

“ The effect of marital regimes on wills and estate planning

FISA CONFERENCE
2013

Till death or divorce us do part



What is estate planning ?

Estate planning is about;

- *people,*
- *their lives,*
- *their aspirations, and*
- *skeletons –*

as experts we are sometimes blinded by the numbers.

(source ?)

Our approach : Four estates

PERSONAL
ASSETS

TRUST
ASSETS

CONTRACTUAL
ARRANGEMENTS

RETIREMENT
FUND BENEFITS

Our approach



lifeview™

Three vital questions

■ Who is a spouse ?

- 4A deduction (rollover)
- Intestate succession
- Maintenance Of Surviving Spouse Act

■ Which marital property regime?

- there are only two
- the general rule
- two exceptions

■ Are you a surviving spouse?

- Rev 267e

Personal assets : Exclusion clause

I direct that the inheritance devolving upon any beneficiary under this will as well as the proceeds, the reinvestment of such proceeds and the income thereon shall be free from the legal effects, including any accrual system, of any present or future marriage of such beneficiary and shall also be protected against the creditors of their spouses.

Personal assets : Exclusion clause

Accrual marriages

- Inheritances and donations acquired during the marriage are excluded from accrual assets in terms of section 5 of the Matrimonial Property Act.
- Assets acquired prior to the marriage?
 - Excluded in the antenuptial contract.
 - What if not specifically excluded in the antenuptial contract?

Personal assets : Exclusion clause

In community marriages

Du Plessis and others v Pienaar 2002 (4) SA 311 (SCA).

Facts:

Mrs Du Plessis married in community inherited farms, farming equipment, and livestock – subject to an exclusion clause.

Husband conducted business as a moneylender – his business went under.

Creditors attached joint estate – Mrs Du Plessis argued that her inheritance was part of her separate property.

Personal assets : Exclusion clause

In community marriages cont..

Du Plessis and others v Pienaar 2002 (4) SA 311 (SCA).

SCA Found

- Debts are not incurred by a persons estate
- The estate is merely the source from which the debt is recovered.
- Debt is incurred by a person who is the debtor
- The insolvent debtors are Mrs Du Plessis and her husband the debts having accrued to them both.
- The fact that some property may be separately owned only has relevance between the parties – but does not affect the rights of creditors to look to all the property of a debtor in satisfaction of a debt.

Confirmed 1994 Natal High Court case of Badenhorst v Bekker

Patrimonial damages – Van Der Merwe v Road Accident Fund (Con Court)

Personal assets : Transferring assets to a spouse

Section 21 of the Insolvency Act

- Makes the Trustee of the insolvent estate the owner of the solvent spouse's property in the same way as it makes him the owner of the insolvent spouse's estate.
- Solvent spouse has to prove that held as her separate property in one of the following categories;
 - property acquired before the marriage
 - property acquired by valid title against the creditors of the insolvent spouse during the marriage
- Definition of spouse for the purposes of section 21

Not only wife or husband in the legal sense, also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to each other

Contractual arrangements: Life assurance benefits

Accrual Marriages

	Owner	Life Assured	Beneficiary	Asset for Accrual	Estate Duty	Executor's Fees
1	Deceased	Deceased	None	Yes	Yes	Yes
2	Deceased	Deceased	Spouse	No	Yes but 4(q)	No
3	Deceased	Deceased	3 rd Party	SV only Shrosbee & Hees, cases	Yes (deemed property)	No
4.1	Deceased	3 rd Party	None	Yes SV	Yes SV	Yes SV
4.2	Deceased	3 rd Party	Spouse	No	SV, but 4(q)	No
5	3 rd Party	Deceased	N/A	No	Yes (deemed property)	No
6	Spouse	Deceased	None	No	Yes but 4(q)	No

Contractual arrangements: Life assurance benefits

Out of community marriages

	Owner	Life Assured	Beneficiary	Estate Duty	Executor's Fees
1	Deceased	Deceased	None	Yes	Yes
2	Deceased	Deceased	Spouse	Yes but 4(q)	No
3	Deceased	Deceased	3 rd Party	Yes	No
4.1	Deceased	3 rd Party	None	Yes - SV	Yes- SV
4.2	Deceased	3 rd Party	Spouse	Yes – SV But 4(q)	No
5	3 rd Party	Deceased	N/A	Yes (deemed property)	No

Contractual arrangements: Life assurance benefits

In Community Marriages

	Owner	Life Assured	Beneficiary	Asset for Accrual	Estate Duty	Executor's Fees
1	Deceased	Deceased	None	Yes	Yes minus 1/2 P+6%	Yes
2	Deceased	Deceased	Spouse	No	Yes but 4(q)	No
3	Deceased	Deceased	3 rd Party	No Alienated with consent to beneficiary nom.	Yes (deemed property)	No
4.1	Deceased	3 rd Party	None	Yes SV	Yes 1/2 SV	Yes SV
4.2	Deceased	3 rd Party	Spouse	No	SV, but 4(q)	No
5	3 rd Party	Deceased	N/A	No	Yes (deemed property)	No

Personal assets : accrual claim

- Which spouse has the claim?
- Liquidity?

I hereby wish to place on record that in the event of me predeceasing my spouse, and should my estate be entitled to monies from my spouse, by virtue of the application of the accrual regime to our respective estates, then my spouse shall not be required to realise any assets or to transfer any assets in specie to the FAMILY TRUST, but the amount owing, if he so chooses, shall be reflected as a debt owed by him to the said Trust, which debt shall not accrue any interest and shall be repayable without fixed date.

Trusts and marital regimes



Contractual arrangements:

Buy and sell agreements

- Marriages in community of property
- Joint powers of administration
- Section 15(2)(c) – requires written consent
- Section 15(6) – 15(2)(c) does not apply where and act is performed *in the ordinary course of profession trade or business.*

Retirement fund benefits

Kotze v Kotze (2013 Cape High Court)

■ Section 7(7)(a) is clear;

“In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party, shall, subject to paragraphs (b) and (c), be deemed to be part of the assets”

■ Automatically an asset for division, therefore;

- does not have to be pleaded
- applies to all marital regimes except post '84 totally out of community marriages
- applies equally to each spouse's fund

In future settlement agreements will have to specifically exclude a pension interest if that's what the parties intended.



Think World Class

glacier
by Sanlam

“ Questions

