DLA CLIFFE DEKKER HOFMEYR

TRUSTS AND ESTATES ALERT

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MARRIAGE - AN IMMUTABLE FACT

Your marriage status and the form of your marriage hold what are known as immutable consequences in law. In other words, you personally cannot, without legal recourse, elect to alter the fact and consequences. This particularly applies to your estate and its devolution.

Over and above the common law, a number of statutes refer to 'spouse' and 'marriage'. These terms have a direct bearing on the Law of Succession, which we will discuss in this alert.[1]

If you have not entered into a pre- or post-nuptial contract and your marriage is not regulated by a foreign marriage regime, the default dispensation is that you are married in community of property. From a succession perspective, the effect of an in community of property estate is that, on your death you are only entitled to effectively dispose of an undivided half share of your estate, either by means of your Will or through the operation of the Law of Intestate Succession. In other words, your assets are equally shared between your spouse and beneficiaries. Your surviving spouse will automatically be entitled to a 50% share of your estate by virtue of the marriage, without any formality and no matter what you might otherwise wish.

On a practical level, the economic impact and viability of halving an estate and the difficulty of co-ownership can be challenging. But these challenges can be overcome by using certain estate planning techniques.

In limited circumstances, a possible solution would be for a couple to consider entering into a post nuptial agreement in terms of section 21 of the Matrimonial Property Act, No 88 of 1984. Spouses could also consider a mutual Will incorporating 'massing' thereby dealing with the estate as a whole on the death of the first-dying. By massing, or consolidating the properties of both parties, the spouses can jointly determine what part of the joint estate will be available for the benefit of the surviving spouse and what part to the other beneficiaries. Alternatively, after the death of the first-dying spouse, the beneficiaries to the estate may repudiate and so alter undesirable or impractical results or the beneficiaries can enter into a Redistribution Agreement where the distribution may be altered to be more practical. From the perspective of a testator preparing a Will, some negative consequences can be avoided in that you can direct in your Will that any inheritance does not form part of the beneficiaries' joint estate. The person inheriting would then have two estates - a joint and an exclusive estate. This advantage is often lost sight of by advocators of the cost and time benefits of direct beneficiary nominations through policiesand other select investments.

If you are married under an antenuptial contract that excludes the accrual of your spouse's estate, each of your estates is separate and neither the survivor nor the deceased has a right against the other's estate to any automatic benefit.

But if your antenuptial contract includes accrual, it means that the assets may be shared. On dissolution of the marriage by death, the estate values are determined separately according to commencement values and excluded assets. The larger estate must then transfer half the net difference to the smaller estate. This means that either the surviving spouse may have a claim against the estate or the estate may have a claim against the surviving spouse.

While there may be certain estate duty benefits for a claim to lie against the estate, on a practical level there could also be unintended negative consequences, particularly if the claim is against the surviving spouse. Enforcing such a claim could mean that the value of the estate of the first-dying spouse could increase and the estate of the survivor could face liquidity problems. If the claim is waived it may attract capital gains tax.

continued

[1] In our next alert we will look at the extension of the terms 'spouse' and 'marriage' since 1994.

When drafting your Will you need to consider carefully the nature of any antenuptial contract and gauge your estate's projected termination values and consider the specific terms of the agreement and the likely consequences.

If you die without a valid Will, the Intestate Succession Act, No 81 of 1987 will determine who your beneficiaries are and how much they are entitled to.

The Act determines that a surviving spouse is entitled to a so-called 'child's share', subject to a minimum distribution. The net estate is divided by the number of children plus one (the surviving spouse) and each is entitled to an equal share, subject to a minimum distribution of R125,000. This amount was gazetted in March 1998 and with inflation, is now potentially inadequate provision for a surviving spouse, especially in a small estate.In a large estate, it might mean that the children receive too much, particularly if the children are still minors. In the circumstances, it is possible to enter into a Section 38 takeover agreement so as to provide a practical solution for the surviving spouse who usually is responsible for maintaining dependent children.

In South African law, every person has testamentary freedom to dispose of their property as they please, even omitting or disinheriting a spouse. But whatever the Will may say, a deceased estate can be held liable to provide funds for the maintenance of the surviving spouse who must maintain them. The surviving spouse has recourse to the Surviving Spouse's Maintenance Act, No 27 of 1990 to institute a claim against the estate for such maintenance. If this should happen, the executor (and a court, in unresolved situations) must consider factors like the funds in the estate, amounts available for distribution to the beneficiaries, and the surviving spouse's likely means, earning capacity, financial needs and obligations. The executor, or court, would also take into account the length of the marriage, standard of living during the marriage and age of the deceased at the time of death.

The position of the surviving spouse is favourably dealt with in the Income Tax Act, No 58 of 1962 (specifically the 8th Schedule, which deals with capital gains tax) as well as the Estate Duty Act, No 45 of 1955.

Death is a deemed capital gains tax event, meaning that your assets are regarded as having been sold on the date of your death. However, to the extent that the surviving spouse is your beneficiary, your assets become subject to capital gains tax only on the death of that spouse. So capital gains tax is delayed, but not extinguished.

Under Section 4(A) of the Estate Duty Act, estate duty becomes payable on the net asset value of an estate over R3,5 million. However, all benefits flowing to a surviving spouse are exempt under Section 4(q). Again, this is not an absolute exemption, but a deferment to date of the second-dying. As of 1 January 2010, the unused portion of the Section 4(A) abatement was made available to the surviving spouse, with the result that a married couple collectively enjoy a combined basic exemption of R7 million. This latest dispensation, which introduced the 'portable spousal deduction', has been the death knell to the ubiquitous Testamentary Trust.

It should be apparent that drafting Wills and executing, revoking or amending them, is by no means straightforward and an understanding of other aspects of law such as your marriage and its immutable consequences, should be carefully considered.

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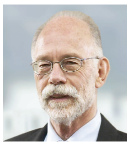

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