



TRUSTS AND ESTATES

ALERT

DOES IT FALL INTO MY ESTATE?

In this alert, we pick up a theme raised in a previous alert stressing the importance of pre-planning before drafting a Will, which leads us to the question: what falls into the estate?

Put differently, it is often glibly stated "it does not fall into your estate". But what does it mean exactly?

There are three possible applications and implications to this expression.

The asset does not attract estate duty

The first is that the asset does not fall into your estate, from an estate duty perspective. In other words, no estate duty will be payable on the asset or the value of the asset.

Effectively estate duty is payable on your net estate at the rate of 20% on the amount exceeding R3,5 million. So the non-inclusion of an asset may reduce the amount of estate duty payable.

The most common assets that fall outside your estate for estate duty purposes are those that are bequeathed to your surviving spouse (section 4q of the Estate Duty Act) and those benefits left to recognised public benefit organisations (charities), (section 4h of the Act). From an estate planning perspective, these two statutory exemptions should be considered.

Further exclusions were introduced recently with the insertion of section 3(2)(i) which states that the benefit payable in consequence of death from any pension, provident, retirement annuity and preservation fund introduced after 1 January 2009, is excluded.

Legal and policy distributions

The next type of asset that could be said to be excluded from your estate are those that are generally distributed in terms of certain legislative or policy considerations rather than in terms of your Last Will, or in terms of the Law of Intestate Succession.

The most obvious interest that falls into this category is the proceeds of policies such as endowment or life policies. The reason for this is that by making such an investment, the contracting party (the deceased) entered into a contract with a company (eg insurance company) through which the proceeds would be paid to a third party (the nominated beneficiary) when a certain date or event (such as death) is reached.

This type of contract is in legal terms known as a *stipulatio alteri*, or a contract for the benefit of a third party. The proceeds from these contracts are generally paid out much sooner than other assets which are only distributed, when the estate is finalised. A distribution of this nature does not necessarily involve the intervention of the executor of the estate and is paid on presentation of the death certificate, as long as there are no untoward causes of death of the contracting party.

To gain the benefit of such a policy and to ensure certainty, it is usually a contractual term that the nomination of the beneficiary must be in writing (usually on the standard proforma of the insurance company). It must also have reached or been registered by the insurance company before the event or the date of death.

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Where pension funds are involved, the expression "it falls out of the estate" is even more relevant. Determining the identity of the beneficiaries and the amounts they are entitled to is subject to the over-arching provisions of the Pension Fund Act (section 37C). Under this section, the trustees of the relevant fund must exercise their discretion when considering to whom the proceeds should be paid and in what amount, and who may qualify as factual or legal dependents of the deceased.

In practice it means that although you are entitled to nominate beneficiaries to the proceeds of such funds, the trustees can partially or fully vary the distribution, given the tax concessions the deceased would have enjoyed while making contribution to these funds, and the state's concern for the welfare of dependents.

When considering your potential beneficiaries, clearly, you need to consider the benefits your intended dependents may or may not receive from other sources.

Once the trustees have exercised their discretion (the Act gives them a period of a year to do so), they will make payment directly to the beneficiary or to a trust created for the benefit of a minor beneficiary. Only if no nominations and beneficiaries have been identified will the proceeds from policies be paid into the estate and the funds collected by the executor.

Executor fees

Lastly, the phrase may allude to the fact that the executor will not be entitled to commission on the asset or the proceeds collected because the money has been paid directly to the beneficiary. In practice, the executor will still have to consider and obtain the documents pertaining to these proceeds or investments, if for no other reason than to complete the necessary estate duty returns.

Recommendations

To deal adequately with your assets and harmonise the benefits with your overall scheme of inheritance, you need to bear in mind that estate planning is wider than merely having a Will. It often requires the collaboration of a number of professionals, such as financial planners, brokers and drafters of Wills.

As part of the exercise, you should ensure that your nominations for the benefits discussed herein are up to date and recorded by the relevant institutions, and that copies of these and other important documents are kept with your Will.

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