

# ESTATE PLANNING GUIDE

YOUR SUCCESS IS OUR SUCCESS



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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.

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**

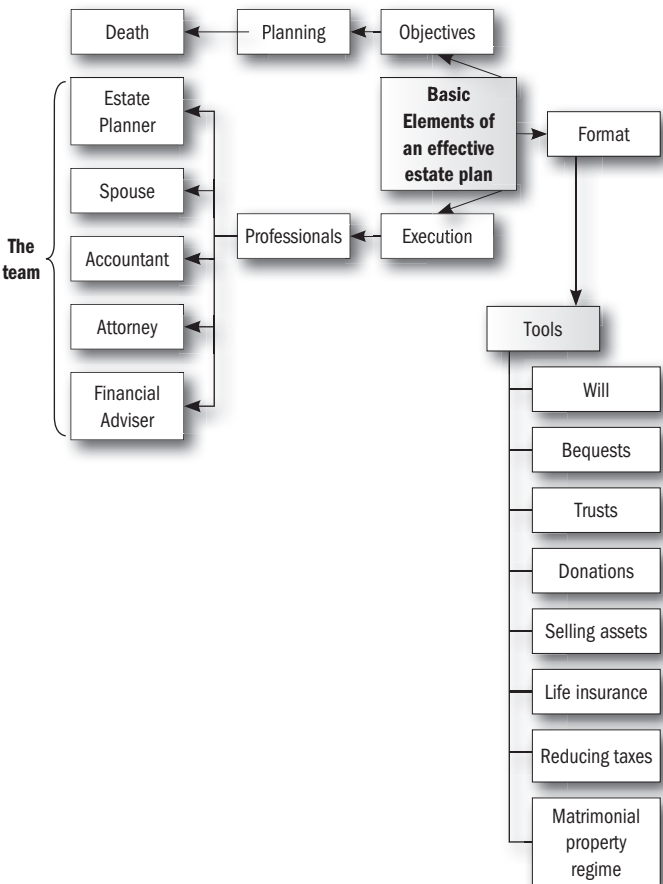
## **WHO NEEDS TO DO ESTATE PLANNING?**

- 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.
- 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. The estate planner's assets may accordingly 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 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
- Until the Master of the High Court has issued Letters of Executorship, authorising the executor to act on behalf of the estate, the estate is frozen. The estate planner needs to build this contingency into his plan, to ensure that family members have cash funds immediately available.
  - ◆ See Annexure A on page 42 to complete a quick estimate of liquidity.
- **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 or she 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**
  - ◆ To ensure that the costs do not outweigh the benefits when implementing the estate plan.
  - ◆ 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 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). See Annexure B on page 44 to create an estimate of net worth.
- List his goals and planning objectives, based on his personal needs, financial circumstances, lifestyle and practical efficiencies.

# TOOLS FOR ESTATE PLANNING

## 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, and the laws relating to intestate succession will apply.
- According to the Intestate Succession Act, the estate must be divided between the deceased's spouse and dependants. The surviving spouse inherits the greater of R125,000 or a child's share. A child's share is determined by dividing the total value of the estate by the number of the children 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 and/or siblings. In the absence of parents or siblings, the estate is divided between the nearest blood relatives.

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

- The Wills Act 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.
- 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.
- See Annexure C on page 46 for the full list of requirements for the valid execution of a Will.

## **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 under the Will (there is usually a clause to this effect).
- It is recommended that the executor be granted the power of assumption, which will entitle him to appoint another 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 pages 32 and 33 for further detail on bequests to a surviving spouse, the portable R3,5 million deduction, and bequests to certain public benefit organisations.

## 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.
- However, 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 assets.
- 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.
- Where agricultural property is bequeathed, the testator needs to be aware of Section 3 of the Subdivision of Agricultural Land Act, 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” and are dealt with leniently from an income 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**

- 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 (the claim is valid until death or remarriage of surviving spouse, but is usually limited to a period of one to two years).

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

- This is another instance where the freedom of the testator is limited, to a degree.
- The Close Corporations Act 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 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 to any other person who qualifies for membership of a corporation in terms of section 29.

## **Bequeathing a loan account or debt due**

- Where a loan or debt which is due to the testator, is bequeathed back to a beneficiary, this can be seen as a discharge of a debt for no consideration, and accordingly be subject to capital gains tax.
- It is preferable for the testator to rather:
  - ◆ Ensure that the debt is repaid, or
  - ◆ Bequeath an amount of the same value to the beneficiary (debtor).  
When the estate is wound up, the loan amount due would be set off by the executor against the cash bequest.

## **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.

## **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 – for example with immovable property, it is limited to two successive generations.

## **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.

## **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.
- 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. Estate planners should not mistakenly believe that an asset held and owned in a discretionary trust will vest in beneficiaries upon the trust founder's death.
- A badly worded Last Will and Testament may lead to unintended consequences, and even the disinheritance of a loved one that the testator did not intend to disinherit.
- 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.
- Refer to Annexure D for a checklist for drafting a Last Will and Testament.

## TRUSTS

### General information on trusts

- The Trust Property Control Act defines an ownership trust as “when the creator of the trust, “the Founder”, has handed over to another “the Trustee”, the ownership of property, which, is to be administered by the Trustee, for the benefit of some person other than the Trustee (the beneficiary), or for an impersonal object”
- The Trustee is owner of the trust property and is required to administer it in terms of the trust deed
- A bebind trust is defined in the same way except ownership is transferred to the beneficiaries and the property is placed under the control and disposal of the trustee in terms of the deed
- “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 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
- Audit 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.
2. **Types of inter vivos trusts:** 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
3. **Testamentary Trust:** This is a trust created in a Will 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.
4. **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.
5. **Special trusts:** Section 1 of the Income Tax Act defines two types of special trust:
  - a. **Special trust for incapacitated persons:** This is a trust created for the maintenance and care of a person with a mental illness (as defined in the Mental Health Care Act) or any serious physical disability which precludes him from earning income, or managing his own affairs, or
  - b. **A testamentary trust:** This is a trust created by a testator by or in terms of his Will solely for the maintenance and care of his relatives who are alive on the date of death of the deceased (including any beneficiary who has been conceived but not yet born on that date), where the youngest of those beneficiaries is on the last day of the year of assessment of that trust, under the age of 21 years.

## 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. Because the beneficiary has no rights whatsoever, in the event of his death (or insolvency), nothing can be held in his estate or pass to his heirs or creditors. 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 have a personal right to 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

Trusts are divided into two categories for tax purposes:

| Special trusts  |   | All other trusts  |
|---|---|---|
| Taxed at individual tax rates<br>Primary rebate, and interest and foreign dividend exemptions do not apply  |   | Taxed at 40% income tax rate  |
| Incapacitated persons definition (a) page 14  | Testamentary definition (b) page 14                 |   |
| Capital gains tax: treated as individual, with capital gains tax inclusion rate of 33.3%, effective rate 13.3% of gain, capital gains tax primary residence exclusion allowed if meets criteria | Capital gains tax: treated same as all other trusts | Capital gains tax inclusion rate of 66.6% with effective rate of 26.7% 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 paid 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. A bebind trust provides no protection in these circumstances.

### **C Estate duties and donations tax**

- 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.
- 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 by-passed for one or more generations.
- These benefits are only applicable to a discretionary inter vivos trust and not vested or bebind 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.
- ◆ Although interest free loans do not constitute a donation under the prevailing Income Tax Act, they do amount to a gratuitous disposition for the purposes of Section 7 of the Income Tax Act.
- Requests 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 (see page 32).

## **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, and special testamentary trusts, 66.6% of the net gain is added to the taxable income of the trust. As trusts are taxed at a flat rate of 40% on taxable income, the effective rate of tax on capital gains will be 26.7%. There is no primary residence rebate for these trusts.
- Special trusts created for the mentally ill or physically disabled qualify for the primary rebate, and are subject to capital gains tax at the same inclusion rate of 33.3% as a natural person, and would qualify for the annual capital gains tax exclusion of R30,000.

## **Transfer of fixed property out of a trust to an individual estate planner's name**

- Should the estate planner wish to transfer his primary residence out of a trust or close corporation or company, and into his personal name, there is an opportunity to do so free of transfer duty, capital gains tax or securities tax until the 31 December 2012, subject to certain criteria being met.
- This relief has been extended to holiday homes and rental property in certain instances.
- The estate planner should weigh the benefits of doing so against the following considerations:
  - ◆ Consider what the purpose was for the creation of the trust at the outset, and why the property was purchased by the trust, or transferred to the trust – was it for asset protection, or limiting the estate planner's dutiable value?
  - ◆ Transferring assets out of the trust into the estate planner's individual name, means that the asset will be included in his estate for estate duty purposes.
  - ◆ If a fixed property is not a primary residence, (if it is a holiday home or rental property) it will not qualify for the primary residence rebate.
  - ◆ There may be other incidental costs involved, such as bond registration costs (a new bond may need to be registered).
  - ◆ The conduit principle of taxation for trusts means that any gains can be distributed to beneficiaries, who will be taxed in their own hands.
  - ◆ Death is a capital gains tax event. Assets owned by a trust will not be subjected to capital gains tax on death of the estate planner or beneficiary.

## **Anti-avoidance provisions for trusts**

- Various anti-avoidance provisions exist to combat the use of trusts for income splitting and tax avoidance schemes.
- 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.
- 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 are subject to donations tax, at a flat rate of 20% on the value of the donation.
- Donations tax is payable within 3 months after the donation.

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. donations made by the trust to a beneficiary)
10. Donations between companies forming part of the same group of companies

## 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).
- **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 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 scenarios 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 has extended the definition of 'spouses' to include "a same sex or heterosexual union which the Commissioner is satisfied is intended to be permanent".

Many pieces of legislation now define spouse to include a partner in a cohabitative relationship, including the Pension Funds Amendment Act, Taxation Laws Amendment Act, the effects of which are that cohabittees 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, or decide not to use it in favour of it being used by his spouse or dependants after his death, the proceeds will attract no 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 are permitted to invest abroad. The current limit is R4 000 000 per person per 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:
  - i) Before the donor became a resident of South Africa for the first time; or
  - ii) 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
  - iii) 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.

# BUSINESS SUCCESSION PLANNING

- 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 (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 paid out, the benefits are included in the partnership's gross income, and the premiums are deductible for income tax purposes.

## **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.

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.

## ESTATE DUTY

### 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 currently levied at 20% on the dutiable value of the estate.
- 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 would 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.

### **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.

#### **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. It appears that the portability of the deduction will only apply when the entire value of the estate of the first dying spouse is left to the survivor of them.

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.

## **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.

### **Rebate for rapid succession**

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

### **Valuing your estate: Making an estimate of estate duty liability**

- The insert attached to the guide sets out a broad outline of the formula for the estate planner to estimate the value of his 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.

### **Future of estate duty in SA**

- The scrapping of estate duty has been on the cards for a number of years now.

- It is generally believed that estate duty in South Africa will either be scrapped or scaled down in the future. It is believed that capital gains tax will be the main way to get tax from a deceased estate. It remains to be seen in future Budget's whether this indeed comes about.
- If estate duty is indeed scrapped in the future, it will affect the estate planner's planning requirements.

## 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 [set up for mentally ill or seriously physically disabled persons] 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 and medical expenses.
- The percentage used to calculate the taxable gain is:
  - ◆ 33.3% for individuals (which includes deceased estates), and certain special trusts;

- ◆ 66.6% for companies, close corporations, ordinary trusts and special testamentary trusts.

## Annual exclusion

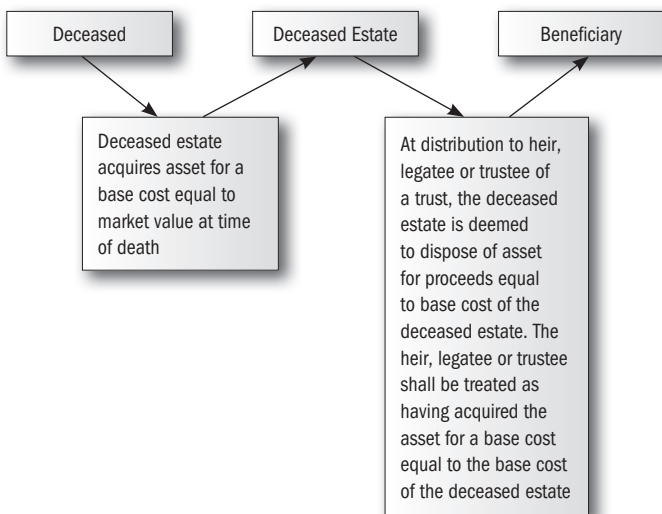
- The annual exclusion in the year in which a person dies is R300,000.
- R30,000 is allowed as an annual exclusion in the case of a living person.
- Since it is deemed that the deceased disposed of all of his assets on the day of death, the higher exclusion is intended to grant some relief in the year concerned.

## Capital gains tax and death

- Certain assets in a deceased estate are excluded from capital gains tax. These assets are:
  - ◆ Assets for personal use (with certain exceptions)
  - ◆ Assets that accrue to the surviving spouse
  - ◆ Assets bequeathed to approved public benefit organisations
  - ◆ The proceeds from life assurance policies
  - ◆ Interests in pension, provident or retirement annuity funds
  - ◆ The first R2 million in respect of a primary residence
  - ◆ The first R750,000 in respect of small business assets
  - ◆ Currency, excluding gold and platinum coins

## 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 R30,000), 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.
- The estate can however claim the capital gains tax from the heir receiving the asset.

## **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 could amount to a deemed disposal and acquisition for capital gains tax purposes. For example, if a donation is made in the form of a R100,000 waiver of debt, such waiver will not attract donations tax, but will be subject to capital gains tax. Where R100,000 of the debt is paid and the payment is then donated back to the debtor, such donation should not incur donations tax nor capital gains tax, however this is problematic and may be seen as a sham – in that the true substance of the transaction was a waiver of a debt.
- To avoid capital gains tax on donations, they should be in cash, and structured in such a way as to not create the impression of a mere reduction of a loan. A contract should rather be drafted to repay the debt in monthly instalments, and then donate the money in a lump sum with which to repay the 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, this means that there is a taxable gain in the hands of the beneficiary, since it is deemed that the loan is acquired at no value and disposed of at market value.

## **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

## General

- Transfer duty is calculated on the value of the immovable property (purchase price or fair value whichever is the highest).

### **Transfer duty is payable at the following rates on transactions which are not subject to VAT:**

Acquisitions of property by all persons:

#### **Property value Rates of tax**

R0 – R600 000 0%

R600 001 – R1 000 000 3% of the value above R600 000

R1 000 001 – R1 500 000 R12 000 plus 5% of the value above R1 000 000

R1 500 001 and above R37 000 plus 8% of the value exceeding R1 500 000

Applicable to legal persons (close corporations, companies and trusts).

## VAT and/or transfer duty

- If a seller is a VAT vendor, transfer duty is not payable.
- A notional VAT input credit may be claimed when a VAT vendor buys a fixed property from a non-VAT vendor. To combat abuse, this notional VAT input is currently limited to the transfer duty paid by the purchasing VAT vendor.
- The VAT and transfer duty nexus has resulted in the notional VAT input credit being delinked from the transfer duty payable, and the quantum of the notional VAT input credit being set equal to the tax fraction (14/114) of the lower of the:
  - ◆ Selling price (consideration) payable for the property
  - ◆ Open-market value of the property
  - ◆ Current municipal value of the property
  - ◆ VAT-inclusive acquisition price, including improvements, by the non-vendor selling the property
- The purchaser of the shares or members interest will be liable to pay deemed transfer duty if the seller is not a VAT vendor.
- Liabilities of the entity are to be disregarded when calculating the fair value of the contingent right in the trust, the shares in the company or the member's interest in the close corporation.

## Exemptions from transfer duty

- Transfer duty will be exempted if the purchase price/value is R600,000 or less.
- 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, no VAT or transfer duty is payable.

- The transfer of any property to a surviving spouse or divorced person who acquires sole ownership in 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 is also exempt from transfer duty.

## **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 (medical accounts, store accounts, loan accounts, Telkom, cell phone, rates and levies, electricity, water, subscriptions, and so on)
  - ◆ 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)

## REVISING THE ESTATE PLAN

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

- **Divorce**
  - ◆ Review estate planning documents, such as the existing Last Will and Testament. 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** – amend the Will or trust deed accordingly – without the asset, the bequest falls away.

- **Newly Married**
  - ◆ The marital property regime chosen will impact on an existing plan. Review and update past planning.
- **Birth of a child or grandchildren:** If children are minors the estate planner needs to ensure that the assets they inherit are protected through his Will.
- **Estate planner acquires significant property**
  - ◆ The estate planner needs to review structures to protect and secure the assets for future generations and reduce taxes where applicable.
- **Downturn in estate planner's financial position**
  - ◆ Where there is a downturn in an estate planner's financial position, and many assets have been sold and there is little liquidity – the Last Will and Testament needs to be reviewed. A legatee will receive his bequest before any heir (who inherits the residue, of which there may be very little left). This may not be what the testator intended.
- **New business ownership:** Provide for business succession planning in the partnership, shareholders or association agreement(s).
- **Change in legislation having an impact on the estate plan**
  - ◆ For example annual Budget speech announcements.

The estate planner will need to decide whether it is practical and viable to merely amend current documents or create entirely new documents to account for any changes.

## Annexure A: Quick estimate of an estate's liquidity

|   | Claims in favour of the estate<br>(turned into cash) |              |
|---|--|--------------|
|   | Description  | Est. value R |
| <b>Cash</b>   |  |              |
| Savings   |  |              |
| Cheque  |  |              |
| Moneymarket accounts  |  |              |
| Other   |  |              |
| <b>Investments</b>  |  |              |
| <b>Quoted Shares/Unit trusts to be turned to cash</b>                 |  |              |
| <b>Life insurance payable to estate</b>                               |  |              |
| <b>Life insurance to cover mortgage bond</b>                          |  |              |
| <b>Life Insurance to cover estate duty liability</b>                  |  |              |
| <b>Retirement annuity lump sum payable to estate</b>                  |  |              |
| <b>Bequest prices payable by heirs</b>                                |  |              |
| <b>Other assets to be reduced to cash per estate planner's wishes</b> |  |              |
| <b>Total A</b>  |  |              |

| Cash bequests                     |                |
|-----------------------------------|----------------|
| Description                       | Est. value R   |
| <b>Cash bequests made in Will</b> |                |
| Name of legatee                   |                |
| Name of legatee                   |                |
| <b>Total B</b>                    | (            ) |

| Claims against the estate   |                |
|---|----------------|
| Description   | Est. value R   |
| <b>Debts payable by estate planner</b>                                  |                |
| Credit card   |                |
| Daily accounts  |                |
| Medical/Hospital Accounts   |                |
| Mortgage bond balance outstanding<br>(if not covered by life insurance) |                |
| Motor vehicle finance settlement  |                |
|   |                |
| <b>Taxation liability</b>   |                |
| <b>Loans to be repaid</b>   |                |
| <b>Other</b>  |                |
| <b>Total C</b>  | (            ) |

| Administration expenses  |                |
|--------------------------|----------------|
| Description              | Est. value R   |
| <b>Executor's fees</b>   |                |
| <b>Master's fees</b>     |                |
| <b>Funeral expenses</b>  |                |
| <b>Estate duty</b>       |                |
| <b>Capital gains tax</b> |                |
| <b>Total D</b>           | (            ) |

**Total A - (Total B + Total C + Total D)**

Notes:

Bequest prices need to be carefully drafted in the Last Will and Testament, however can be used to cover liabilities such as motor vehicle finance agreements and mortgage bond liabilities.

## Annexure B: Estimate of Assets and Liabilities of Estate Planner (Net worth)

|                                      | Assets                  |                                     |                              |                   |
|--------------------------------------|-------------------------|-------------------------------------|------------------------------|-------------------|
|                                      | Description of property | Registered owner<br>Joint ownership | % of shared property you own | Market value<br>R |
| <b>Liquid assets</b>                 |                         |                                     |                              |                   |
| Cash                                 |                         |                                     |                              |                   |
| Savings                              |                         |                                     |                              |                   |
| Cheque                               |                         |                                     |                              |                   |
| Money market accounts                |                         |                                     |                              |                   |
| <b>Movable property</b>              |                         |                                     |                              |                   |
| Motor vehicle(s)                     |                         |                                     |                              |                   |
| Jewelry                              |                         |                                     |                              |                   |
| Coins                                |                         |                                     |                              |                   |
| Artwork                              |                         |                                     |                              |                   |
| Tools                                |                         |                                     |                              |                   |
| Other collectables                   |                         |                                     |                              |                   |
| Personal goods                       |                         |                                     |                              |                   |
| Household goods                      |                         |                                     |                              |                   |
| <b>Business interests</b>            |                         |                                     |                              |                   |
| Shareholding(s)                      |                         |                                     |                              |                   |
| Partnership interest(s)              |                         |                                     |                              |                   |
| Intellectual property rights         |                         |                                     |                              |                   |
| Goodwill                             |                         |                                     |                              |                   |
| <b>Loan account(s)</b>               |                         |                                     |                              |                   |
| <b>Investments</b>                   |                         |                                     |                              |                   |
| Quoted shares                        |                         |                                     |                              |                   |
| Unit trusts                          |                         |                                     |                              |                   |
| Government stock                     |                         |                                     |                              |                   |
| Other                                |                         |                                     |                              |                   |
| <b>Insurance policies</b>            |                         |                                     |                              |                   |
| Life insurance payable to estate     |                         |                                     |                              |                   |
| Retirement Annuity payable to estate |                         |                                     |                              |                   |

|                           |  |  |  |  |
|---------------------------|--|--|--|--|
| <b>Immovable property</b> |  |  |  |  |
| Residential property      |  |  |  |  |
| Holiday home(s)           |  |  |  |  |
| Agricultural land         |  |  |  |  |
| <b>Foreign assets</b>     |  |  |  |  |
| Fixed Property            |  |  |  |  |
| Investments               |  |  |  |  |
| <b>Gross asset value</b>  |  |  |  |  |

|                                     | Liabilities                 |  |                          |                          |
|-------------------------------------|-----------------------------|--|--------------------------|--------------------------|
|                                     | Description<br>of liability | Person<br>liable<br>Joint<br>liability | % of shared<br>liability | Market<br>value<br><br>R |
| <b>Accounts</b>                     |                             |  |                          |                          |
| Credit card                         |                             |  |                          |                          |
| Daily accounts<br>(estimated total) |                             |  |                          |                          |
| <b>Mortgage bond</b>                |                             |  |                          |                          |
| <b>Motor vehicle<br/>finance</b>    |                             |  |                          |                          |
| <b>Loans</b>                        |                             |  |                          |                          |
| <b>Estimated tax<br/>liability</b>  |                             |  |                          |                          |
| <b>Other</b>                        |                             |  |                          |                          |
| <b>Gross liabilities</b>            |                             |  |                          | (       )                |

**Net worth**

\*It is also advisable to prepare a schedule of long term insurance policies, including death values, where beneficiaries are named on the policy (if applicable).

An estate planner's net worth calculation assists with:

- Getting a snapshot on what he is worth financially
- Seeing how vulnerable he might be to shifts in his circumstances
- Guarding against the effects of tragedy by letting him review how much income will be available to support his family, including insurance proceeds from policies
- Understanding how risk tolerant and comfortable he is with handling his debt
- Reflecting on his lifestyle and what is important to him



## Annexure C: Requirements for a valid Last Will and Testament

In order for a Last Will and Testament to be valid, it must be:

- Reduced to writing
- Signed at the end of each and every page by the testator in the presence of two or more competent witnesses who must both sign in each other's presence and in the presence of the testator
- A testator can also sign by making a mark or he can ask somebody to sign on his behalf (in his presence and at his direction), but then a Commissioner of Oaths must be present who must complete the requisite Certificate (certifying the identity of the testator), and sign each and every page thereof
- The Will should be dated
- A person who signs as witness should be at least 14 years of age
- The executor and any person who stands to benefit from the estate should not sign the Will as witness, as this will disqualify them from inheriting under the Will or nullify the appointment as executor
- Ensure that no blank spaces exist between the end of the typing and the signature of the testator

**If a Will does not comply with these formalities, a testator may die intestate if the Will is declared invalid.**

The High Court is empowered to order the Master to accept or reject a Will.

If a person drafts an amended document and then dies, the Court must be satisfied that he intended the document to be his Will or an amendment. If the Court is satisfied, it may order the Master to accept the document even though it does not comply with the formalities for the execution or amendment of the Will.

## Annexure D: Last Will and Testament Checklist

Below is a list of information to use as a starting point to drafting a Last Will and Testament.

- The testator's identity document, full names and residential address
- Marital status (tick the appropriate box)

Single

Divorced

Widow(er)

Married in community of property

Married out of community of property (ANC) with accrual

Married out of community of property (ANC) without accrual

Married in terms of foreign law

Living together but not married

Married in terms of customary or religious law

Same sex union, of a permanent nature

- If either of the boxes indicating a marriage out of community of property with an antenuptial contract were ticked, are there any conditions in the antenuptial contract which may override the Will? If yes, provide this information to the adviser.
- Details of spouse (or cohabiting partner), including full names, identity number and residential address
- Are there children? If so, are they minors (under the age of 18)? Are they from a previous marriage?
- Who is the first and second choice of executor and trustee?
- Are there any cash legacies or specific bequests to be made to a particular person?
- Who are the heirs to be? If there is more than one heir, decide what percentage or portion of the estate is to go to each heir.
- Is there a bequest price to be payable by any of the heirs or legatees?
- Will there be any minor heirs or legatees (under the age of 18)? If so, speak to the adviser about the benefits of setting up a testamentary trust within the Will.

**Note:** *If a testamentary trust is not set up in the Will, and a minor child receives a bequest, it will be paid to the Guardian's Fund and managed by them until the child reaches majority.*

- Will a usufruct be created in the Will? Discuss the implications with an adviser.

## Alternate beneficiaries

- Consider the scenario where one of the heirs or legatees may not be in a position to receive his bequest, because he may predecease the testator or may repudiate the bequest. Consider making provision for alternative beneficiaries. If there is more than one alternate, consider what percentage or portion of the estate is to go to each one.

**Notes:** *the purpose for substitution is to prevent intestate succession or to prevent certain legacies from falling back into the residue of the estate (a legacy will fall away on the legatee's death, unless an alternate is named).*

## Particular considerations for surviving spouses:

- A testator may wish to leave everything to his surviving spouse, failing which (i.e. should the spouse predecease him), to his children (if applicable). He would then need to specify whether, if one of the children fails, the remaining child inherits the deceased child's portion in full, or whether the pre-deceased's child's *descendants* would inherit his portion by representation.

- Simultaneous death: This is the scenario where each spouse has named the other as sole beneficiary in each of their Wills. Both are in an accident together and perhaps one is killed outright, and the other remains alive for a few days longer, (usually up to 30 days) and then dies. In this scenario, the estate of the first dying will, in the absence of a provision in the Will to the contrary, be awarded to the estate of the survivor. It is only once the first dying's estate is wound up, that the survivor's estate will have to be administered and distributed to the beneficiaries nominated in the survivor's Will. In order to avoid this, the testator may wish to consider providing that if his spouse does not survive him by more than 30 days (and vice versa), his estate would go directly to the substituted beneficiaries or trust formed for the minor(s).
- Legal guardianship and custody: In the event of minor child(ren) consider providing for legal guardianship and custody.

**Notes:** *the legal guardian has the right to make decisions concerning the minor and the custodian is the person with whom he/she will live.*

- Consider cremation or burial, and donation of organs.

## **Annexure E: Table of applicable legislation**

Wills Act no 7 of 1953, as amended

Maintenance of Surviving Spouses Act no 27 of 1990

Trust Property Control Act no 57 of 1988

Intestate Succession Act 81 of 1987

Estate Duty Act no 45 of 1955

Administration of Estates Act no 66 of 1965

Divorce Act no 70 of 1979, as amended

Matrimonial Property Act no 88 of 1984

Civil Union Act no 17 of 2006

Subdivision of Agricultural Land Act no 70 of 1970

Income Tax Act no 58 of 1962, as amended

Transfer Duty Act no 40 of 1949

Close Corporations Act no 69 of 1984

Companies Act no 71 of 2008

Mental Health Care Act no 17 of 2002

**(Note:** this list is not exhaustive)