



# Maintenance and your will

**W**HEN DOES THE obligation to pay maintenance to children and former spouses end? This is a vital consideration that is often overlooked in estate planning and when wills are drafted. A lack of proper planning can have serious unintended consequences for the people you want to benefit from your estate.

If you pay maintenance to a child or a former spouse, bear in mind that such obligations do not necessarily die with you, and should be taken into account in your estate planning, writes **Carien Strauss**.

finalisation of the estate. The deceased's assets can be distributed to beneficiaries only once all creditors' claims have been settled. Maintenance orders and related claims constitute creditors of the estate, and these are settled in full only once a child turns 18 (or later, in the case of a court order made in favour of a child over 18), or an ex-spouse remarries or dies.

## The legal position

### Maintenance obligations for child support

Parenthood automatically results in the obligation to support a child. This obligation arises upon the birth of a child, regardless of whether the child is born in or out of wedlock. In terms of the Children's Act of 2005, maintenance is payable to a child until the age of 18 years. A child over 18 years does have a claim for maintenance, but must apply to the court and show good cause why he or she is still in need of it.

The obligation for child support can be terminated only by the child's death, not by the parent's death. Therefore, the child has a right to claim maintenance from a deceased parent's estate. Any maintenance order that is already in place will also be binding on the deceased estate.

### Maintenance obligations for spousal support

The situation is somewhat different when it comes to spousal support. Where divorce is concerned, the key to maintenance obligations is the wording of the divorce order granted in favour of the spouse. In *Kruger v Goss 2009*, the appeal court determined that an ex-spouse does not have a claim for maintenance against the deceased estate of her ex-husband unless the divorce order specifically states that the maintenance order is binding on the deceased estate. There is usually the additional provision that the order will terminate on the death or remarriage of the ex-spouse, whichever occurs first.

A current spouse is likely to have a maintenance claim against the deceased estate of his or her spouse if there is no provision for maintenance in the will or by other means.

### Effect on estate planning

When proper provision is not made in a will, maintenance claims can significantly delay the

### The trust option

A lump-sum bequest directly to an ex-spouse and/or child in your will is one way of covering maintenance needs, but it is unconditional and does not take into account that a spouse might remarry, or a child become self-supporting. Thus, either or both might benefit beyond their entitlement and disadvantage other beneficiaries.

Instead, a trust can be an effective mechanism for ensuring that a deceased estate can be finalised and that your heirs are protected against further claims. This option entails bequeathing a cash lump sum (actuarially calculated as the present value of future obligations) to a testamentary trust (also known as a will trust), or transferring a cash lump sum to an inter vivos trust (sometimes called a living trust) with your ex-spouse or child as the beneficiary. The funds in trust are then used to settle the maintenance obligation. As a trust would not automatically have any obligation in relation to 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

When a cash lump sum is transferred to an inter vivos trust, the amount escapes donations tax in terms of the judgment in *Estate Welch v CSARS* [2004]. In this particular case, it was held that the transfer of assets into a trust for the express purpose of discharging legal obligations that the settlor owed to third parties did not amount to a donation either in common law or within the meaning of the definition of "donation" in the Income Tax Act of 1962.

Payments to an ex-spouse for monthly

