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Provide in trust for your children if you divorce or die

A TRUST is a useful tool to utilise in a divorce settlement, whereby a divorce settlement can be transferred into a trust and be applied for the benefit of typically minor children and a spouse.

Similarly, one can ring-fence a maintenance obligation post-death in a trust.

When you are divorced, the Divorce Act – and not the Maintenance of the Surviving Spouses Act – applies, whereby maintenance does not extend beyond the death of the maintenance payer unless the divorce order states that it applies.

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Assets put in trust in settlement of an obligation

A trust is a useful tool to utilise in a divorce settlement, whereby a divorce settlement can be transferred into a trust and be applied for the benefit of typically minor children and a spouse.

If a person is obliged in terms of a court order to transfer assets into a trust, it is unlikely that Donations Tax would be leviable on that transaction since it is not motivated by pure liberality or generosity – a requirement for the application of Donations Tax.

In the Estate Welch v Commissioner for SARS case of 2004, more than R3 million was transferred to a trust for the maintenance of the ex-wife and their child in terms of the divorce settlement.

The court held that the transfer of assets was not a donation, which would have triggered Donations Tax.

The ex-husband received an undertaking from the trustees to discharge his liability resulting from the court order, thereby ensuring that the assets were not transferred to the trust without an obligation.

Mr Welch had established a trust for the benefit of his former wife and son in terms of their divorce agreement. Mr Welch died before having transferred the obligatory funds into the trust, so the executors were obliged to do so.

Sars treated the payment as a donation by the executors, who ultimately prevailed in the court in showing that they had performed an obligation and did not make a donation.

But what made their life more difficult than it should have been was that Mr Welch had included himself and his other children as discretionary beneficiaries as well, although the trust instrument indicated that the trust had been established in pursuance of the provisions of the divorce agreement.

The court was of the view that the other children's expectation of receiving any such payment was only a *spes* (hope) and not easily quantifiable for the purposes of Donations Tax.

Mr Welch would have been better advised to have created two classes of beneficiaries: the first being his former wife and son as primary beneficiaries; and himself and his other children as secondary beneficiaries, to be considered only after the obligations to the primary beneficiaries had been satisfied.

Ring-fence maintenance obligations post-death

Many maintenance obligations continue after death in terms of the Maintenance of the Surviving Spouses Act, in so far as the surviving spouse is unable to provide therefore from their own means or earnings until they die or remarry.

In a marriage, the surviving spouse will have the same order of preference as a claim for maintenance of a dependent child of the deceased spouse, and if these claims compete, the claims shall be reduced proportionally.

This claim arises regardless of the matrimonial property system, which operated in the marriage.

Upon the death of the spouse who has the maintenance obligation, the surviving spouse will lodge a claim against the estate for the maintenance obligation, and this can delay the winding up of the estate and result in conflict with the beneficiaries.

The following factors must be taken into account when considering the surviving spouse's reasonable maintenance needs:

- The amount in the deceased estate available for distribution among the heirs and legatees.
- The existing and expected means, earning capacity, financial needs and obligations of the surviving spouse and the subsistence of the marriage.
- The standard of living of the surviving spouse during the subsistence of the marriage.
- The duration of the marriage.
- The surviving spouse's age at the time of the deceased's death.

The solution is to create a trust on the death of the spouse who has the maintenance obligation so that the trust takes over the maintenance obligation and continues paying income to the surviving spouse.

When the maintenance obligation expires, the balance of the capital in the trust can be distributed to the deceased's heirs. A claim against the deceased's estate for maintenance is deductible for estate duty purposes, provided it is reasonable.

A trust is, therefore, a useful tool to prevent abuse of funds by an ex-spouse or widow/widower, and to ensure your children are solely benefitting from the funds.

A TRUST is the formal transfer of assets (it could be property, shares or just cash) to a small group of people (usually two or three) or to a trust company. | Freepik.com

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