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FIDUCIARY MATTERS

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Revoking a donation for gross ingratitude

The law on donation and the revocation of gifts in South Africa is governed by Roman Dutch Law. There exists a principle of gross ingratitude, where the donor (of a gift) may revoke the donation made, if the donee acts with gross ingratitude towards the donor. Fiduciary practitioners and financial planners should bear in mind that circumstances may exist where a gift is revocable such as if the donee fails to give effect to a direction for its application or on the ground of the donee's gross ingratitude.

A donor is entitled to revoke a donation on account of ingratitude if

the donee causes the donor to suffer an atrocious injury, willfully causes them great loss of property, makes an attempt on their life or does not fulfill the conditions attached to the gift. There are probably also other equally attributable causes where a donation may be revoked.

According to **Potte v Rand Township Register 1945 AD 277 at 290** "a donation is an agreement which has been induced by pure benevolence or sheer liberality whereby a person under no legal obligation undertakes to give something to another person, called the donee, with the intention of enriching the donee, in return for which

the donor receives no consideration nor expects any further advantage".

According to **Voet, Commentarius 39. 5. 22**, one of the grounds on which a donation may be revoked is gross ingratitude on the part of the donee. Under these circumstances, the donor may recover the gift if the donee has shown ingratitude towards the donor. This principle was followed in **Mulligan v Mulligan 1925 W.L.D 178 at 180** where the court stated that: "the donee may demand the return of the gift on the basis of any act of ingratitude. It further stated that: "The right to revoke on the ground of ingratitude is recognized in the Roman - Dutch law where a gift has been accepted. Five reasons for revocation are given Voet (39. 5. 22) says it does not seem to admit of doubts that a gift can be revoked for similar and other weighty reasons."

As an action for revocation of a gift based on gross ingratitude is of a personal nature, the question to ask is whether the cause of action in such a case would survive the death of either party in any proceedings.

If the cause of action dies with the death of the donor, the donee will be enriched to the detriment of the donor. The application based on gross ingratitude for the return of donated property must continue as the property forms part of the deceased's estate and the benefit should accrue to their heirs. The donee will be unjustly enriched where retaining the property is not supported by acceptable cause. To prevent unjust enrichment it may therefore be a viable option to substitute the deceased with the executor to continue an action instituted for the revocation of the gift.

The principle of revocation of a

donation for gross ingratitude was invoked in an unreported case **Fenton v Fenton** Case 21384 of 4 May 2006 in the Transvaal Provincial Division (as it was then) which was an outright judgement in favour of the plaintiff whose cause of action was based on gross ingratitude.

Although the detail of the case is beyond the scope of this article, the principle is generally an interesting one and I would encourage those involved in estate planning to bear in mind that while donations are a useful planning tool, there can also be unforeseen consequences.

This article was written by Lesley Maman, a FISA member and attorney with Friedland Hart Solomon Nicolson

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Membership is drawn from trust companies and banks, as well as the legal, accounting and financial planning professions.

Activities of FISA members include but are not restricted to estate planning, the drafting of wills, administration of trusts and estates, beneficiary funds, tax and financial advice and the management of client assets.

FISA members collectively manage in excess of R280 billion. They draft several thousand wills each year and administer around 50 percent of deceased estates reported to the Master's Office.

FISA helps to make processes smoother for members and the public, particularly through its good working relationship with the Master's Office and SARS.

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