



MOORE

MOORE SOUTH AFRICA

# ESTATE PLANNING GUIDE

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## **IMPORTANT NOTE AND DISCLAIMER**

This guide is intended as an easy reference, pocket-sized guide for the estate planner, and anybody involved in estate planning.

The information contained herein is a summary of some of the key estate planning principles. Estate planning touches on many areas, and involves not only planning for death, but also planning during your lifetime – from financial planning, health planning, matrimonial property regime planning, income tax and business planning, to offshore and retirement planning – all of which should form part of any comprehensive estate planning exercise. The main thrust of this guide is to provide the estate planner with an overview on how to plan his estate during his lifetime, with the primary goal of transferring his wealth to his beneficiaries, so that they receive the maximum benefit.

Many aspects of a comprehensive plan have been omitted due to limitations in length of the guide (except where overlaps may occur). These include disability planning, retirement planning, insolvency planning, investment structuring, and offshore planning. All these activities do form part of a comprehensive plan, and it is recommended that the estate planner consult with his estate planning team for assistance to develop strategies in regard to each of these activities.

### **Disclaimer**

We recommend that professional advice be sought before making any decisions based on this guide's contents or when dealing with any matters relating thereto. The guide should not be treated as a substitute for advice. Professional advice must therefore be sought in relation to any aspect referred to in this guide.

All references to the masculine gender shall include the feminine (and vice versa), and in particular, any reference to testator or executor shall include testatrix or executrix.

While every care has been taken in the compilation of this guide, no responsibility of any nature whatsoever shall be accepted for any inaccuracies, errors or omissions.

## WHAT IS ESTATE PLANNING?

- An 'estate' comprises the assets and liabilities that an estate planner accumulates during his lifetime, and which he leaves behind at his death.
- 'Estate planning' has been defined as the process of creating and managing a programme that is designed to:
  - ◆ Preserve, increase and protect an estate planner's assets during his lifetime;
  - ◆ Ensure the most effective and beneficial distribution thereof to succeeding generations on his death, and in accordance with his wishes.
- A common misconception about estate planning is that it revolves solely around the making of a Last Will and Testament, or the structuring of an estate planner's affairs so as to reduce estate duty.
- Estate planning is multidisciplinary in nature, and should take into account an individual estate planner's financial, economical, social, and psychological needs in relation to his estate, himself, his family and his beneficiaries.
- It is not a once-and-for-all activity. The estate planner should regard it as a process, with built in flexibility.
- It involves the estate planner entering into a strategic exercise, comprising the following steps:

**Determining a snapshot of net worth – including assets, liabilities and income**



**Setting goals and planning objectives – deciding in advance what to do with assets and liabilities**



**Deciding on appropriate estate planning tools – once the objectives have been set, deciding on 'how' to do it**



**Setting timeframes – deciding 'when' to do it**



**Execution – deciding 'who' should do it, deciding on the team of professionals to assist with executing the plan**

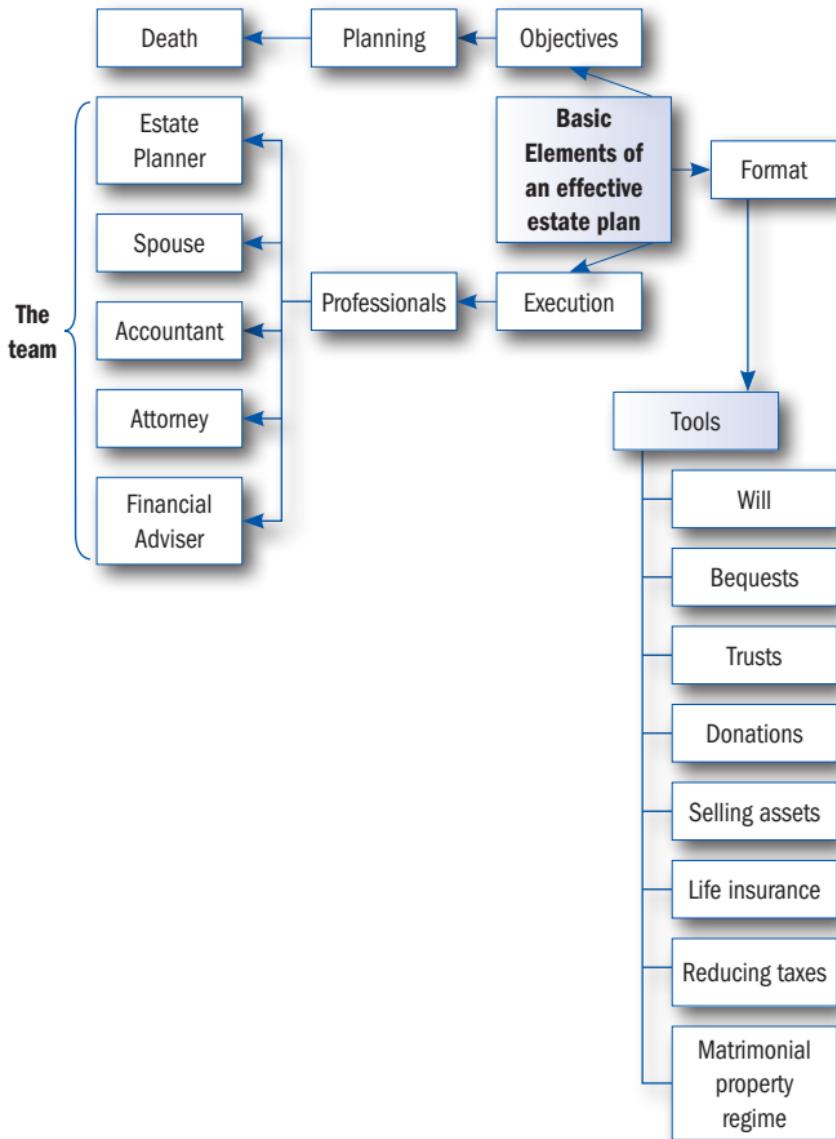
## WHO NEEDS TO DO ESTATE PLANNING?

- Many may think that they are not old enough or wealthy enough to warrant doing any estate planning. However, if a person is over the age of eighteen, no matter how small his estate is, it is advisable to begin the process. It is important to note that all persons 16 years and older are competent to make a Last Will and Testament, in order to determine how their estate should devolve upon their death (where applicable).
- Where an estate planner is “at” in life, will determine his strategic plan for his estate, and which techniques to use in order to implement in the plan. An estate planner may be single, married, divorced, or separated. He may have minor children or adult children. He may be married for a second or third time, with children from previous marriages. He may own assets with a strong growth potential.
- Each plan will be unique and structured according to an estate planner’s own unique set of circumstances, goals and objectives, and reviewed regularly to take account of personal and legislative changes.

## Who should be involved?

- The estate planner should work together with an estate planning team, which usually comprises a set of professionals, including an accountant, attorney, and financial adviser.
- The professional team should assist the estate planner with developing and reviewing his estate goals, providing direction on various strategies and tactics, performing cost-benefit analyses, providing advice on the tax implications of various strategies and tactics, and most importantly liaising with other professionals on the estate planning team.
- The attorney may assist with drawing up legal documents such as the Last Will and Testament and an inter vivos trust deed. The financial adviser may assist with ensuring the estate is liquid, and the accountant may typically assist with tax planning. Family members, more specifically, a spouse should also form part of the team, especially where more complex plans are contemplated.

## Flow chart: Strategy of estate planning for death



## AIMS OF ESTATE PLANNING

- The main aim for the estate planner, working together with his estate planning team, is to ensure that as much of his accumulated wealth is utilised for his own benefit and for the maximum utilisation of his dependants on his death.
- Some of the goals of estate planning can be summarised as follows:
- **To achieve efficient deceased estate administration**
  - ◆ To ensure that the winding up of an estate takes place as efficiently and effectively as possible.
- **To appoint heirs or legatees of choice and distribute assets as the estate planner wishes**
  - ◆ Where there is no Last Will and Testament, the estate will be dealt with in accordance with the law of intestate succession, and thus his assets may be dealt with in a manner that was not in accordance with his intentions. A Last Will and Testament will indicate the estate planner's wishes, and ensure that his assets are transferred to heirs and legatees of his choice.
- **To provide liquidity**
  - ◆ Ongoing planning for the liquidity needs of an estate is an essential element of estate planning. Should an estate not be liquid at death, the deceased's family members and dependants may suffer hardship, as they may have to provide the cash themselves or agree to the sale of an asset to generate the cash needed.
  - ◆ Planning for liquidity means ensuring, inter alia, that there are sufficient cash funds available in an estate to:
    - Pay estate duty
    - Settle liabilities and administration costs
    - Provide for other taxation liabilities that may arise at death, such as capital gains tax.
- **To provide for dependants and protect minor beneficiaries**
  - ◆ To ensure that dependants are adequately provided for during an estate

planner's lifetime, and after his death.

- ◆ To provide protections for minor beneficiaries, including custody and/or guardianship, and to prevent any bequests to a minor being held by the Guardian's Fund until he reaches majority.

- **To minimise the impact of taxation on an estate**

- ◆ Suitable planning could help minimise the impact of tax on an estate including estate duty, income tax, capital gains tax, value-added tax and transfer duty.

- **To provide for future growth of assets outside the estate planner's estate**

- **To provide for business interests (where applicable)**

- ◆ An estate planner's business interests may impact on his personal affairs, and indeed his estate.

- **To provide for an estate planner's own set of unique circumstances**

- ◆ An estate planner may have been involved in more than one marriage or relationship, or have obligations to various children, perhaps from different marriages. Each set of circumstances will need careful planning.

- **To take account of offshore assets (where applicable)**

- ◆ An estate planner may hold assets offshore. When embarking on the process of planning his estate, the estate planner needs to take account of his global estate.

- **To decide whether to execute a Living Will**

- ◆ The Living Will is an advance directive, devised to stand as a declaration of non-consent to artificial life-support in the event of the patient being unable to communicate in the event of incapacity.

- **To minimise costs**

- ◆ The estate planner, together with the estate planning team should carry out an exercise of weighing the costs against the benefits of implementing the proposed plan, taking into account professional fees, transfer duty, securities transfer tax, estate duty, donation tax and capital gains tax implications.

- **To ensure that the plan is both practical, legal and efficient**
  - ◆ An estate planner needs to align his goals with the practicalities of implementing strategies to achieve those goals.
  - ◆ In theory, what might seem to be an effective strategy may in reality be practically inconvenient and inefficient to the estate planner and his spouse during their lifetime. They may both need easy access to income and capital resources during their lifetimes.
  - ◆ Using estate planning tools solely with the main aim of paying less income tax is problematic. Planning should not be done in such a way that taxation savings are part of the solution, but not the sole solution.

- **Provide for built in flexibility**

- ◆ Any changes and amendments to the plan should be able to be implemented at minimal cost and inconvenience to the estate planner.

As a starting point in the process, the estate planner should:

- Determine an estimate of his net worth (assets less liabilities).
- List his goals and planning objectives, based on his personal needs, financial circumstances, lifestyle and practical efficiencies.

## TYPES OF MARRIAGES IN SOUTH AFRICA

The following pieces of legislation recognise a "marriage" for all purposes, in South Africa, as follows:

- **The Marriage Act (no. 25 of 1961)** is an act of the Parliament of South Africa governing the solemnisation and registration of marriages in South Africa.
- **The Civil Union Act (no.17 of 2006)** allows for, inter alia, same-sex marriages, which are legally equivalent to marriages under the Marriage Act.
- **The Recognition of Customary Marriages Act (no.120 of 1998)** - all customary marriages between black persons.

### Introduction

Once planning objectives have been set, the next step is for the team to decide on which tools are most appropriate to execute the plan.

- In estate planning, there are plenty of tools available, such as:
  - ◆ The Last Will and Testament
  - ◆ Bequests
  - ◆ Trusts
  - ◆ Donations
  - ◆ Choosing an appropriate matrimonial property regime
  - ◆ Using life insurance to assist with liquidity
  - ◆ Living annuities
  - ◆ Tax structuring

Whichever technique(s) or tool(s) the estate planner decides to use, he should ensure that each mechanism operates in co-ordination with his ultimate wishes. The estate planner's Last Will and Testament, inter vivos trust structure, and beneficiary arrangements stipulated in life insurance policies, all operate independently of each other, yet should be co-ordinated to reflect the estate planner's ultimate wishes and estate planning goals. The estate planning team needs to work together to achieve a coordinated plan.

### The Last Will and Testament

- This is one of the most important tools in an estate plan.
- Every estate planner should have a Last Will and Testament, which is reviewed and updated on a regular basis.

- A carefully structured and written Last Will and Testament can meet many of the estate planner's goals – including reducing estate duty liability, providing for dependants, and achieving the efficient administration of his deceased estate.
- The estate planner who makes a Will is referred to as a 'testator'. There are very few limitations to the freedom of the testator to dispose of his property as he sees fit in his Will.
- This section is aimed at providing the estate planner with a broad overview of the requirements for executing a valid Last Will and Testament. There are many pitfalls to watch out for, and it is advisable to consult a specialist when drafting a Last Will and Testament.

### **Preventing intestate succession**

- Should an estate planner die without executing a valid Last Will and Testament, his estate will be dealt with as an intestate estate, in accordance with the Intestate Succession Act (no. 81 of 1987). This means that his estate will be divided amongst his surviving spouse, descendants, parents or siblings according to a set formula.
- According to the Intestate Succession Act, where a deceased is survived by his spouse (or spouses) and have no living descendants, the spouse(s) will inherit the estate. Where the deceased is survived by only a descendant(s) and not by a spouse, the descendant(s) will inherit the estate. Where a spouse and descendants survive the deceased, the estate must be divided between them, whereby the surviving spouse inherits the greater of R250 000 or a child's share, and the children inherit the balance of the estate. A child's share is determined by dividing the total value of the estate by the number of the surviving children of the deceased and deceased children who have left issue (where applicable), and the surviving spouse.
- If the spouses were married in community of property, one half of the estate goes to the surviving spouse as a consequence of the marriage, and the other half devolves according to the rules of intestate succession.

- If there is no surviving spouse or dependants, the estate is divided between the parents (including adoptive parents) of the deceased in equal shares. Where there is, for example, only one living parent, and siblings of the deceased (i.e. the descendants of the predeceased parent), then the surviving parent will inherit half of the intestate estate, and the other half will devolve upon the descendants of the deceased parent (i.e the deceased's siblings). In the absence of parents or siblings, the estate is divided between the nearest blood relatives.
- Note that if the deceased had no living relatives and his assets have not been claimed by a legitimate heir upon his death after 30 years, his estate may be forfeited to the government.

### **The importance of nominating the executor and trustee**

- Where there is no valid Last Will and Testament, there will be no executor appointed. This means that the Office of the Master of the High Court will require nominations from interested parties, and, based on these nominations will appoint an executor 'dative'. The procedure may cause a delay in the winding up process, perhaps creating unnecessary hardship for the family. In addition, the Master may require the executor to provide security -which may create an unnecessary cost for the estate, and a further delay in having to raise the security.
- Normally a family member or professional person such as an accountant or attorney is appointed as the executor and/or trustee. Where a layman is appointed, the Master may require a certificate by an accountant or attorney stating that they will assist with the administration of the estate.
- The testator can describe the executor's powers in the Will, and provide that he may be exempted from providing security.
- The executor or trustee may benefit (inherit) under the Will (there is usually a clause to this effect).
- An executor may not, however, benefit under the Will, if he has signed the Will as a witness, or has written out the testator's Will in his own handwriting. The spouse of such a person also cannot be nominated as executor in such a Will. The Wills Act (no. 7 of 1953) provides some exceptions to this provision (which

exceptions are set out in detail under the paragraph 'Requirements for the valid execution of the Will' below.

- It is recommended that the executor be granted the power of assumption, which will entitle him to appoint another executor (as co-executor) should the need arise.
- An executor is entitled to the following remuneration:
  - ◆ The remuneration fixed by the deceased in the Last Will and Testament, or
  - ◆ 3,5% of gross assets
  - ◆ 6% on income accrued and collected from date of death
  - ◆ Executor's remuneration is subject to VAT where the executor is registered as a vendor.
- ◆ Some duties of the executor:
  - ◆ To report the deceased estate to the Master of the High Court
  - ◆ To notify all creditors of the deceased's passing
  - ◆ To collect all monies owing to the estate
  - ◆ To pay all creditors and legatees
  - ◆ To account to the Master, all interested parties and to the heirs
  - ◆ To pay all taxes and administrative charges
  - ◆ To distribute the heirs' inheritance(s).

## **Heirs and Legatees**

- It is important to understand the legal difference between a legacy and an inheritance.
- A legacy or special bequest is a specific item or amount of cash that is bequeathed to a particular person (a legatee).
- The heir is the person who inherits the residue of the estate. This is what is left after the debts have been paid and the legacy(s) distributed.

## **Bequests**

- Where a testator bequeaths a cash legacy to a beneficiary, he needs to be sure that his estate has sufficient liquidity to accommodate the bequest.
- The testator needs to give careful consideration to a specific bequest of an asset which is subject to an encumbrance. For example, where no mention is made of a bond on a fixed property, the executor is required to settle the bond from the estate residue and only then is he able to transfer the fixed property to the beneficiary (free of the bond). This could have serious consequences for the heirs (who inherit the residue of the estate), as there may be very little residue left, after the bond liability has been paid.
- All bequests to a surviving spouse and certain public benefit organisations are exempt from estate duty. The value of these assets may thus be excluded from the estate for estate duty purposes.
- Refer to the detail discussion of estate duty.

## **Bequest price**

- A testator may wish to include a bequest price in his Will, in order to provide for encumbrances on an asset. For example, he may bequeath the fixed property subject to the beneficiary paying the bond in return for his right to inherit the fixed property. The way in which the bequest price is worded in the Will, has an impact on whether the liability may be included as a deduction for estate duty purposes or not. Where the beneficiary is required to pay the liability before he can receive the benefit of the inheritance, the liability will fall outside the estate and accordingly not be deductible for estate duty purposes. Where the liability remains that of the deceased estate, it will be included as a deduction for estate duty purposes. It may therefore be preferable to word the bequest price as follows: "x inherits the fixed property situate at (address) provided he pays an amount to the estate equaling the bond on the fixed property".

## **Your Will and your fixed property**

- Where a testator bequeaths a fixed property to his surviving spouse, no tax is payable, as all bequests to spouses are exempt from estate duty and/or capital gains tax.

- If an estate planner bequeaths fixed property to an heir or legatee in his Will, no transfer duty will be payable.
- If the value of his estate is more than R3,5 million, estate duty will become payable on the balance in excess of R3,5 million. Sufficient cash should be made available to pay this duty in order to avoid selling any fixed property.
- If the property is subject to a mortgage bond, and the property is left as a specific bequest, the estate planner may wish to secure the bond by life insurance, the proceeds of which would clear the debt on his death, or could make the bequest subject to a carefully worded bequest price.
- A fixed property bequeathed to a number of heirs in equal shares, may give rise to impracticalities due to the indivisibility of the bequest. This may result in a redistribution agreement being drawn up between the heirs.
- There may be specific provisions in an estate planner's antenuptial contract in regard to fixed property, which may override the estate planner's wishes in terms of the Will.
- There is a portable R3.5 million estate duty deduction between spouses.
- Where agricultural property is bequeathed, the testator needs to be aware of Section 3 of the Subdivision of Agricultural Land Act (no.70 of 1970), which prevents the subdivision of agricultural land, and such land being registered in undivided shares in more than one person's name. This is especially relevant when the testator is considering bequeathing agricultural land to more than one beneficiary.

### **Protection of minor beneficiaries**

- A minor child is a person under the age of 18 years of age.
- Should an estate planner die intestate or should he have not created a testamentary trust in his Will, any funds bequeathed to a minor child will be held by the Guardian's Fund, which falls under the administration of the Master of the High Court. These funds are not freely accessible, and are usually invested at below market interest rates.
- It is advisable to create a testamentary trust in the Will to provide for minor beneficiaries, so as to prevent any bequests to a minor being dealt with by the Guardian's Fund.

- The testamentary trust will specify the duties of the trustees, and provide them with discretion as to the investment of funds, how and when to allocate monies for maintenance and education from trust income, and when the capital trust funds should be paid out to the beneficiaries.
- These kinds of trusts are known as Special Trusts (Type B) and are dealt with leniently from a tax perspective.
- Providing for guardianship and custody of minor child(ren) is also important. This is particularly relevant in the event of simultaneous death of the testator and his spouse, or in the case of single parents, or those with sole custody (per a divorce decree).
- The nominee guardian would have to agree to the appointment, and it would have to be confirmed by the court (taking into account the best interests of the child).
- Reference to ‘children’ in a Will includes children conceived at that time who are born later.

### **Exclusion from marital regime**

- This is a standard clause usually inserted into a Will where the testator states that any benefit his heirs or legatees may receive will not form part of the assets of such beneficiary’s spouse.

### **Maintenance of Surviving Spouses Act (no.27 of 1990)**

- This is one of the few instances where the freedom of the testator is limited. If a surviving spouse has not been provided for in a Will, and is unable to maintain him or herself from personal means or earnings, then she or he can claim against the estate of the deceased for the provision of his or her maintenance until his or her death or remarriage. A spouse for purposes of this Act will include a party to a customary marriage, a monogamous and polygamous Muslim marriage and a civil union.

### **Member's interest in a Close Corporation**

- This is another instance where the freedom of the testator may be limited, to a degree.

- Section 35 of the Close Corporations Act (no.69 of 1984), provides that, subject to the association agreement, where an heir is to inherit a member's interest (in terms of the deceased's Will), the consent of the remaining members (if any) must be obtained. If no consent is given within 28 days after it was requested by the executor, then the executor is forced to sell the members interest in one of three ways, i.e, either:
  - (a) To the close corporation itself, or
  - (b) To the other members in proportion to the interests of those members in the close corporation, or as they may otherwise agree upon, or
  - (c) To any other person who qualifies for membership of a corporation in terms of section 29.

It may therefore be advisable for a member to ensure that a proper Association Agreement is in place between the members of the close corporation, that explicitly states what the members' rights are upon death.

### **Writing-off a loan account or debt due**

writing-off a loan through a bequest in a Will should not trigger a CGT liability.

Other possible treatment options for the loan are:

- Leave the residue of the estate to the creditor as sole heir.
- Roll the claim over to the surviving spouse (if relevant) i.e. bequeath the loan to him or her.
- Leave the claim to a third party and bequeath a cash amount to the debtor so that he or she can repay the same.
- Quantify the loan and leave a specified amount to the debtor, but preferably not the exact same amount of the loan. In such a way, the loan amount is included as property in the Estate Duty calculation of the testator, the executor calls up the loan and once the same has been repaid, then distribute the legacy.

### **Usufruct and bare dominium**

- A usufruct is created when a testator gives a right to the income or use of a specific asset to a person (usufructuary), and the right of ownership (bare dominium) to another.

- During his lifetime, the usufructuary must take good care of the asset and cannot sell or encumber it in any way without the bare dominium holder's consent.
- The holder of the bare dominium is the eventual owner of the property, but his rights are limited by the usufruct. After the usufruct has ended, he receives full title.
- Upon the bare dominium holder's death, his interests are transmittable to his intestate/testate heirs.
- The method of valuing the usufruct differs between donations tax and estate duty. The death of the holder of the usufruct will however not trigger additional capital gains tax.

### **Fideicommissum**

- This is where one person inherits an asset on the condition that it must pass to someone else at a certain future date or the occurrence of a specified event.
- The purpose of this mechanism is to enable an estate planner to retain assets within the family circle for successive generations.
- There are statutory limitations on the length of time a fideicommissum can be used with immovable property, as it is limited to two successive generations, despite the provisions of the Will [in terms of Section 6 of the Immovable Property (Removal or Modification of Restrictions) Act (no.94 of 1965)].

### **Assurance policies and the Will**

- If there are beneficiary arrangements stipulated in life policies, retirement annuities, pension or provident funds, the proceeds will be paid outside of the estate.
- The estate planner cannot change a policy beneficiary nomination in his Will.
- Although not included in the Will, each of these instruments (RA policies, life assurance policies, and trust deeds), although operating independently of each other, should be reviewed by the estate planner – to ensure that they all tie up with each other, and to ensure that the policy and fund nominations are intact and tie in with his intentions and estate planning goals.

## **Requirements for the valid execution of the Will**

- The Wills Act (no.7 of 1953), sets out the formal requirements to execute a valid Last Will and Testament.
- A person can validly execute a Will from the age of 16 years, as long as he is not mentally incapable of appreciating the nature of his acts at the time of signing the Will.
- The Testator must sign the Will at the end thereof in the presence of two or more competent witnesses who are the persons who must confirm that it was the testator who signed the Will. They must be present at the same time that the testator signs the Will.
- A person can sign as a witness from the age of 14 years, provided that at the time of signing as witness, he was not incompetent to give evidence in a court of law. The witness does not attest the contents of the Will, but acknowledges the signature of the testator. A blind person therefore cannot qualify as a witness, for example.
- If the Will consists of more than one page, each page other than the page on which it ends, must also be signed by the testator anywhere on that page. The witnesses need only sign the last page, however it is practice that they also sign every page.
- No amendment made in a Will will be valid unless it is identified by the signature of the testator, and the amendment is further identified and attested to (signed) by two competent witnesses all of whom were present at the same time when signing. These witnesses need not be the same as the witnesses who signed the original Will.
- Any person who signs a Will as a witness, or any person who writes out the Will (or any part of it) in his own handwriting (and any spouse of such a person at the time of the execution of the Will) is disqualified from receiving any benefit from that Will. However, the court may declare such a person (or his spouse) still competent to receive a benefit if:
  - a. it can be shown that the person or his spouse did not defraud or unduly influence the testator in the execution of the Will;

- b. that person or his spouse would have, in terms of the law of intestate succession, been entitled to inherit from the testator if that testator had died intestate (subject to some conditions);
  - c. if the Will had been attested to and signed by at least two other competent witnesses who will not receive any benefit from the Will.
- A court may declare an executor, trustee or guardian who signs a Will as a witness, or writes out the Will in his own handwriting, to nevertheless be competent to act as executor/guardian or trustee (whichever is applicable) if the court is satisfied that such a person or his spouse meet the requirements of either (a) or (c) above.

## Trusts

### General information on trusts

- A trust is a structure which has been set up by the founder, into which property is transferred and is then administered by trustees on behalf of one or more beneficiaries, in accordance with the deed of trust or Will (as the case may be).
- In South Africa, the written trust instrument is automatically governed by the Trust Property Control Act (no.57 of 1988), which regulates most aspects relating to a trust's administration. All actions and decisions taken by the trustees must be made in reference to the trust deed and the Trust Property Control Act.
- “Property” in a trust may be movable, immovable, including contingent interests in property, which are to be administered or disposed of by a trustee in terms of the deed.
- Beneficiaries can be specifically named, or they can be a specified group. A group of beneficiaries can be broadly defined, for example, a trust on behalf of all descendants, including any unborn descendants. As long as the class of beneficiaries is ascertainable.
- The trustees must be authorised and have capacity (for example, in South Africa, when you turn 18, you are free to contract and conduct your own affairs without your parent or guardian's assistance).
- The essential elements for creating a valid trust are: (a) a serious intention to create it (b) the intention is expressed in a manner which is legally valid in order to create an obligation (c)the trust property must be determined or easily determinable (d) the trust object must be clear and lawful.
- A trust is regarded as a ‘person’ for tax purposes in terms of the Income Tax Act, Transfer Duty Act and Value-Added Tax Act, and for registration in the deeds office.
- Perpetuity- the trust ordinarily continues to exist as an entity, despite the death of the founder, a trustee or beneficiary. An audit is not required by law.

## **Types of Trusts**

1. **Inter Vivos (Living) Trust:** This is a trust created during the founder's lifetime. Established by a trust deed which sets out who the founder, trustees and beneficiaries are, defines powers and duties of trustees and how and when the trust is to be wound up. The founder may also be co-beneficiary and/or trustee. The founder usually donates assets to the Trust. There are various kinds of inter vivos trusts that can be set up, depending on their purpose, for example, charity trusts (formed with an impersonal object), empowerment or employee trusts and business trusts.
2. **Testamentary Trust:** This is a trust created in a Last Will and Testament and comes into effect only on the death of the testator. Since the testator is also the founder, he cannot also be co-beneficiary and/or trustee. If the Will is invalid for any reason, the trust will not come into effect.
3. **Family (private) trusts:** (can be testamentary or inter vivos). The main object is the protection and maintenance of trust property, for the benefit of minor children, or family relations of the founder.
4. **Special trusts:** Section 1 of the Income Tax Act (no.58 of 1962), defines two types of special trust:

**Special Trust Type A** – a trust created solely for the benefit of a person(s) with a “disability”, as defined in section 6B(1) of the Income Tax Act\*, where the disability makes it impossible for the person(s) from earning enough money for their care or from managing their own financial affairs: Provided that -

- Such trust shall be deemed not to be a special trust in respect of years of assessment ending on or after the date on which all such persons are deceased; and
- Where such trust is created for the benefit of more than one person, all persons for whose benefit the trust is created must be relatives in relation to each other.

\*A “disability”, as defined in section 6B(1) of the Income Tax Act means – a moderate to severe limitation of a person's ability to function or perform daily activities as a result of a physical, sensory, communication, intellectual or mental

impairment. The disability must be diagnosed by a duly registered medical practitioner, and that disability must have lasted or has a prognosis of lasting more than one year.

**Special Trust Type B** – this is a testamentary trust created by a testator by or in terms of his Last Will and Testament, which is created solely for the benefit of a person(s) who is a relative of that testator, and such person(s) are alive on the date of death of that deceased testator (including those conceived but not yet born), and the youngest of the beneficiaries is younger than 18 years on the last day of the year of assessment. A trust will cease to be a Type-B trust as from the beginning of a year of assessment in which the youngest of its beneficiaries turns 18 years old.

### **Vesting vs. Discretionary Trusts**

- A discretionary trust gives the trustee(s) discretionary powers as to how and when to allocate the income or capital of the trust to the beneficiaries. The beneficiary does not have a vested right to the income until the trustees have exercised their discretion, and paid over the benefit to the trust beneficiary. The trustees may also be given discretion to nominate income and/or capital beneficiaries from a group, as long as a “class” of potential beneficiaries has been named, as well as how and when and the ratio of any such award is given. This is an effective structure from the point of view of estate planning – for estate duty savings as well as protection of assets from creditors, on the basis that the trust assets do not form part of the estate planner’s estate.
- In a vested trust, the trustees are not given any discretion in the deed, and the beneficiaries and their benefit(s) are fixed and predetermined. Any income earned by the trust vests in the beneficiary. The beneficiaries may claim their portion of the trust benefits from the trustee upon the happening of a certain event (e.g. upon reaching the age of 18). The beneficiary has a vested right to the income and capital, which cannot be contested by anyone else. In the event of the death of the beneficiary prior to payment, the deceased beneficiary’s interests (i.e. his personal rights) are transmissible to his heirs, and these must be included in his estate for estate duty purposes.

## Nature of office of trustee

- The trustee acts in an official capacity, which is fiduciary in nature. The trustee must honour the trust placed in him, and always act in the best interests of the trust beneficiaries and the trust.
- A natural person and a corporate person may be a trustee.
- The trustee is not personally liable for the debts of the trust and trust assets do not form part of the trustee's estate in the event of his sequestration.
- At least one independent outsider trustee should be co-appointed as trustee to every trust in which (a) the trustees are all beneficiaries and (b) the beneficiaries are all related to each other.
- A trustee can be a beneficiary of a trust, but a sole trustee may not also be a sole beneficiary of a trust, as a trustee by definition holds and administers property for some person other than himself.

## Taxation of trusts

A trust must be registered for tax as soon as it has been set up. Trusts are divided into two categories for tax purposes:

Special trusts		All other trusts
Taxed at individual tax rates (the tax rates for natural persons for the 2022 year of assessment is between 18% to 45%). Primary rebate, and interest and medical tax credits do not apply.		Taxed at 45% income tax rate (for the 2022 year of assessment).
Special trust Type A	Special trust Type B	
Capital gains tax: treated as individual, with capital gains tax inclusion rate of 40%, capital gains tax primary residence exclusion allowed if meets criteria, and annual exclusion of R40 000 allowed.	Capital gains tax: treated as individual, with capital gains tax inclusion rate of 40%, otherwise treated the same as all other trusts.	Capital gains tax inclusion rate of 80% with effective rate of 36% of gain to be added to the taxable income of the trust. 

## **Income tax tips on trusts**

- Trustees may create tax efficiencies based on the timing and amounts of distributions made to beneficiaries.
- Where income received by the trust is distributed out to the beneficiaries within the same tax year, it is treated, for tax purposes, as if it had never been received by the trust, but rather directly by the beneficiaries. It is therefore advisable for distributions to be made to the beneficiaries in the same year as income is received.
- The trust acts as a conduit through which income flows. Income flowing through a trust to beneficiaries retains its identity. Therefore, interest received by the trust is also treated as interest received by the beneficiary and is thus taxed in the beneficiary's hands.
- Where income is taxed in the hands of the trust, any subsequent distribution thereof will not again attract tax in the hands of the beneficiary.

## **Trusts as financial and estate planning tool**

- Trusts offer various benefits to the estate planner in that they can serve a dual function of protecting assets as well as creating certain taxation benefits.
  - A To protect minor beneficiaries and incapacitated persons**
    - Setting up a special trust for a mentally disabled or incapacitated person allows for the safe custody of assets while at the same time benefitting from lenient tax treatment from an income tax and capital gains tax perspective.
    - Setting up a testamentary trust for the benefit of minor children provides some income tax benefits as well as preventing any funds being held by the Guardian's fund on behalf of the minor.
  - B Protection against creditors**
    - A discretionary trust may enjoy creditor protection in the case of an estate planner or beneficiary's insolvency (subject to insolvency rules).

- Where the asset was transferred to the trust while the estate planner was solvent it would be difficult for creditors to set aside the trust transaction.
- Where there are vested rights – the protection is only afforded to those assets in which the insolvent has no vested rights.

### C Estate duties

- If properly planned, managed and controlled, a trust can act as a significant shelter against future estate duties.
- The estate planner may transfer assets with growth potential in favour of a trust, preferably a discretionary trust, with his children and grandchildren as beneficiaries.
- The growth in the assets from the date of transfer to date of his death accrues to the trust, and at most, only the value of the asset at the date of the transfer (usually in the form of a loan account) is retained in his estate.
- The loan account is usually gradually reduced during the estate planner's lifetime by loan repayments, further reducing estate duty liability. The loan repayments may take the form of a tax free donation of up to R100,000 per annum to the trust by the estate planner. Interest-free or low interest loans to trusts may have certain donation tax consequences, and the estate planner needs to bear in mind Section 7C of the Income Tax Act (no.58 of 1962), which is explained in more detail in the paragraph E below.
- Actual cash must exchange hands, as a writing off of a loan constitutes a capital gains tax event whereupon capital gains tax is payable.
- Any growth in the asset(s) will take place in the trust and not in the estate planner's hands. The increase in value will not be included in the estate planner's estate and the value of his estate (and therefore estate duty) is reduced accordingly.
- In this way, estate duty may be bypassed for one or more generations.
- These benefits are only applicable to a discretionary inter vivos trust and not vested or bewind trusts.
- The estate planner needs to bear in mind:
  - ◆ Section 3(3)(d) of the Estate duty Act

- ◆ Incidental costs involved with transferring an asset to a trust – such as transfer duty and conveyancing fees (with immovable property), and Securities Transfer (when transferring securities or shares)
- ◆ Capital gains tax considerations
- ◆ The mechanism used to transfer the asset(s) to the trust will have an impact on the estate planner's plan:

**By donation:**

- ◆ The estate planner will pay donations tax on the value of the assets donated to the trust. The first R100,000 per annum per natural person is exempt from donations tax.

**By sale:**

- ◆ Assets can be sold to the trust at fair market value against a loan account. The sale must be at fair market value, otherwise the estate planner will probably have to pay donations tax. In order to gradually reduce the loan account, the estate planner may then donate up to R100,000 each year to the trust without attracting any donations tax liability. The balance of the loan account will be included in his estate when he dies.
- ◆ Due to the anti-avoidance rules relating to interest-free loans, a sale by way of an interest-free loan should only be considered when the expected future growth of the asset sold is to exceed the SARS Official Interest Rate.
- Bequests to a trust for the benefit of a surviving spouse may or may not qualify for the Section 4(q) deduction, depending on how the trust deed has been drawn up.

**D Capital gains tax and Trusts**

- With the introduction of capital gains tax, the effectiveness of the use of trusts in estate planning has been slightly negated, but with careful planning the impact of capital gains tax can be reduced and even completely avoided.
- Capital gains tax is payable by any trust in South Africa on any gains made due to a disposal of assets after 1 October 2001.

- For ordinary trusts, 80% of the net gain is added to the taxable income of the trust. As trusts are taxed at a flat rate of 45% on taxable income, the effective rate of tax on capital gains will be 36% (for the 2022 year of assessment). There is no primary residence rebate for these trusts.
- For Capital Gains Tax purposes, both the Type-A trust and Type-B trusts are treated as an individual, with a capital gains tax inclusion rate of 40% (2022 year of assessment). The distinction between a Type-A trust and a Type-B trust is important however, in that a Type-A trust qualifies for certain further relief from Capital Gains Tax (CGT) while a Type-B trust does not qualify for such relief. Type A trusts will be allowed the CGT exemption for primary residence (where a primary residence is disposed of, the capital gains relating thereto of up to R2 million is exempt from CGT), should all other requirements also be met in order to qualify. The Type-A trust also qualifies for the CGT annual exclusion (R40 000 for the 2022 year of assessment). The property legally and beneficially owned by a Type-A trust will be a “primary residence” of that trust, provided the beneficiary or a spouse of the beneficiary uses the property mainly (more than 50%) for domestic (that is, residential) purposes.

On disposal of personal-use assets by Special Trusts, capital gains or losses thereon may be disregarded for Special Trusts Type A, but not for Special Trusts Type B. A Special Trust Type A may disregard capital gains or losses on compensation for personal injury, illness, or defamation of the beneficiary of that trust, but not for a Special Trust Type B.

Only a Type-A Special Trust is excluded from the application of section 7C - not Type B Special Trust.

## E Interest-free and low-interest loans to a trust

With effect 1 March 2017 loans made to a trust by

- a natural person, or
- at the instance of that person, a company in relation to which that person is a connected person, and where that person or company is a connected person in relation to the trust

an amount, calculated as the difference between the amount of interest incurred by the trust (if any, otherwise nil) and the interest that would have been incurred by that trust had the official rate of interest been charged on the loan, will be a continuing, annual donation for purposes of donations tax, made by the lender on the last day of the year of assessment of the trust

The following will be specifically excluded from the above donation provisions:

- special trusts that are created solely for the benefit of disabled persons
- trusts that fall under public benefit organisations
- vesting trusts (in respect of which the vesting rights and contributions of the beneficiaries are clearly established)
- loans used by the trusts to fund the acquisition of a primary residence
- loans that constitute affected transactions and are subject to transfer pricing provisions
- loans provided to the trust in terms of a sharia-compliant financing arrangement, or
- loans that are subject to dividends tax
- loans to a qualifying employee share purchase trust

The lender may utilise the annual donations tax exemption of R100 000 (or remaining portion if applicable) against this deemed donation.

No deduction, loss, allowance or capital loss may be claimed in respect of the reduction, waiver or other disposal of such a loan, advance or credit by the lender and will thus have no tax benefit for the lender.

Loans to a company where 20% or more of the shareholding of the company is being held directly or indirectly by a trust are also be subject to the donation tax rules contained in s 7C. As a result the continuous shareholding by trusts in operating companies might have to reconsidered do the the potential negative consequences of donation tax levied on interest-free and low-interest loans to these companies.

## **Other anti-avoidance provisions for trusts**

- Various anti-avoidance provisions exist to combat the use of trusts for income splitting and tax avoidance schemes, including the deemed donation tax to be levied on interest-free or low interest loans to trusts.
- Income splitting occurs where the marginal rate of tax is reduced to an amount less than if the income had been taxed from one source.
- Section 103(2) of the Income Tax Act includes trusts – and prevents the utilisation of any loss in a trust, solely for the purposes of avoiding tax.
- The Section 7 deeming provisions of the Income Tax Act work mainly on the basis whereby any income earned by the trust as a result of a donation, settlement, or other disposition made by a person (“the donor”) which is not distributed, is deemed to be the income of that donor and taxed in their hands. If income is distributed to beneficiaries who are minor children of the donor, the income is also taxed in the hands of the donor. Similar provisions exist in respect of capital gains made by or accrued to a trust.

## **Section 3(3)(d) of Estate Duty Act**

- Where an asset is transferred to a trust during an estate planner's lifetime, yet the estate planner, as trustee of the trust retains such power as would allow him to dispose of the trust asset(s) unilaterally for his own or his beneficiaries benefit during his lifetime, then Section 3(3)(d) of the Estate Duty Act may come into play. Such asset(s) may be deemed to be property of the estate planner and included in his estate for estate duty purposes.
- The way in which the trust deed is drafted is important, and also the way in which the trust and the trust assets are administered. One trustee should not be allowed to do as he or she pleases in regard to the trust assets.
- It is advisable to appoint at least three trustees, one of whom is completely independent, to act as such so that the estate planner (who may be a trustee and a beneficiary) will have a minority vote.

## **Divorce and assets in trust**

- A 2006 Supreme Court case (Badenhorst vs. Badenhorst) highlights the fact that if a trust is not correctly established and managed, it could be deemed to be invalid, and in fact, not a trust at all.
- The case was between a husband and his ex-wife, and the Court held that the trust assets were deemed to be owned by the husband in his personal capacity, and he was consequently ordered to share same in an equitable fashion with his ex-wife in their divorce proceedings.
- Some of the factors which contributed to the Judge's ruling were that the husband had listed the trust assets as his own personal assets in an application for a credit facility and had insured in his own name a beach cottage owned by the trust. In addition, he seldom consulted with the other trustee (his brother) regarding the administration of the trust assets.

## **Important considerations re trusts:**

- Most inter vivos trusts are set up for various purposes such as financial and estate planning, reducing estate duty payable on death and/or protection of assets against creditors.
- The estate planner needs to weigh these benefits against the practicalities of losing ownership and control over assets transferred to a trust.
- If a trust does not have an independent trustee appointed, and, depending on the way the deed is set out and the trust assets administered, these "benefits" or protections may fall away.
- Due to exchange control regulations, South African trusts may not own direct international/foreign assets. This means an international trust is required to be set up in regard to foreign assets, for exactly the same reason that an estate planner may set up a South African trust for his South African assets.
- In order to prevent these serious consequences, a trustee should acquaint himself with the trust deed and adhere actively to his duties and responsibilities.

## **Donations**

- An estate planner may donate one of his assets or cash to another and so reduce his estate during his lifetime, creating an estate duty saving.
- Donations are regulated by the Income Tax Act, which provides that:
  - ◆ Donations tax is payable by any individual living in the Republic of South Africa, or any South African company or one managed or controlled in the Republic, on the value of any gratuitous disposal of property, including the disposal of property for inadequate consideration and the renunciation of rights.
- Donations tax is payable at the end of the month following the month in which the donation was made, at a flat rate of 20% on the first R30 million donations. Donations tax on the donations in excess of R30 million will be 25%. Only donation from 1 March 2018 will count towards the R30 million threshold.

It is important to note which donations are exempt from donations tax, when the estate planner considers whether to include donations in his estate plan.

## **Principal exemptions**

1. Donations between spouses.
2. Donations to charitable, ecclesiastical and educational institutions, and certain public bodies in the Republic of South Africa (limited to certain thresholds).
3. Donations by natural persons not exceeding R100,000 per year.
4. The donation of assets situated outside the Republic, subject to certain conditions.
5. Donations by companies not considered to be public companies up to R10,000 per annum.
6. Donations where the donee will not benefit until the death of the donor.
7. Donations made by companies which are recognised as public companies for tax purposes.
8. Donations cancelled within six months of the effective date.
9. Property disposed of under and in pursuance of any trust (i.e. distributions made by the trust to a beneficiary).

10. Donations between companies forming part of the same group of companies.
11. Reasonable bona fide contributions to the maintenance of individuals.

### **Donations tax and estate planning**

- By donating assets and incurring donations tax, the actual donations tax paid reduces the estate planner's estate, which may result in an estate duty saving.
- **Interest free loans**
  - ◆ An interest free loan is not regarded as a gift for the purposes of donations tax, although it may activate the provisions of Section 7 (tax avoidance provisions) and Section 7C dealing with interest-free or low interest loans to trusts.
- **Exemption of R100,000 per annum**
  - ◆ The estate planner may donate a maximum of R100,000 per annum without attracting liability for donations tax.
  - ◆ The R100,000 exemption is applicable per natural person, per annum.
  - ◆ The R100 000 exemption could alternatively also be used to reduce the deem donation tax on interest-free or low interest loans to trusts.
  - ◆ The estate planner could anticipate bequests by donating assets to his heirs during his lifetime up to the maximum allowed per annum to natural persons, thereby decreasing the value of his estate.
  - ◆ The estate planner will need to evaluate as to whether losing control over the asset during his lifetime is both practical and viable, given his personal circumstances.
- **Donations between spouses**
  - ◆ All donations between spouses are exempt from donations tax.
  - ◆ The exemption should also apply to a trust of which the spouse is the sole beneficiary or has a vested right to the donation.
  - ◆ The values of each respective spouse's estate can therefore be adjusted using this mechanism (subject to Section 7).

- ◆ **Donations between spouses married in community of property**

- ◆ If one spouse in a marriage in community of property makes a donation to the other of property that forms part of the joint estate of the spouses, it is deemed that the donation is made in equal shares by each spouse.

- **Donating a usufruct**

- ◆ The estate planner could donate an asset in the form of a split donation of the usufruct and bare dominium.
- ◆ Donations tax may be payable, however no subsequent estate duty is payable thereon.
- ◆ The way the usufruct and the bare dominium is valued for donation's tax purposes may be beneficial to the estate planner.

- **Record the donation in an agreement and include in income tax return**

- ◆ It is advisable to record the donation in an agreement, although it is not a legal requirement that the donation be in writing (unless it is in regard to immovable property or for donations promised for a date in the future, known as "executory" donations).
- ◆ Both the donor and the donee should record the donation in their income tax return in the year that the donation was made.
- ◆ Should donations tax be payable on a donation, the donor is responsible for the payment, provided that should the donor fail to make payment within the required timeframe, both the donor and donee are jointly and severally liable.

- **Tax avoidance schemes- Section 7 of the Income Tax Act**

- ◆ Section 7 was inserted into the tax legislation many years ago to tackle specific tax avoidance schemes.
- ◆ Section 7 specifically targets assets which are donated by a taxpayer person to another person with the idea of avoiding tax in his own hands on the profits derived from these assets.

### **Some examples:**

- The taxpayer transfers an investment to his spouse (who is taxed at a lower marginal rate than he is), in order that she be taxed on the profits of the investment. He saves the donations tax, since donations between spouses are exempt from donations tax, and his wife pays the tax at a lower marginal tax rate. *Section 7(2)* specifically deems these profits to be taxed in the hands of the taxpayer and not in the hands of his wife.
- The taxpayer and founder of a trust donate a profit-making investment to his trust and at year-end the trustees of the trust distribute the profits from this investment to his minor child, being in the lower tax bracket than himself. This way he avoids being taxed on these profits in his personal capacity, being at a higher marginal rate. This scenario is specifically dealt with in section 7(3). The taxpayer will be taxed in his own hands on these profits and not the minor child.
- The taxpayer transfers an investment to his minor children. He pays the donations tax (if the donation exceeds R100,000) but the child is taxed at a lower tax rate. Again, *section 7(3)* deems these profits to be taxed in the hands of the taxpayer.

The above serve as some examples and there may be other scenario's which must be carefully considered before implementing any action. While the estate planner may well save on donations tax, there may be other unplanned tax implications that could result.

A detailed analysis of Section 7 is beyond the scope of this guide and it is advisable for the estate planner to consult with a professional adviser, and the estate planning team before taking any action when including donations in his estate plan.

## **Matrimonial Property Regimes**

The three most important forms of marriage are: In community of property, marriage with antenuptial contract (ANC), and the accrual marriage.

The Civil Union Act provides that any references in any other law include a civil union, and thus these three forms will also be applicable to a civil union.

- Marriage in community of property
  - ◆ There is no prior contractual arrangement, apart from getting married;

- ◆ Spouses do not have two distinct estates;
  - ◆ There is a joint estate, with each spouse having a 50% share in each and every asset in the estate (no matter in whose name it is registered);
  - ◆ Applies to assets acquired before the marriage and during marriage;
  - ◆ Should one spouse incur debts in his own name, he will automatically bind his spouse, who will also become liable for the debt;
  - ◆ If a sequestration takes place (in the case of insolvency), the joint estate is sequestered.
- Marriage out of community of property
- ◆ An antenuptial contract (ANC) is drawn up by an attorney (who is registered as a notary) before marriage;
  - ◆ Where there is no contract, the marriage is automatically in community of property;
  - ◆ The values of each spouse's estate going into the marriage are stipulated in the contract;
  - ◆ A marriage by ANC means that all property owned by spouses before the date of marriage will remain the sole property of each spouse;
  - ◆ Each spouse controls his/her own estate exclusively without interference from the other spouse, although each has a duty to contribute to the household expenses according to his/her means;
  - ◆ To allow for assets acquired by spouses during the marriage to remain the sole property of each spouse, the accrual system must be specifically excluded in the ANC.
- ANC with accrual
- ◆ The accrual system automatically applies unless expressly excluded in the antenuptial contract;
  - ◆ The accrual system addresses the question of the growth of each spouse's estate after the date of marriage;
  - ◆ The spouse whose estate shows the smallest financial growth will have a claim against the estate of the other spouse, at dissolution (death or

divorce);

- ◆ The estate with the smallest growth will have a claim of 50% of the difference between the growth in the respective estates, with reference to the consumer price index to take into account inflation;
- ◆ Not all assets are included in the accrual calculation, such as inheritances, donations or legacies received by one spouse during the course of the marriage, donations between spouses, any assets specifically excluded in the contract, and any cash paid to the spouse in regard to a claim for defamation (as this claim would have been of a personal nature).

## **Marital property regimes and estate planning**

Donations between spouses are exempt from donations tax and estate duty.

### **Marriage in community of property**

- In the event of the death of one spouse, the surviving spouse will have a claim for 50% of the value of the combined estate, thus reducing the actual value of the estate by 50%. The estate is divided after all the debts have been settled in a deceased estate (not including burial costs and estate duty, as these are the sole obligations of the deceased and not the joint estate).
- When drafting a Last Will and Testament, spouses married in community of property need to be aware that it is only half of any asset that he or she is able to bequeath.
- Upon the death of one spouse, all banking accounts are frozen (even if they are in the name of one of the spouses), which could affect liquidity.
- Donations or bequests to someone married in community of property can be made to exclude the community of property – in other words – if the donor stipulates that the donation must not fall into the joint estate, then the donee can build up a separate estate. However returns on such separate assets will go back to the joint estate.
- Fideicommissary property and usufructs do not form part of the joint estate, however the fruits or income derived there from, do.

### **Marriage with ANC**

- Each estate planner (spouse) retains possession of assets owned prior to marriage.

### **Marriage with accrual**

- A donation from one spouse to the other spouse is excluded from the calculation of each spouse's accrual- in other words, the recipient does not include it in his growth and the donor's accrual is automatically reduced by the donation amount.

### **Divorce**

In the event of divorce, the marriage will be dissolved by court decree, which will address such aspects as child maintenance, access, guardianship and custody, spousal maintenance, the division of assets, division of pension interests and so on.

The divorce order will have an effect on the estate planner's estate plan, which would then need to be reviewed and adjusted.

### **Cohabitation and definition of 'spouse'**

Cohabitation is defined as a stable, monogamous relationship where a couple who do not wish to or cannot get married, live together as spouses. The Taxation Laws Amendment Act (no.5 of 2001) has extended the definition of 'spouses' for purposes of the Transfer Duty Act (no.40 of 1949), to include "a same sex or heterosexual union which the Commissioner is satisfied is intended to be permanent, and a customary union, as well as a union recognised as a marriage in accordance with the tenets of any religion".

Many pieces of legislation now define a spouse to include a partner in a cohabitative relationship, including the Pension Funds Amendment Act (no.24 of 1956) - the effects of which are that cohabitantes will benefit from the Section 4(q) estate duty deduction in the Estate Duty Act and the donations tax exemptions of the Income Tax Act.

It is important to understand the legal implications of marital property regime, especially when drafting a Last Will and Testament and also when entering into a marriage – as which regime the estate planner chooses, is going to affect his assets.

## Assurance Policies

Understanding long term financial needs allows the estate planner to plan for them.

Proceeds from life insurance policies can be used to:

- Replace income that the estate planner would have generated to maintain his spouse or dependants while he was alive.
- Pay estate expenses: funeral, income tax, estate administration, estate duty.
- The estate planner should try to balance affordability with his beneficiaries' anticipated needs. Examine debts, income needs, expected future expenses.
- On death, the proceeds from an insurance policy go to the designated beneficiary. If there are minor children, the estate planner may want the proceeds to be held in a trust for them.

### South African “domestic” life policies

- All proceeds of South African “domestic” policies taken out on the estate planner’s life, where there is no beneficiary nominated on the policy, will fall into his estate on his death.
- Where a beneficiary is nominated on the policy, the proceeds will be deemed property for estate duty purposes, even although they are paid directly to the beneficiary (subject to partial exemptions based on policy premiums).
- Policies which are exempted from exclusion for estate duty purposes are buy and sell, key man policies, and those policies ceded to a spouse or child in terms of an antenuptial contract.
- The main aim of this tool is to provide liquidity in the estate. The estate planner may wish to take out life assurance cover, not only to provide his spouse and/or dependants with liquidity on his death, but for the purpose of providing for estate duty liability or to cover the mortgage bond liability over a fixed property, vehicle finance agreements, taxes and winding up costs such as executor’s fees. To prevent the executor from having to sell an asset out of a deceased estate

to cover these liabilities, it may be preferable and cost efficient to take out life assurance to ensure estate liquidity.

### **Living Annuities**

- An annuity is a policy taken out that will provide a pension to the estate planner from the age of 55 years and older.
- Upon maturity, the insurance company invests the proceeds and the estate planner receives a monthly pension from the proceeds. He may take a lump sum payment (up to one third of the value) on maturity.
- Should he die before the policy matures, and he has nominated beneficiaries on the annuity, the proceeds will not form part of his deceased estate and will attract no estate duty or capital gains tax.
- However, so much of all the contributions made by the deceased in consequence of membership or past membership of any retirement annuity fund, that has not been deducted at the time of death for income tax, will be subject to Estate Duty.
- This specific inclusion in the property of a deceased estate was introduced to limit the practice of avoiding estate duty through retirement contributions, which are not deductible and not subject to the retirement lump sum tax tables. These contributions would otherwise pass on to beneficiaries free from estate duty.
- Although there is no estate duty payable, his heirs may be liable for income tax on the monthly annuity benefits.

This tool can be used effectively to provide an income for spouses or dependants.

By making contributions to an annuity fund during his lifetime, the estate planner is effectively:

- Taking income out of his estate to create a fund which will have no bearing on his estate;
- Creating an income tax saving (by deducting monthly premiums from taxable income).

## FOREIGN ASSETS OF A SOUTH AFRICAN RESIDENT

- Currently South African resident individuals who are over 18 and taxpayers in good standing, and have been granted a Tax Clearance Certificate by the South African Revenue Service, are permitted to invest abroad. The current limit is R10 000 000 per person per year. Without a Tax Clearance Certificate, the taxpayer can only send a maximum of R1 million out of South Africa into his foreign bank account each year.
- Since the relaxation of exchange control, an increasing number of South Africans have been investing offshore with important consequences for their estate planning.
- An estate planner who owns offshore assets when he dies will have a foreign estate that will need to be administered.
- If a South African resident has only a South African Last Will and Testament, the executor of his estate may have to apply for foreign orders to recognise his right to deal with the property.
- This could result in delays, problems with foreign language and additional administration costs.
- It is normally preferable to have a separate foreign Will dealing with offshore assets, as this will address jurisdiction specific requirements and different legal systems and simplify the administration of the offshore estate.
- It is important to specify in the foreign Will, that it deals specifically and only with those foreign assets and in the South African Will, that it deals only with South African assets, and to bear this in mind when making amendments or revocations to either of them. It is important that the documents tie in with each other and that the one does not result in the other being revoked.
- Having separate Wills for South African and foreign assets will not affect the estate duty payable. **Estate duty is payable on all assets, wherever situated, for a South African resident** (except where assets were acquired by the deceased before he became ordinarily resident for the first time, or even after he became

- ordinarily resident, if he acquired the property from a non-resident donor or non-resident deceased estate).
- It is also important to note that any donation of foreign property or the donation of any right in foreign property (i.e. located outside of South Africa) is exempt from donations tax if the donor acquired the property:

- Before the donor became a resident of South Africa for the first time; or
- By inheritance from someone, who, at the date of his death, was not usually resident in South Africa or in consequence of a donation from a non-resident donor (other than a company); or
- Using the funds from the sale of the property referred to in (i) and (ii) above, or if the donor sold such property and replaced it with other properties (also located outside South Africa and purchased from the returns on the sale of the property).

### **Non-residents**

- Immovable property and movable property situated outside of South Africa, and which belong to a non-resident, are not subject to estate duty in South Africa.
- The estate of a non-resident pays estate duty on properties located in South Africa (subject to double tax treaty relief).
- When determining estate duty liability, it is important to establish:
  - the residence of a person
  - The location of the asset(s)
- A non-resident is free to donate the whole or part of his South African estate without any liability for donations tax.

This is a complex area and it is advisable to seek professional advice when considering the impact of investing offshore on the estate plan.

- Any good estate planning exercise must involve succession planning of an estate planner's business, where applicable.
- The estate planner needs to make plans for who will succeed him, who may purchase his shares on his death, whether the business should be sold, or who will have the rights to income generated by the business.

### **Partnerships /shareholders/members**

- In the case of a partnership, it is automatically dissolved when one partner dies. All the surviving partner(s) can do is wind up the affairs of the partnership.
- In the case of shareholders in a company – do the remaining shareholders have first right of refusal to purchase the shareholding of a deceased shareholder? Will the heirs sell the inherited shares in the business?
- In many cases, the shareholder's agreement (or partnership agreement/ association agreement) will include a clause about the future ownership of the business.
- The clause may make provision for a “buy and sell” agreement to be concluded, which is a binding contract between the business partners in the event of the death of a partner.
- The buy and sell agreement usually states that on death, the executor of the deceased partner's estate will be obliged to offer the deceased's equity or shares to the remaining partners, and in turn, they will be obliged to purchase them. A time limit is set for this to take place, so that the winding up of the estate is not delayed (usually three months after the date of death).
- It is essential that a regular determination of the value of the business is obtained. This can take the form of an addendum to the agreement, signed by all parties, as soon as the annual financial accounts are available. The parties need to work together with their accountant and discuss the value of the underlying assets and goodwill. When the business is largely dependent on the input and skills of an individual as opposed to a trade, it is also important to agree on the intellectual capital.

- The parties may make provision for the survivor(s) to fund the taking over of the deceased's share of the business by taking out life insurance on each other's lives and by paying each other's premiums, known as "buy and sell insurance". In practice this means that the deceased estate is paid cash for the equity (from the proceeds of the policy) and the surviving parties take over the shares.
- The beneficiaries of the deceased estate are ultimately "looked after" in that they will receive the value of the equity in cash.
- Essentially it means that there is a life policy for each partner, owned by all the other partners (not by the business). This policy then provides the cash to enable the remaining partners to buy the deceased partner's share of the business. The partner whose life is insured must not own the policy, or it will be deemed a part of his estate when he dies. By letting the other partners own the policy, the money falls outside the deceased partner's estate.
- The proceeds of the buy and sell insurance will not be subject to estate duty provided three requirements are met:
  - ◆ The partners paid each other's premiums. No premium on the policy must have been paid by the deceased;
  - ◆ The relationship (partner or co-shareholder or co-member) to the deceased must have been in existence at the date of death;
  - ◆ It must have been the intention of the parties to enable the partner or co-shareholder or co-member to acquire the deceased's interest at his death. If there was a different intention, the deduction will not apply, even if the policy proceeds are actually applied to obtain the deceased's interest.
- The reason for the exemption of such policies from estate duty is to prevent the paying of double estate duties on the same interests. The actual business interest (whether it be shares or a % ownership in the business) are generally included as an "asset" in the estate, and thus for estate duty purposes, however the proceeds used to purchase these interests are excluded.
- It is important to note that first and foremost, the buy and sell agreement needs to be in place between the partners, which is then funded by life insurance, so that the arrangement is legally enforceable, and the intention is reduced to writing.

- The partners may also decide to propose for key man insurance, where one partner is a “key” person in the business, whose particular skills and knowledge are essential for continued success of the business.
- The life of that partner is insured by the partnership, which owns and funds the policy. This insurance protects the partnership against financial loss which may be caused by his/her untimely death. In attributing a value to such key man policies, factors such as the cost of appointing and training a replacement and the decline of profit of the business is taken into consideration.
- When the policy is taken out the partnership can elect if the premiums are tax deductible. If the election is made for the premiums to be tax deductible, when the policy pays out the proceeds will form part of gross income. If however the election is not made for the premiums to be tax deductible, when the policy pays out the proceeds will be exempt from tax.

### **The sole proprietor**

- Sole proprietors should also consider succession planning.
- A sole proprietor's Last Will and Testament should state who should be approached first to take over the business, and how the executor should deal with the situation.
- The sole proprietor will need to make a decision as to whether he wishes to leave his business to an associate or to a family member. It could be useful for the sole proprietor during his lifetime to give or sell the named successor a small share of the business, and to introduce him to the secrets, modus operandi and client base of the business. In addition, the sole proprietor should write down the secrets or methodologies of the business, so that they are available in the event of his demise.
- Even though a sole proprietor may have several employees, legally the business and the sole proprietor are one and the same, which means that should he pass away, his estate will be wound up, as essentially the business forms part of his estate.
- Where he leaves the business to someone in terms of a Will, he could also leave that person with enough capital to assist that new person's purchase. A life policy could be taken out whereby the sole proprietor is the life assured

and the potential new owner in terms of the Will is the beneficiary. The policy proceeds on death would form part of the deceased's dutiable estate, but the amount of cover could be increased to mostly cover this as well.

- The executors could also arrange for the sale of the business whereby the purchase price will form part of the deceased estate in terms of estate duty and other taxes.
- Ultimately, a sole proprietor's beneficiaries will benefit from a well thought out succession plan.
- A sole proprietor who instructs his executor to sell the business and ensures that his business will continue uninterrupted after his death, will benefit his beneficiaries in the long run, as a beneficiary is likely to receive far less if a business is sold on the basis of fixed assets, stock and a debtors book rather than as a going concern.
- A natural person is deemed to have sold all his or her assets for income tax and capital gains tax purposes at market value upon death. To limit these tax consequences a natural person's business assets could be transferred to a company before death utilising the corporate rollover relief in the Income Tax Act.

Establishing and monitoring a succession plan also provides excellent ongoing opportunities for reviewing an organisation's aspirations and strategies.

Succession planning in a business is not easy, and this chapter merely provides a broad overview of key aspects relating thereto. The assistance of a skilled professional to assist in the logical planning of your business succession issues is essential.

### A General

- Estate duty is the tax charged in terms of the Estate Duty Act, on the dutiable value of your estate.
- The general rule is that if the taxpayer is ordinarily resident in South Africa at the time of death, all of his assets (including deemed property), wherever they are situated, will be included in the gross value of his estate for the determination of duty payable thereon.
- Estate duty is levied at 20% on the first R30 million of the dutiable estate. Estate duty will be levied at 25% on the dutiable estate in excess of R30 million.
- Estate duty is also leviable on the South African property of non-residents.
- In order for an estate planner to effectively make use of the estate planning tools available to him, he needs to estimate the value his estate for estate duty purposes.
- It is important for the estate planner to understand estate duty and how it is calculated, so that he can plan and minimise the effects of estate duty on his estate.
- The following provisions apply in regard to determining estate duty liability:
  - ◆ which property is to be included,
  - ◆ which property which you may not own at the date of your death is also included as “deemed property”
  - ◆ all the possible deductions that are allowed when calculating estate duty liability.

### B Property

- Includes all property, or any right to property, including immovable or movable, corporeal or incorporeal - registered in the deceased's name at the time of his death.

- Includes any tangible asset registered in the deceased's name at his death as well as fiduciary rights, usufructs, and certain types of annuities, and options to purchase land or shares, goodwill and intellectual property.

## C Deemed property

### Insurance policies

- i) Includes proceeds of domestic insurance policies taken out on the life of the deceased, irrespective of who the owner (beneficiary) is.  
The policy must be a 'domestic' one, in other words, a policy payable in South Africa in South African currency (ZAR).
- ii) The proceeds of such a policy are subject to estate duty, however these can be reduced by the amount of the premiums, plus interest at 6% per annum, to the extent that the premiums were paid by the person (the beneficiary) entitled to the proceeds of the policy. Premiums paid by the deceased himself are not deductible from the proceeds for estate duty purposes.
- iii) If the proceeds of a policy are payable to the surviving spouse or child of the deceased in terms of a properly registered antenuptial contract (i.e. registered in the deeds office) the policy will be totally exempt from estate duty.
- iv) Where a policy is taken out on each other's lives by business partners, and certain criteria are met, the proceeds are exempt from estate duty.
- v) The proceeds of any other policy not covered by the exemptions listed in iii and iv are also exempt from estate duty if (a) the policy was not affected by or at the instance of the deceased (b) no premium on the policy was paid by the deceased (c) no part of the proceeds have been or will be paid into the estate of the deceased and (d) no part of the proceeds will be utilized for the benefit of a relative or dependant of the deceased. This could cover the scenario of key man insurance.

### Benefits payable by pension and other funds by or as a result of the death of the deceased

- Payments by such funds (pension, retirement annuity, provident funds) usually consist of two components – a lump sum payment on death and an annuity

afterwards. The lump sum component used to be subject to estate duty. However as from 1 January 2009, no amount received from such a fund will be included in the estate of the deceased for estate duty purposes. However, so much of all the contributions made by the deceased in consequence of membership or past membership of any retirement annuity fund, that has not been deducted upon death, will be subject to Estate Duty.

### **Donations at date of death**

- Donations where the donee will not benefit until the death of the donor and where the donation only materialises if the donor dies are not subject to donations tax. These have to be included as an asset in the deceased estate and are subject to estate duty.

### **Claims in terms of the Matrimonial Property Act (accrual claim)**

- An accrual claim that the estate of a deceased has against the surviving spouse is property deemed to be property in the deceased estate.

### **Property that the deceased was competent to dispose of immediately prior to his death (Section 3(3)(d) of the Estate Duty Act)**

- An example would be where the estate planner donates an asset to a trust, and is both a trustee on the trust with total control over the trust assets, and also a beneficiary. Although the asset is owned by the trust, the estate planner may be deemed to be in control of the asset which may as a result be included in his estate as deemed property for estate duty purposes.

## **D Deductions**

- The dutiable value of the estate can be considerably reduced by claiming all the deductions for which the estate planner qualifies.
- Some of the most important allowable deductions are:
  - ◆ **The cost of funeral, tombstone and death bed expenses**
  - ◆ **Debts due at date of death to persons who have their ordinary residence in South Africa**
- To the extent to which these debts are to be settled from property included in the estate.

- This includes the deceased's income tax liability (which includes capital gains tax) for the period up to death.
  - It is important to note that the deduction is such that the liability must be actually discharged before it is taken into account. Where there is a bequest price obliging an heir to settle an amount in order that he or she may inherit – for example an heir inherits fixed property provided he or she pays the bond thereon, then the bond amount (liability) will not be allowed as a deduction.
- ◆ **Costs of administration and liquidation, and expenses incurred during the administration of the estate**
    - Includes executor's remuneration, Master's fees, costs of transferring assets (conveyancing fees), and costs of advertising the estate.
  - ◆ **Foreign assets and rights**
    - The general rule is that foreign assets and rights of a South African resident, wherever situate, are included in his estate as assets.
    - However, the value thereof can be deducted for estate duty purposes where such foreign property was acquired before the deceased became ordinarily resident in South Africa for the first time, or was acquired by way of donation or inheritance from a non-resident, after the donee became ordinarily resident in South Africa for the first time, (provided that the donor or testator was not ordinarily resident in South Africa at the time of the donation or death). The amount of any profits or proceeds of any such property is also deductible.
  - ◆ **Debts and liabilities due to non-residents**
    - Debts and liabilities due to non-residents are deductible, but only to the extent that such debts exceed the value of the deceased's assets situated outside South Africa which have not been included in the dutiable estate.
  - ◆ **Bequests to certain public benefit organisations**
    - Where property is bequeathed to a public benefit organisation or public welfare organisation, which is exempt from income tax, or to the State or any local authority within South Africa, the value of such property will be able to be deducted for estate duty purposes.

◆ **Property accruing to a surviving spouse [Section 4(q)]**

- This includes so much of the value of any property included in the estate that has not already been allowed as a deduction, and accrues to a surviving spouse.
- The phrase “accrues to a surviving spouse” means that it is not limited only to property bequeathed to the spouse in the deceased’s Will, but any other property that accrues to the surviving spouse on the deceased’s death, such as the proceeds of life insurance payable to the spouse as beneficiary, or any annuities that may accrue to the surviving spouse.
- Note that proceeds of policy payable to surviving spouse is required to be included in the estate for estate duty purposes (as deemed property), however are deductible in terms of Section 4(q).
- Section 4(q) will not be granted where the property inherited is subject to a bequest price.
- Section 4(q) will not be granted where the bequest is to a trust, established by the deceased for the benefit of the surviving spouse, if the trustee(s) has a discretion to allocate such property or any income there from to any person other than the surviving spouse (a discretionary trust). Where the trustee(s) have no discretion as regards to both the income and capital of the trust, the Section 4(q) deduction may be granted (a vested trust).
- It is important to plan for the liquidity in the estate of the surviving spouse, to provide for possible capital gains tax and estate duty liability.

## **E Rebates**

### **R3,5 million abatement**

- The Act allows for the R3,5 million deduction from estate duty.
- This applies to all estates, which means that all estates under R3,5 million are exempt from estate duty.

### **Portable R3,5 million deduction between spouses**

The Act allows for the R3.5 million deduction from estate duty to roll over from the deceased to a surviving spouse so that the surviving spouse can use a R7 million

deduction amount on death. The portability of the deduction will apply to the extent that the first dying spouse did not use the whole abatement

The past technique of bequeathing R3,5 million away from the surviving spouse (often to a trust) so as to reduce the estate of the surviving spouse, and thus reduce estate duty liability in the second dying's estate, was not always a viable one as often this meant that access to cash and capital became more difficult for the surviving spouse.

The portable deduction between spouses now allows any part of the abatement not used upon the death of the first-dying to be available to the surviving spouse, making it possible for spouses not to use this mechanism to save duties.

However, should the spouses have substantial estates, such that the surviving spouse would not require the additional R3,5 million worth of assets, it is still preferable to bequeath this amount away from the survivor upon the death of the first dying, as it would otherwise increase the future growth of the surviving spouse's estate, and consequently increase estate duty liability in the survivor's estate.

This list is not exhaustive. Due to the limitations in scope of this guide, only the most pertinent allowable deductions have been expanded upon. Detail on other allowable deductions such as limited interests received as a gift, improvements made by beneficiaries, improvements to property subject to limited interest, accrual claims (by surviving spouse against deceased estate), books and works of art lent to the state, limited interests created by a predeceased spouse and so on, have not been detailed, and it is advisable to consult with your professional adviser for further information on these.

### **Rebate for rapid succession**

There is relief in the case of the same property being included in the estates of taxpayers dying within 10 years of each other. The deduction is calculated on a sliding scale varying from 100% where the taxpayers die within 2 years of each other and 20% where the deaths are within 8 to 10 years of each other.

### **Valuing the deceased estate: Making an estimate of estate duty liability**

- Estimate the value of the estate planner's estate for estate duty purposes.

## **Life assurance for estate duty**

- When ascertaining the liquidity requirements of an estate, the estate planner must take into account estate duty liability.
- Life assurance to cover estate duty liability and thus meet liquidity needs of the estate may be an option. The estate planner must reckon in to the calculation the fact that estate duty will also normally be leviable on the assurance proceeds themselves.
- Another strategy for spouses would be to take out joint assurance to cover estate duty liability which pays out on the death of the last-dying spouse or on simultaneous death.

## **DEATH AND TAXES**

### **Income Tax: General**

- When a person dies, his executor is appointed as a representative taxpayer of the estate, and he must handle the tax affairs of both the deceased individual taxpayer, to date of death, as well as that of the deceased estate (post death).
- The executor is required to ensure that the deceased estate is registered for income tax separately to that of the deceased individual. The deceased estate receives its own tax reference number, and is assessed at rates applicable to individuals, except that it will not qualify for any of the personal rebates.
- The executor is required to ensure that the deceased's final income tax return and the return(s) for the deceased estate are submitted to the South African Revenue Service.
- There are therefore two types of assessments that must be taken into account, namely:
  - ◆ the pre-death assessment (assessing the income and deductions applicable to the taxpayer to date of death), and
  - ◆ the post-death assessment (assessing the income and deductions applicable to the deceased estate after date of death).

## **Specific Income Tax Considerations**

- The provisions of Section 25 of the Income Tax Act (no.58 of 1962) were amended, with effect from 1 March 2016, and apply to persons dying on or after that date.
- The amended provisions state that any income received or accrued to the deceased estate post death, which would have been income in the hands of the deceased, had he received it before he died, must be treated as income of the deceased estate regardless of who inherits the income (previously such income was taxed in the beneficiary's hands). The deceased estate therefore is required to account for all its income until the Liquidation and Distribution account is finalised. The deceased estate will qualify for the annual interest exemption.

## **Income Tax and Estate Planning**

- The estate planner needs to evaluate the impact of income tax on his estate plan, and it is advisable for him to consult with his professional adviser for further information on this.

## **Capital Gains Tax: General**

- Capital gains tax was implemented on 1 October 2001.
- It is triggered by the disposal on or after valuation date of any asset of a South African resident, irrespective of where in the world the asset is held, and certain assets of a non-resident.
- Assets include property of whatever nature, whether movable or immovable, corporeal or incorporeal, except for currency (with the exception of gold and platinum coins).
- A capital gain or loss is determined by calculating the difference between the proceeds i.e. the amount accruing to the seller and the base cost of the disposed asset.
- Base cost relates to the costs directly incurred in acquiring or improving the asset.
- The Income Tax Act has set out certain valuation rules and methods of calculation of the base cost. Due to limitations in scope of this guide, a comprehensive discussion on all aspects of capital gains tax, including

valuation rules, is not possible, and the estate planner is advised to consult with his adviser for more detail.

- Certain assets are excluded, such as personal use assets (see below for list of assets excluded from a deceased estate).
- The first R2 million of the capital gain or loss incurred on the disposal of a primary residence is excluded from capital gains tax (applies to a South African resident and a natural person or Special Trust Type A, which owns property as a primary residence).
- Once the taxable capital gain is calculated, it is included in taxable income and taxed at normal income tax rates applicable.

### **Inclusion rate**

- A person's taxable capital gain for the year of assessment is calculated as a percentage of the net capital gain for the year. For normal tax purposes, the taxable capital gain is then added to taxable income before deducting donations.
- The percentage used to calculate the taxable gain (for the 2022 year of assessment) is:
  - ◆ 40% for individuals (which includes deceased estates), and special trusts;
  - ◆ 80% for companies, close corporations, and ordinary trusts.

### **Annual exclusion**

- The annual exclusion in the year in which a person dies is R300,000.
- R40,000 is allowed as an annual exclusion in the case of a living person.
- Since it is deemed that the deceased disposed if all of his assets on the day of death, the higher exclusion is intended to grant some relief in the year concerned.

### **Capital gains tax and death**

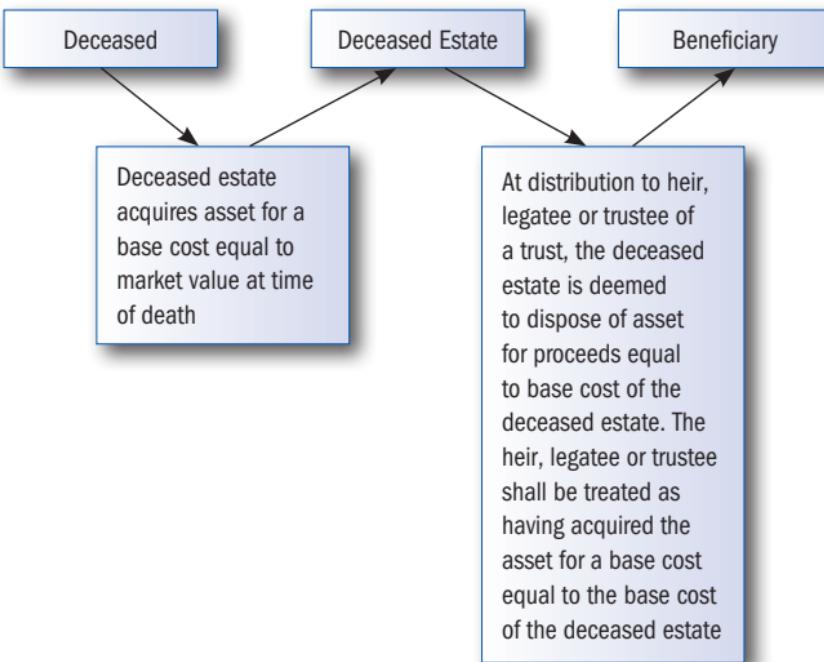
- In terms of Section 9HA and revised Section 25 of the Income Tax Act, a person is treated as having disposed of his or her assets at his date of death for an amount received or accrued equal to the market value as prescribed, given the following exclusions:

- ◆ Assets for personal use (with certain exceptions)
- ◆ The proceeds from life assurance policies
- ◆ Interests in pension, provident or retirement annuity funds
- ◆ The first R2 million in respect of a primary residence
- ◆ Small business assets with capital gains up to R1.8 million (applicable when a person is over the age of 55 where the maximum market value of the small business assets does not exceed R10 million).

Assets that have been bequeathed to a surviving spouse are subject to a "roll-over", whereby the CGT liability is postponed until the surviving spouse's death.

### **Capital gains tax and the deceased**

- At death, capital gains tax is activated through a deemed disposal whereby the deceased is deemed to have disposed of all his assets to his estate, at market value at the time of death.
- Assets bequeathed to a surviving spouse do not incur capital gains tax as they are subject to roll-over relief.
- The R300,000 exemption will apply to disposals made to the deceased estate.
- The exclusion for primary residence may apply.
- Therefore, where an estate consists of a primary residence, and personal use assets, no capital gains tax may be payable.
- Under most circumstances, although capital gains tax may be paid at the death of the deceased, no further capital gains tax will be payable when an heir, legatee or trustee receives an asset from the deceased estate.



### **Capital gains tax and the deceased estate**

- The executor may sell certain assets during the administration of the estate to persons other than beneficiaries, legatees or trustees of a trust.
- The value of such assets may increase or decrease between the date of death and the date of sale, which may have capital gains tax implications for the estate.
- Capital gains tax is levied in a deceased estate at the same rate as for individuals.
- The deceased estate will be entitled to the same exemptions and exclusions as would have been available to the deceased before his death (the annual exclusion of R40,000), however will not be entitled to any assessed capital loss that might have remained in the estate of the deceased, or the R300,000 exemption.

## **Capital gains tax and estate duty**

- Capital gains tax will be a liability in the estate, thus reducing the dutiable estate for estate duty purposes.

## **Capital gains tax and roll-overs**

- All assets that pass to a surviving spouse (either by way of a Last Will and Testament, or by intestate succession) are subject to “roll over” relief.
- This means that capital gains tax is postponed until the surviving spouse disposes of the assets during his or her lifetime or at death- the capital gain is then determined from the date of acquisition by the first dying spouse and the base cost at such disposal is the base cost as incurred by the first dying spouse.

## **Capital gains tax and the discretionary trust**

- As soon as a beneficiary has received a vested right to an asset through the exercising of the discretion of the trustee(s), this will be a deemed disposal and capital gains tax will be payable on the gain.

## **Capital gains tax and donations**

- A donation may be subject to both donations tax and capital gains tax, as a donation constitutes a disposal.
- Where a person donates an asset to another, or for a consideration not measurable in money, or to a person who is a connected person in relation to that person for a consideration that does not reflect an arm's length price, then:
  - ◆ The donor must be treated as having disposed of the asset for proceeds equal to the market value of the asset at the date of disposal and the person who acquired the asset must be treated as having acquired it at a cost equal to that market value.
- Donations between spouses are subject to roll-over relief.
- A donation which takes the form of writing off a debt which is regarded as gratuitous in nature, and therefore regarded as a donation, will not also be subject to capital gains tax. This will also apply to the utilisation of the annual R100 000 donation tax exemption to reduce a debt. This is important to bear in mind when drafting a Last Will and Testament, as if a beneficiary is relieved of an obligation to repay a loan to the deceased estate in the Will, there will

not be a capital gain in the hands of the beneficiary if the debt in question was included as property of the testator for estate duty.

### **Capital gains tax and liquidity**

- In order to prevent liquidity problems caused by excessive capital gains tax:
  - ◆ Where the capital gains tax liability exceeds 50% of the net value of the estate (before taking capital gains tax into account), and
  - ◆ The executor is required to dispose of an asset to pay the capital gains tax,
- The heir can elect to accept the asset and the liability for the excess over 50% of that net value, the liability plus interest will have to be paid by the heir within three years.

### **Capital gains tax and estate planning**

- The estate planner needs to evaluate the impact of capital gains tax on his estate plan.
- Capital gains tax may place a burden on the liquidity of an estate.
- A carefully structured Will could go a long way in minimising the capital gains tax effects in the estate itself, as there is no exclusion available to the deceased estate.
- When considering whether to transfer a primary residence out of a legal entity into an estate planner's personal name, evaluate the full tax liabilities for both forms- in many cases, the capital gains tax liability is less than the combined effect of executors fees and estate duties.

## **TRANSFER DUTY**

Transfer duty is an indirect tax on the acquisition of immovable property situated in South Africa. The following are the main provisions:

- ◆ It is calculated on the value of the immovable property (purchase price or market value whichever is the highest).
- ◆ It is payable within six months after the transaction is entered into.
- ◆ Where a registered VAT vendor purchases property from a non-vendor, the

notional input tax is calculated by multiplying the tax fraction [15/115 (14/114 before 1 April 2018)] by the lesser of the consideration paid or market value.

- ◆ The acquisition of a contingent right in a trust that holds a residential property or the shares in a company or the member's interest in a close corporation which owns residential property comprising more than 50% of its assets, is subject to transfer duty at the applicable rate.

<b>Transfer duty is calculated as follows:</b>	
R0 – R1 000 000	0%
R1 000 001 – R1 375 000	3% of the value over R1 000 000
R1 375 001 – R1 925 000	R11 250 + 6% of the value over R1 375 000
R1 925 001 – R2 475 000	R44 250 + 8% of the value over R1 925 000
R2 475 001 – R11 000 000	R88 250 + 11% of the value over R2 475 000
R11 000 001 +	R1 026 000 + 13% of the value over R11 000 000

The most notable exemptions from transfer duty are the following:

- If the purchase price/value is R1 000 000 or less.
- If the transaction is subject to VAT (i.e. where the seller is a VAT vendor).
- In the event of immovable property being transferred to a person (including a close corporation, company or trust), in terms of a Last Will and Testament, or as a result of intestate succession.
- The transfer of any property to a surviving spouse, or divorced person, who acquires sole ownership of the whole or any portion of property registered in the name of his or her deceased or divorced spouse where that property or portion is transferred to that surviving or divorced spouse as a result of the death of his or her spouse or dissolution of the marriage or union.

### **Transfer duty and estate planning**

- The estate planner needs to balance the benefits and financial implications of transferring assets from one entity to another, taking into account transfer duty costs, conveyancing fees etc. against the future benefits, bearing in mind that

transfer duties will seldom be payable upon death if the property remains in the estate planner's estate.

## THE LIVING WILL

- The Living will is a legal document that states the type of medical treatment a person would like his medical practitioner(s) to follow if he is unable to express these wishes himself, either because he is terminally ill or permanently unconscious.
- A Living Will states the types of medical treatments that can and cannot be used.
- Living wills typically cover issues such as artificial life support, resuscitation, organ donation, tube feeding, and whether organs are to be made available for medical research or donated for transplants.
- It is a separate document to a Last Will and Testament. It should not be incorporated into the Last Will and Testament or attached to it, as the Last Will and Testament only comes into effect upon death, which would be too late.
- It should be signed when of sound mind, and after careful consideration, and in the presence of two witnesses.
- The contents should be discussed with the estate planner's medical doctor, and a copy provided for the doctor or hospital's file.

## STORAGE OF ESTATE PLANNING DOCUMENTS

All important estate planning documents should be kept in one place, where the estate planner, his family, executor or trustee can readily find them. A "master file" should be set up, which lists all the important documents and where they can be located. The executor and family members should be made aware of the location of the "master file" and the location of the estate documents, so that they are easily accessible.

## **Photocopies and duplicate originals**

- The estate planner should photocopy the documents he wishes people to see or have. These copies are not legal originals, because they are not signed by him.
- A photocopy of the estate planner's signature does not make a document a legal original.
- The estate planner should never sign a copy, as this could legally qualify as a "duplicate original".
- To be extra safe, the estate planner should mark "copy" in ink on each page.
- The Master of the High Court may only accept copies of an original Last Will and Testament if ordered to do so by the Court.
- Otherwise the Master will only accept the original Last Will and Testament or a duplicate original.

## **Checklist of important estate planning documents for safekeeping**

- The original Last Will and Testament
- Identity document
- Marriage certificate, and antenuptial contract (if applicable)
- Divorce and maintenance orders (if applicable)
- Copies of inter vivos trust deed(s) and Letters of Authority (if applicable)
- Banking accounts
  - ◆ Every account should be listed indicating the name of the bank, account number and name on the account
- Credit cards
  - ◆ List all credit cards and account numbers and where they can be found
- Sources of income
  - ◆ Loan agreements/Acknowledgement of debt
  - ◆ Salary details
  - ◆ Group life, pension or provident fund details
  - ◆ Profit sharing arrangements
- Details of insurance
  - ◆ Buy and Sell insurance policy and agreement (if applicable)

- ◆ Accident insurance (if applicable)
- ◆ All policies of insurance including life insurance and short term insurance- policy name, type and number (portfolio statement)
- ◆ Name, address and telephone number of insurance agent
- Medical aid
- Income tax
  - ◆ Income tax number and location of previous assessments
  - ◆ Documents for the current year of assessment
  - ◆ Capital gains tax valuations
  - ◆ Name, address and telephone number of accountant or tax practitioner
- Investments
  - ◆ List of securities or shares held, name on certificate, its number, location and number of shares held
- Motor vehicle
  - ◆ Where to find car registration and other papers
  - ◆ If subject to finance, then details of finance agreement
- House
  - ◆ Title deed if house is unencumbered (otherwise bondholder will hold the title deed)
  - ◆ Bond holder - name of institution and bond account number
  - ◆ Lease agreement - if renting
- Other assets
  - ◆ Timeshare certificates
  - ◆ Loan account in an inter vivos trust
  - ◆ Acknowledgement of debt in estate planner's favour
  - ◆ Details of any usufruct or fideicommissum interest
- Liabilities
  - ◆ A list of all liabilities
  - ◆ List bank and branch details, account numbers and monthly payments

- ◆ Full names, addresses and telephone numbers of creditors
- The Living Will (if there is one)
- The estate planner should also take note of making provision for his social media accounts - most social media platforms do have policies in place regarding the profiles of users who may have passed away. The estate planner should indicate his wishes regarding his social media accounts, to his next-of-kin.

## DAVIS TAX COMMITTEE

The Davis Tax Committee has been established to evaluate tax policy and legislation in South Africa and to make recommendations to the legislator regarding possible amendments and other related changes. To date the Davis Tax Committee has made recommendations that will be continued to be considered by the legislator and might in future be incorporated into the legislation, some of which include the following:

That the estate duty deduction for assets bequeathed to the surviving spouse be deleted, and the estate duty rebate to be increased to R15 million, and that the trust distribution flow through principle to be limited.

## REVISING THE ESTATE PLAN

**Some key events which should ring a bell for an estate planner to revise his estate plan:**

- **Divorce**

- ◆ The Wills Act states that except where expressly otherwise provided, a bequest to a divorced spouse will be deemed revoked if the testator dies within three months of the divorce. This provision is to allow a divorced person a period of three months to amend his Will, after the trauma of a divorce. Should he fail to amend his Will within three months after his divorce, the deemed revocation rule will fall away, and his divorced spouse

- will benefit as indicated in the Will.
- ◆ In addition, review beneficiary nominations on any policies, retirement annuities, and trust deed provisions (all subject to the divorce order).
- **Sale or donation of asset specifically mentioned in Last Will and Testament or Inter vivos trust, marriage, birth of a child or grandchildren, minor child reaching majority (18 years of age).**
- **Estate planner acquires significant property or a downturn in his financial position, new business ownership**
- **Change in legislation having an impact on the estate plan**
  - ◆ For example annual Budget speech announcements and tax legislation amendments.

## IMPORTANT POINTS TO BEAR IN MIND

- A Last Will and Testament only deals with property in deceased's name at the time of his death, and a badly worded Will may lead to unintended consequences.
- In regard to business interests, an association agreement between members of a Close Corporation, or a shareholder's agreement in regard to a private company may prescribe how a deceased's interest should be dealt with.
- When a testator is married in community of property, he must remember that it is only half of joint estate that he is able to bequeath in terms of his Last Will and Testament. The other half belongs to spouse in consequence of the marriage.
- Trust assets do not fall within the testator's estate at death. Trust assets are dealt with in terms of the trust deed.
- Careful consideration of all the principles and legal implications should be exercised by the estate planner and discussed with a professional adviser before taking any course of action.