retirement as a result of a person's past membership of a retirement fund[2] by operation of law. Unlike compulsory purchase annuities which must be purchased with capital from retirement funds, a VPA is purchased with an investor's own (after tax) capital, without any legal obligation to do so.

This article will focus on the tax consequences of the VPA, both during the lifetime of the investor and upon his death, and how the nomination of a beneficiary impacts the tax implications thereof.

As mentioned, a VPA is an investment product, which is purchased from an insurance company. Most often the investor is a natural person, but can also be a legal entity, for example a trust or a company. A "purchaser" as defined in section 10A(1) of the Income Tax Act[3] only includes a natural person or such person's deceased/insolvent estate or, in respect of a person who has been declared mentally ill and incapable of managing their own affairs by the High Court, their curator *bonis* or a trust created solely for their benefit[4]. Here it must be noted that this provision does not prohibit an entity falling outside this definition (for example a company or another type of trust) from purchasing a VPA, but an entity that does not qualify as a "purchaser" will not be entitled to the exclusion afforded by section 10A.

[1] Haupt 3.2.1 p59 and 60.
[2] A pension, provident, preservation or retirement annuity fund as defined in section 1 of the Income Tax Act.
[3] Act 58 of 1962.
[4] Haupt 4.18 p99.

In the case of an annuity purchased form an insurer, the investor pays the insurer a lump sum amount and in return the insurer pays the investor a set or determinable amount of money (annuity) periodically (usually monthly or annually) for a specified term (either a fixed term or for the duration of the life of the annuitant). Upon expiry of the term (often upon death of the annuitant), the payments cease and the remaining capital (if any) may, depending on the contract, remain with the insurer. The insurance company determines the income amount based on certain factors applicable to the investor as well as the prevailing interest rates. Factors that influence the income amount include the age, gender and life expectancy of the annuitant, whether they chose a guarantee period and whether there is more than one life assured under the annuity contract. The annuitant can also choose to have the income increased at a fixed or determinable percentage annually, which will decrease the initial annuity amount. The government-determined "draw down" rates for certain CPA's (i.e. living annuities) are not applicable to VPAs.

These types of investments may be attractive to more conservative investors who wish to be certain of their income (and possibly for a spouse upon the death of the annuitant) for the rest of their lives and do not wish to take on any market risk.

Due to the tax advantages discussed below and the fact that the remaining capital or annuity payments can be channelled away from a deceased estate via a beneficiary nomination, investors may also find a VPA attractive . Investors may also consider a VPA for the income benefit during their lifetime, with the added benefit of leaving the remainder of the capital to their children as part of their inheritance.

Taxation

Income tax

Annuity payments are specifically included in paragraph (a) of the definition of gross income in section 1 of the Income Tax Act[5]. This also includes amounts payable as a result of the commutation or termination of the annuity contract[6].

[5] Act 58 of 1962

[6] Paragraph (a) of the definition of "gross income" in section 1 of the Income Tax Act, read with the definition of "annuity amount" in section 10A(1) of the Income Tax Act; Haupt 4.18 p 99

VPAs are often referred to as Section 10A annuities, as the taxation of VPAs is regulated by Section 10A of the Income Tax Act[7]. A VPA payment essentially consists of a capital element and an income element. Section 10A exempts the capital element of the VPA and prescribes the formula for calculating the exempt portion of an 'annuity amount'. An annuity amount is defined as: "*an amount payable by way of annuity under an annuity contract and any amount payable in consequence of the commutation or termination of any such contract*[8]". An 'annuity contract' is an agreement between an insurer and a purchaser in terms of which the insurer agrees to pay the purchaser an annuity/annuities (and no other payments other than such annuity/annuities) until the death of the annuitant or for a specified term and in return the purchaser agrees to pay the insurer a specified lump sum[9]. It is interesting to note that this section only applies to natural persons and the exemption applies to annuity amounts payable to the purchaser; his/her deceased or insolvent estate or his/her spouse/surviving spouse and their deceased or insolvent estate.

For the Section 10A exemption to be applicable there must be[10]:

a) An agreement between an insurer and:
   (i) a natural person (this includes such person's deceased or insolvent estate) or
   (ii) the curator *bonis* of, or a trust created solely for the benefit of a natural person where the High Court declared such person of unsound mind and incapable of managing his own affairs and such Court ordered the appointment of such curator or creation of such trust; and
b) The annuity must be payable by the insurer until the death of the annuitant or the expiry of a specified term; and
c) The annuity must not be payable as a result of the rules of any type of retirement fund; and
d) The annuity must be payable to the purchaser him/herself or to their deceased/insolvent estate or to their spouse or surviving spouse.

Section 10A excludes annuity payments from CPA's and the exemption is thus not applicable to annuity payments from CPAs.

[7] Act 58 of 1962
[8] Section 10(A)(1) of the Income Tax Act; Haupt 4.18 bl98
[9] Section 10(A)(1) of the Income Tax Act; Haupt 4.18.
[10] 2020 Premiums and Problems pA18.

The capital element of a VPA, which is exempt from income tax, will be calculated as follows:

Y = A/B X C[11]

Where:

Y = The capital element (exempt portion)

A = The lump sum paid by the annuitant to the insurance company for the annuity contract

B = The total expected returns for all annuity payments under the contract

C = The monthly/annual/total amount of the annuity.

Example: Exempt portion of yearly annuity payment (fixed term)

Investor X purchases a VPA for an amount of R500,000 which will pay a yearly income of R50,000 for a period of 15 years. The capital element per year of assessment (tax year) will be:

Y = A/B X C

Y = R500,000/R750,000 (R50,000 x 15 years) x R50,000

Y = R33,333.33

The effect of this is that R33,333,33 of the yearly annuity payment of R50,000 will be exempt from gross income and the balance of R16 666.67 will be taxable.

Example: Exempt portion of yearly annuity payment (lifelong)

A female investor who is 67 years old buys a VPA (for life) for R700,000. She receives an annuity of R84,000 per year. Her expected life expectancy is 15,580 years[12].

The taxable portion will be calculated as follows:

Total expected return: R84,000 X 15,580 = R1,308,720

Y = R700,000/ R1,308,720 X R84,000 = R44,929.40

Thus the annual taxable portion will be R84,000 less R44,929.40 = 39,070.69

In the case of commutation of a VPA, any lump sum payable as a result of the termination or commutation of an annuity contract is included in the definition of gross income (as discussed above). Section 10A(3)[13] prescribes the formula for the portion of the lump sum that will be exempted from income tax. This formula is as follows:

X = A – D

[11] Section 10A(3)(a) of the Income Tax Act.
[12] Old Mutual Premiums & Problems, Edition 123, 2021, Editors S Cloete et al, page F26
[13] Of the Income Tax Act 58 of 1962

Where:

X = The capital element (exempt portion)

A = The amount originally paid by the annuitant

D = The total of the previously exempt portions of all annuity payments received under the annuity contract

Example: Exemption on commutation of VPA (fixed term)

Investor X paid R500,000 for a R50,000 annuity paid annually for a period of 15 years. After 10 years, X terminates the contract and receives a lump sum payment of R200,000. The exempt portion of the yearly annuity was R33,333. The capital element (exempt portion) of the lump sum payment will be:

X = A – D

X = R500,000 – R333,333,30 (R33,333.33 x 10 years)

= R166,666.70

Thus X will only be taxed on the amount of R33,333,30 (R200,000 lump sum less exempt portion of R166,666.70).

Where beneficiary continues receiving annuity payments upon the annuitant's death:

The Section 10A exemption of the capital element of a VPA is applicable if, upon the death of the annuitant, the annuity should pass to the surviving spouse of the annuitant or to the deceased estate. The exemption is however not granted should the VPA be transferred to someone else upon the death of the annuitant.

Example: Exemption on death of annuitant where the beneficiary opts to continue with annuity payments:

Investor AB purchased a 20 year VPA for R500,000. She received an annuity of R3,000 per month (R36,000 per year).

During her lifetime, the Section 10A exemption would thus have been calculated as follows:

Y = R500,000 / (R36,000 X 20) X R36,000 = R25,000 (Section 10A exemption).

Thus the annual taxable portion would thus have been R36,000 less R25,000 = R11,000 (taxable portion).

Should investor AB pass away before the 20-year term is over and ***she nominated her spouse*** as the beneficiary, the above calculation would be applied in the same fashion in his annual tax

return. However, if investor AB ***nominated her child*** as the beneficiary, the exemption would not apply. The child would be taxed on the full R36,000 per year for the remainder of the term.

Commutation/termination upon death of the annuitant

The same principles applicable to the continuation of a VPA upon the death of the annuitant iis applicable in the case of a commutation by the beneficiary on death, Therefore, , should the commuted VPA value of an investor be payable to the deceased estate or to asurviving spouse, the section 10A exemption would still be granted.

Example: Exemption on death of annuitant where the beneficiary opts to commute the VPA:

Investor AB dies10 years after purchasing a VPA for an amount of R500 000 in terms whereof she received annuity income of R25 000 per year. Her husband is the beneficiary and opts to commute the VPA. He receives a commuted lump sum of R300,000. The amount that will form part of his income is calculated as follows:

X = A - D

Exempt portion = R500,000 – R250,000 (R25,000 X 10) = R250,000 (Section 10A exemption)

The amount to be included in his income is R300,000 less R250,000 = R50,000.

The taxable amount would thus only be R50,000. If any other person other than the estate or her surviving spouse had been the beneficiary, the full R300,000 would have been taxable in their hands with no exemption available.

Capital Gains Tax

Income from a VPA is not subject to capital gains tax. Paragraph 35(3)(a) of the Eighth Schedule to the Income Tax Act provides as follows:

(3) The proceeds from the disposal, during a year of assessment, of an asset by a person, as contemplated in <u>subparagraph (1)</u> must be reduced by—

*(a) **<u>any amount</u>** of the proceeds that **<u>must be or was included in the gross income</u>** of that person or that must be or was taken into account when determining the taxable income of that person before the inclusion of any taxable capital gain;*

In other words, because payments from a VPA is included in the gross income of the annuitant (or beneficiary), it is not again included as proceeds for capital gains tax purposes as it will otherwise effectively amount to double taxation.

Estate Duty

Section 3(2)(b) of the Estate Duty Act[14] includes into the definition of "property" the "*right to an annuity (not charged upon property) <u>accruing to some other person on the death of the deceased</u>*[15]" (my emphasis).

If a VPA is purchased with a certain (or guaranteed) term and the annuitant should pass away before expiration of the term, the insurer is obliged to honour the contract until expiry of the contract term. The annuity will then in all likelihood be payable to the annuitant's nominated beneficiary, thereby accruing to someone else on the death of the annuitant and bringing it into the definition of property in terms of Section 3(2)(b)[16].

The value of this type of limited right passing to another is determined by Section 5(1)(d) of the Estate Duty Act.[17] Section 5(1)(d) provides as follows:

"*(d) in the case of any right to any annuity referred to in paragraph (b) of subsection (2) of section three, an amount equal to the value of the annuity capitalized at twelve per cent over the expectation of life of the person to whom the right to such annuity accrues on the death of the deceased,*

or if it is to be held for a lesser period than the life of such person, over such lesser period;"

If the VPA ceases on the death of the annuitant (not passing to another person) then it will not be property in the estate for estate duty purposes. It is further presumed that if the annuity should pass to a person who cannot be specified/identified, it will not have a value for estate duty purposes

Example: Annuity passing to another person on the death of annuitant:

Investor BC (a 50-year old male) purchased a joint life VPA for R800,000. The annual annuity is R60,000. His wife MN is the second life assured under the contract. BC passes away in year 5 of the annuity contract. MN is 65 years old at the time of his death.

The value of the VPA for estate duty purposes will be calculated as follows:

Annual value = R60,000

[14] 45 of 1955.
[15] Haupt 28.3.3 p 864.
[16] Of the Estate Duty Act 45 of 1955.
[17] 45 of 1955.

Age next birthday of MN = 66 years

Life expectancy of MN per Table A = 14.51

Present value of R1 at 12% for A as per Table A = 6.72393

Value to be included as property in the estate of BC:

R60,000 X 6.72393 = R403,435.80

Due to the Section 4q[18] deduction for assets accruing to the surviving spouse, the same amount will be deductible and the net effect for estate duty purposes would be zero.

If the additional life assured was, however, not BC's spouse for purposes of estate duty, the value would be fully dutiable.

Lump sum (commuted value) payable/passing[19]**:**

A question arises in respect of a nominated beneficiary, other than the spouse of the deceased, opting for the VPA to be commuted and paid as a lump sum. In this regard, there are two possible ways to place a value on such commutation in the estate of the deceased annuitant for estate duty purposes:

(i) The first possibility is based on the fact that, even though a benefit accrues to another person, this benefit no longer constitutes an annuity as the payment would be in the form of a once off lump sum and not repetitive payments. The argument is thus that the value included as property in the estate should therefore be equal to the value of lump sum.

(ii) The second viewpoint is that the value to be included in the deceased estate for estate duty purposes should still be calculated in terms of section 5(1)(d) of the Estate Duty Act. In this regard the interpretation of language used in section 3(2)(b) is of importance in that it provides as follows:

(2) "Property" means any right in or to property, movable or immovable, corporeal or incorporeal, and includes—

(b) any ***right to an annuity*** *(other than a right to an annuity charged upon any property) enjoyed by the deceased immediately prior to his death* ***which accrued to some other person*** *on the death of the deceased,*

[18] Of the Estate Duty Act 45 of 1955.

[19] Haupt 28.3.3 p864.

It could thus be argued that, irrespective of whether the beneficiary opts to receive the benefit in the form of an annuity or a commuted lump sum, it is still a right to an annuity that accrues to such beneficiary, and that it should thus be valued in terms of section 5(1)(d). In my view this is the correct interpretation, as it is in line with the language used in section 3(2)(b).

The value of the lump sum payment on commutation and the value calculated in terms of section 5(1)(d) may differ substantially, depending on the circumstances.

Example: Annuity commuted on the death of annuitant:

Investor BC (a 50-year old male) purchased a joint life VPA for R800,000. The annual annuity is R60,000. His daughter CD is the second life assured under the contract. BC passes away in year 5 of the annuity contract. CD is 9 years old at the time of his death.

The value of the VPA for estate duty purposes will be calculated as follows:

Annual value = R60,000

Age next birthday of CD = 10 years

Life expectancy of CD per Table A = 64.15

Present value of R1 at 12% for A as per Table A = 8.32753

Value to be included as property in the estate of BC:

R60,000 X 8.32753 = R599,582.16

If the VPA of a deceased person is payable to his estate (i.e. without a beneficiary nominated on the product), the treatment would, in my view, depend on the following circumstances:

(i) If it is evident from the will of the deceased annuitant that the right to the annuity is bequeathed to a specific person, or is transferred to the residual heir, it would be valued in terms of section 5(1)(d), as discussed above.

(ii) If it is evident that the commuted value must merely be paid as a cash amount to the estate, without the right to the annuity accruing to any person, it could be argued that section 5(1)(d) is not applicable. If this reasoning is correct, the claim by the deceased estate against the insurer would however still constitute property, as contemplated in section 3(2). However, because the right to the annuity does not accrue to a person, the value of the claim (as property) should then be equal to the lump sum payable. Tax incurred as a result of the lump sum payment of the VPA would then however qualify for a deduction in terms of section 4(b) of the Estate Duty Act, as the deceased estate will be liable for payment of same,

Conclusion

When a client considers investing in a VPA, cognisance should be taken of the fact that not all classes of investor are entitled to the Section 10A exemption. An investor should likewise be made aware of the fact that, in the absence of the VPA accruing to the spouse or deceased estate in the event of the death of the investor, the Section 10A exemption will not be applied in respect of VPA proceeds paid to the beneficiary. In other words, guard against accidentally making after-tax money re-taxable by giving improper advice.

From an estate duty point of view, the VPA will constitute property in the estate of a deceased investor and may thus increase the estate duty liability, unless the VPA is bequeathed to a surviving spouse.

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"Life Rights"- An Effective Retirement scheme to reduce the Value in an Estate

Monica Moodley CFP®
LLB, Adv. PG Dip in Estate Plan
Legal Advisor Manager
Personal Finance: Western Cape

Introduction

The Financial Advisory and Intermediary Services (FAIS) Act 37 of 2002, entrenches the concept of holistic financial planning, which includes retirement planning. Retirement is a life-changing event, which involves a re-evaluation of one's life. This article will evaluate the use of a life right, where a retiree purchases the right to live in a retirement village for retirement.

What is a life right

" Life rights" is a retirement scheme, and it is important that financial advisors must have knowledge of life rights options and the impact that such ownership have on the client's future financial planning.

The South African Association of Retired Persons (SAARP)[1] defines life rights ownership as:
"a guaranteed right to occupation of individuals for their lifetime, whereby ownership is retained by the administering authority, and is resold after the demise of the last dying spouse".

Life rights means that a retiree is purchasing the right to live in a retirement village for a fixed amount (a pre-established formula is applied). Based on the terms and conditions of the agreement, it can be for the remainder of the retiree's life or on the death of the last dying spouse. The purchaser is merely buying the right to live in the property and not the property itself, as the ownership of the property still lies in the hands of the developer.

Upon death of the resident, the developer has the option to resell or regrant the life right. There is a guaranteed buy back on the property due to the agreement that was signed at the time of purchase. The participant of a life rights scheme has the security of tenure for the remainder of his/ her life and that of the spouse (dependant on the provisions of the agreement).

When a couple is married, the concern that arises is whether the surviving spouse can continue to enjoy the benefits of the purchased life right. This will solely be dependent on the agreement that was signed at the time of purchase. It is vitally important that provision should be made for this in such an instance.

[1] The South African Association of Retired Persons, https://www.saarp.net/

The life rights acquired is protected by legislation. Such rights are regulated and subject to the Housing Development Schemes for Retired Persons Act, 65 of 1988 (the Act)(HDSRPA).[2]

In terms of Section 1 of the Housing Development Schemes for Retired Persons Act, a "'right of occupation" means the right of a purchaser of a housing interest- [3]

(a) which is subject to the payment of a fixed or determinable sum of money by way of a loan or otherwise, payable in one amount or in instalments, in addition to or in lieu of a levy, and whether or not such a sum of money is in whole or in part refundable to the purchaser or any other person or to the estate of the purchaser or of such other person; and

(b) which confers the power to occupy a unit in a housing development scheme for the duration of the lifetime of the purchaser or, subject to section 7, any other person mentioned in the contract in terms of which the housing interest is acquired, but without conferring the power to claim transfer of the ownership of the unit to which the housing interest is acquired, but without conferring the power to claim transfer of the ownership of the unit to which the housing interest relates;".

The HDSRPA contains vital information in relation to purchasing a life right in a retirement village.

The advantages and disadvantage of a life right

Some of the advantages associated with owning a life right are:[4]

- ❑ The onus to maintain and upkeep the property passes onto the developer
- ❑ Certain of the schemes is inclusive of meal plans
- ❑ There are social activities for residents to participate in and remain socially connected
- ❑ There is peace of mind regarding their safety and security
- ❑ There is nursing and frail care facilities available to the residents
- ❑ There are tax advantages (since there is no ownership of property, there is no transfer duty, capital gains tax and estate duty).

Consideration must be given to the fact that since the retiree is merely buying the right to live in the property and not the property itself, the ownership of the property therefore still lies in the hands of the developer. If leaving a financial legacy behind for children and grandchildren is a priority, investing in a life right scheme is perhaps not an option that should be explored.

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[2] Housing Development Schemes for Retired Persons Act, 65 of 1988 -https://www.gov.za/
[3] Housing Development Schemes for Retired Persons Amendment Act, 70 of 1990 -https://www.gov.za/
[4] Life-rights-vs-full-title-ownership-which-is-better-for-retirement/ https://www.deplattekloof.co.za/

What must a life right agreement include?

Life rights are regulated by the HDSRPA, which lays down certain important requirements. The most important requirement is that it stipulates a minimum age requirement. The qualifying age that a person may purchase a life right is age 50, however some schemes may have a higher qualifying age criteria.[5]

Below are *some* of the important factors that need to be included in the agreement.[6] The agreement (purchase or sale agreement) must: -

- ❑ Be in writing
- ❑ Be signed by all parties (seller and purchaser, they can be represented by an agent, the agent's authority must be in writing)
- ❑ Be in a language preference selected by the purchaser
- ❑ Have clarity in relation to the parties of the agreement (full names, identity number or registration details and addresses)
- ❑ Include a description of the full right being sold
- ❑ Include a description of the land (erf number)
- ❑ Include the purchase price (the HDSRPA refers to "consideration")
- ❑ Include details of the bond (if applicable)

  Include a section 6 -(1) certificate that must be furnished to the participant (this is a certificate by the architect or quantity surveyor confirming that the retirement village was erected according to approved plans).

A developer can only sell a life right in the retirement village and receive the proceeds if the title deed has been endorsed in the Deeds Office. If the developer fails to do this, it could result in a fine and imprisonment.

Cost implications of a life right

When purchasing a property, the tax implications of such transaction must be given careful attention.

[5] Housing Development Schemes for Retired Persons Act, 65 of 1988 -https://www.gov.za/
Section 1: "retired person" means a person who is 50 years of age or older"
[6] Life Rights for senior citizens in retirement villages- A check list for attorneys- https://www.derebus.org.za

Transfer Duty

When real estate is purchased, there are various costs that need to be catered for. Aside from the purchase price that need to be paid, transfer duty and transfer fees such as conveyancing costs become applicable. "Transfer Duty is a tax levied on the value of any property acquired by any person by way of a transaction or in any other way"[7]. Transfer duty is based on the value of the property and needs to be paid to the South African Revenue Service (SARS).

In the 2021 Budget speech, there was an amendment to the transfer duty calculation, in relation to property transactions. The threshold had been increased from R900 000 to R 1000 000. This in effect means that if a property is purchased for R1 000 - 000 or less, transfer duty will not be applicable. The transfer fees however need to be catered for.

Cognisance must be taken of the fact that property transactions cannot be subject to both VAT and transfer duty. If the property is being purchased from a developer who is a VAT vendor, then the purchaser will be liable for VAT(15%) instead of transfer Duty[8]

According to the latest SARS schedule, transfer duty rates are as follows: [9]

Value of the Property	Rate
R1 – R1 000 000	0%
R1 000 001 – R1 375 000	3% of the value above R1 000 000
R1 375 001 – R1 925 000	R11 250 + 6% of the value above R1 375 000
R1 925 001 – R2 475 000	R44 250 + 8% of the value above R1 925 000
R2 475 001 – R11 000 000	R88 250 + 11% of the value above R2 475 000
R11 000 001 and above	R1 026 000 + 13% of the value above R11 000 000

If tax liability is a concern, purchasing a life right is a viable option to consider.
Since purchasing a life right does not constitute the purchase of property, this transaction is not considered as a property transfer. There is thus no transfer duty or VAT payable. Further, since

[7] Transfer Duty- https://www.sars.gov.za/tax-rates/transfer-duty/
[8] Can the sale of a property be subject to both VAT and Transfer Duty https://www.sars.gov.za/faq/faq-can-the-sale-of-a-property-be-subject-to-both-vat-and-transfer-duty/
[9] Transfer Duty- https://www.sars.gov.za/tax-rates/transfer-duty/

this transaction does not need to be registered with the Deeds Office, registration will be a fast process from one holder to another[10].

The table below illustrates the numerical differences of administration costs ***on death*** between holding a property in a person's own name, versus holding a life right. (Property value at R7 500 000, as per example below):

Administration Costs	**Life Right**	**Property in Personal Name**
Residence	R0	R 73 408[11]
Masters fees	R7000	R7000
Funeral costs	R50 000	R50 000
General (advertisements, bank charges etc.)	R10 000	R10 000
TOTAL	**R67 000**	**R140 408**

Capital Gains Tax

Another potential liability that must be taken into account is capital gains tax.

"Capital gains tax (CGT) is not a separate tax but forms part of the income tax liability of a person. A capital gain arises when you dispose of an asset on or after 1 October 2001 for proceeds that exceed its base cost"[12].

The relevant legislation is contained in the Eighth Schedule to the Income Tax Act 58 of 1962[13].

In calculating the capital gains tax liability, note must be taken of some of the exclusions that has been afforded.

- a gain of up to R2 million on an individual's primary residence is excluded,
- personal assets such as private vehicles,
- ***cash is also exempt from CGT,***
- individuals have an annual capital gain exclusion of R40 000 during their lives, and in the year of assessment upon death, R300 000.

[10] Transfer Duty Act 40 of 1949 property" means land in the Republic and any fixtures thereon, and includes— (a) any real right in land but excluding any right under a mortgage bond or a lease of property other than a lease referred to in paragraph (c)

[11] Tables of Costs for Conveyancing- 2021 Lexis Nexis- Transfer Fees

[12] https://www.sars.gov.za/types-of-tax/capital-gains-tax/

[13] Income Tax Act 58 of 1962. Available at http:// www.gov.za

If a retiree had invested in purchasing property in his personal capacity, CGT could be triggered upon disposal of this property. Each case needs to be looked at individually, weighing the individual's needs, the value of the property and also taking into account the exemptions afforded by the relevant legislations. Section 9HA of the Income Tax Act[14] is also relevant and deals with deemed disposals by a deceased person. Capital gains tax (CGT) is not a separate tax but forms part of the final income tax return that must be prepared after the death of a taxpayer.

If leaving a financial legacy behind for children and grandchildren is not a priority, investing in a life right scheme is an option that should be explored. As previously mentioned, the retiree is merely buying the right to live in the property and not the property itself. As such the ownership of the property still lies in the hands of the developer. Due to this, the retiree will not be liable for any CGT that may become due and payable, as he/she is not the registered owner of the property. Furthermore, upon the death of the retiree, the cash value that is repaid to the estate, as per the signed agreement, will not be taken into consideration for CGT calculations, as it falls under the exemptions that is afforded by the Act.

Estate Duty

A further tax that should be considered is estate duty. An estate for the purposes of the Estate Duty Act 45 of 1955, consists of "property" and "deemed property".

In terms of section3(2) of the Estate Duty Act, "property is defined as any right in or to property, moveable or immovable, corporeal or incorporeal".

In terms of section 3(3) of the Estate Duty Act, "deemed property" is property which did not exist as real property at the time of the death of the deceased or which did not belong to the deceased"

Deemed property consists of :

S 3 (3) (a) Domestic policies of insurance on the life of the deceased.

S 3 (3) (b) Property donated by the deceased in terms of a donation which was exempt from donations tax under s 56(1) (c) or (d) of the Income Tax Act.

S 3 (3) (Ca) Accruals under the Matrimonial Property Act.

[14] South African Institute of Professional Accounts- https://www.saipa.co.za

S 3 (3) (d) Property which the deceased was competent to dispose of for his own benefit or for the benefit of his estate. [15]

Assets in a deceased estate include immovable property, movable property as well as cash in the bank.

When dealing with a life right, cognisance must be taken of the fact that since ownership of the fixed property is registered in the name of the developer, the market value of such property will not be included in the estate of the deceased participant, but only the cash value that is returned to the estate, as per the agreement signed.

A life right will not constitute a fiduciary, usufructuary or other like interest in property held by the deceased immediately prior to death, as a life right is not a real right in property, but rather a personal right based on the agreement.

It must be borne in mind that, as mentioned above, on the death of the participant or the spouse, the property itself is not an asset in their estate, therefore provision cannot be made to distribute the property to heirs. The proceeds received as per the pre-established formula, will be distributed to the nominated beneficiaries in terms of a valid Will or in terms of the law of intestate succession.

The example below illustrates the difference in tax liability between owning property in an individual's personal capacity versus owning a life right in a retirement village. (The value of the life right is the amount that the estate will be paid in terms of the agreement if the participant dies)

Example:
Doctor Jeraney, a single cardio vascular surgeon, has the following assets in her personal name:
Property in Camps Bay valued at R7 500 000. This property was purchased before 1 October 2001.
BMW 440i Grand Coupe 8-sp Sports valued at R800 000.
Maserati Grand Cabrio Sports Special Edition valued at R3 500 000
Her liabilities, not related to the property is valued at R1000 000.

[15] Estate Duty Act 45 of 1955 - https://www.gov.za

All other assets are held in a correctly structured *inter vivos* trust.
Assume that if she purchases a life right, the value thereof will be R1 000 000 on her death.

The example below merely illustrates the difference between a property owned by a person and a life right. It does not take into account cash that could be in the estate subsequent to the sale of property on deciding to purchase a life right, or the costs and taxes involved in selling a property in order to purchase a life right.

	Life right	**Property (Personal Name)**
<u>Assets subject to CGT</u>	No CGT applicable (holder of life right)	Property (Camps Bay)
Base cost		R1 500 000 (20% method used to calculate base cost)
Market value		R7 500 000
Total Gain		R6 000 000
Exclusions		
Primary Residence exclusion		R 2 000 000
Exclusion in year of death		R300 000
Total exclusion		R2 300 000
***Less:* Assessed Losses**		0
Net Capital Gain		R 3 700 000
Inclusion Rate (40%)		R 1 480 000
Assumed Marginal Rate (45%) **Total CGT Payable**		R666 000

	Life Right	**Property: (Personal Name)**
Property	R 5 300 000	R 11 800 000
***Add*: Deemed Property**	-	-

***Less*: Liability**	R1 000 000	R 1 000 000
Administration Cost	R 67 000 (calculations reflected above under administration costs)	R140 408 (calculations reflected above under owning "property in personal name")
***Less*: Executors Fees (4.025%)**	R 213 590	R 475 540
***Less*: CGT**	R -	R 666 000
***Less*: Other deductions**	R -	R -
***Less*: Primary Abatement**	R 3 500 000	R 3 500 000
Dutiable Estate	R 519 410	R 6 018 052
Estate Duty Payable	R 103 882	R 1 203 610

Conclusion

There is always a concern that a person may outlive their retirement savings. This could result in them being forced to sell their residence due to affordability. A life right offers a solution whereby a pensioner is guaranteed a home for the remainder of his/her life. It could be as a cost effective option as the purchase price is usually lower than purchasing a property and the tax liability as well as other costs that arises from such transaction could be exorbitant, as illustrated above. If this scheme is selected as part of a retirement plan, it can bring about financial peace of mind to the retiree.

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Can the sale of a property be subject to both VAT and Transfer Duty

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