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# Fiduciary Matters

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## The effect of maintenance obligations on your Will and estate

**W**hen does the obligation to pay maintenance to children and former spouses end? This is a vital consideration often overlooked in estate planning and Will drafting. Lack of proper planning in this regard may have unintended consequences for your loved ones.

### The legal position

#### Child support

Parenthood automatically results in the obligation to support a child, regardless of whether it is born in or out of wedlock. In terms of the new Children's Act, No. 38 of 2005, maintenance is payable until the age of 18 years.

The maintenance court has held that once the child turns 18 it is the child's duty to apply to court for maintenance. As such, a child above the age of 18 years does have a claim for maintenance provided good cause can be shown that they are still in need of maintenance. The obligation for child support can be terminated only by the child's death.

Therefore, the child has a right to claim maintenance from the deceased parent's estate. Any maintenance order already in place will also be binding on the deceased estate.

#### Spousal support

The situation differs slightly with spousal support and depends, to a large degree, on the wording of the divorce order granted in favour of the relevant spouse.

In *Kruger v Goss*, 2009, it was determined that an ex-spouse does not have a claim for maintenance against the deceased estate of her ex-husband, except where the divorce order specifically states that the maintenance order is binding on the deceased estate.

Such a provision is typically included in the divorce order, together with a provision stating that the order will terminate upon death or remarriage of the ex-spouse, whichever occurs first.

### Effect on estate planning

Maintenance orders against the deceased can significantly delay finalisation of the deceased estate if proper provision has not been made in the Will.

The deceased's assets can be distributed to beneficiaries only once all creditors have been settled.

Maintenance orders or claims constitute creditors of the estate and will only be settled in full once the child turns 18 (or at a later date as per the court order made after the child turned 18) or the ex-spouse remarries or passes away.

### Planning tools available

A testamentary trust can serve as an effective planning tool by specifically bequeathing in your Will a lump sum cash amount (actuarially calculated as the present value of the future obligations) to the trust with your ex-spouse or child as beneficiary.

Alternatively, said lump sum can be transferred to an inter vivos trust prior to death.

The funds in trust are then used to settle the maintenance obligation. As the trust does not have any obligation in terms of the maintenance order, it is advisable to have the trustees sign an agreement whereby they agree to take over the maintenance obligation.

### Tax and other considerations

#### Inter vivos trust

The said lump sum is transferred to an inter vivos trust. If done by way of donation, the donation will be exempt from donations tax (*Estate Welch v CSARS*, 2004)

The amounts distributed to the ex-spouse on a monthly basis should generally be exempt from income tax in terms of section 10(1)(u) as they are payable in terms of a divorce order. The tax implications of amounts distributed to children in

terms of a maintenance order are less clear.

As the lump sum transfer to the trust is not seen as a 'donation' for income tax purposes, it is uncertain whether section 7(3) will apply where a minor child is concerned.

As such, it appears as though maintenance payments received by both minor and major children will be taxable in the hands of the child as maintenance orders for child support are specifically included in gross income without any exemption applying. The trust will not be able to claim the maintenance payments as a deduction for tax purposes.

An inter vivos trust may result in additional administration and compliance costs during the lifetime of the person ordered to pay the maintenance but there will be no estate duty and executor's fees payable on this amount at death as it falls outside the dutiable estate.

The deceased estate may be finalised in a shorter period as no testamentary trust has to be set up. However, should the obligation for maintenance cease to exist prior to the death of the person ordered to pay the maintenance, one is left having incurred additional costs without

having received any benefit in return.

#### Testamentary trust

The said lump sum amount is specifically bequeathed in your Will to a testamentary trust. As the amount is only transferred to the testamentary trust after death, it forms part of your deceased estate and will therefore be subject to executor's fees and estate duty.

### Maintenance orders or claims constitute creditors of the estate

Prior to death, the maintenance payments will be made in the personal capacity of the person ordered to pay them.

Following death, the payments are continued by the testamentary trust. The tax consequences of distributions made to the child or ex-spouse, as beneficiaries, will be the same as with the inter vivos trust.

The Income Tax Court has made varying judgements as to whether the exemption in section 10(1)(u) applies when maintenance is received from the former spouse's deceased estate. In my opinion the words "from or on behalf of such person's spouse or former spouse" in section 10(1)(u) should enjoy such a wide interpretation so as to include maintenance payments made by the former spouse's deceased estate or any vehicle (eg a trust) used to effect such payments.

The setup of a testamentary trust may however increase the time needed to finalise the estate as opposed to having an inter vivos trust already in place.

In conclusion, the need for the above planning tools will vary and one should select the planning tool best suited to your personal circumstances and preferences.

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