LEVERAGE

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At a glance

Financial Planning and Advice

This month's edition is all about spouses. It is important that the definition of a spouse, as it appears in and applies to various pieces of legislation, is understood as it can have a significant impact on the calculations supporting a financial needs analysis. It will highlight that one size does not fit all and one cannot assume a spouse to mean the same thing for all when doing a financial plan for a client.

Amanda Moolman and Emile Hofmeyr are the authors in this edition. Amanda focuses on the actual definition of a spouse contained in various pieces of legislation and the impact thereof. Emile focuses on the practicalities when faced with a client in an informal, long-term relationship. Eventually the financial plan and the successful implementation thereof should negate – or at least manage – the risks facing clients in this position.

Happy reading!

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Who is the spouse? The answer depends on who is asking the question!

In financial planning, the definition of a spouse is often confusing, as is what such a spouse (or partner in a permanent relationship) is entitled to upon dissolution of the relationship due to death, divorce or separation.

The confusion is fuelled by the differences found in legislation and recent court rulings.

This article will focus on the different legislation, the implications during the marriage or permanent relationship, and at the dissolution thereof.

Income Tax Act and Estate Duty Act

The definitions of "spouse" in these two Acts are very similar:

A "spouse" means a person who is the partner of such a person—

a. in a legally recognized **marriage or customary union**;
b. in a **union recognized** as a marriage in accordance with the **tenets of any religion**; or
c. in a **same-sex or heterosexual union** which (the Commissioner is satisfied*) is **intended to be permanent**.

**Reference to the Commissioner is omitted in the Income Tax Act.*

If a client's relationship falls in one of the above categories, the following will be relevant:

- Any bequest to a spouse, including policy proceeds payable to a spouse as nominated beneficiary, will be free from estate duty;
- Donations between spouses are free from donations tax; and
- The transfer of capital assets between spouses will be free from capital gains tax (CGT).

Pension Funds Act

The Pension Funds Act defines a spouse as a person who is the permanent life partner, spouse, or civil union partner of a member in accordance with the Marriage Act, the Recognition of Customary Marriages Act, or the Civil Union Act, or the tenets of a religion.

Please note: A life partner that is not a party to a marriage or union in terms of the three laws mentioned in the current definition or in terms of the tenets of a religion, would not be recognised as a spouse in terms of the Pension Funds Act. However, he/she may qualify as a dependant and subsequently be entitled to benefits.

When considering the impact of the definition in financial planning, section 37 of the Act is particularly relevant.

Section 37A of the Pension Funds Act provides that no benefit – provided for in terms of the rules of the fund can be reduced, transferred, ceded, or attached by creditors. An exception is where there is an amount due by the member:

- Under a maintenance order issued in terms of the Maintenance Act; or
- Owing to a non-member spouse in terms of a divorce order issued in terms of the Divorce Act; or
- In terms of a court order made in respect of the division of assets of a marriage under Islamic Law; or
- For the dissolution of a customary marriage.

In these instances, such a member's benefits may be attached, reduced or transferred.

Section 37C of the Act applies when a member dies and determines that the trustees of the fund must determine who will be entitled to the death benefit within the confines of the Act. While a member can nominate beneficiaries (other than their spouse or children) in respect of their retirement benefits, they may not automatically be entitled to the benefits. In the case of a benefit not being payable to the spouse or child of the deceased member, the trustees must determine who the dependants of the deceased member are, and then consider how the death benefit should be divided amongst the dependants and nominated beneficiaries. A dependant is defined to include a spouse and children (of all ages) as well as parties that are financially dependent on the member – therefore the definition of a spouse is important.

Maintenance of Surviving Spouses Act and Intestate Succession Act

Unlike the definitions of a spouse above, the Maintenance of Surviving Spouses Act and the Intestate Succession Act only applies to –

- A spouse married in terms of the Marriage Act;
- A civil union registered in terms of the Civil Union Act;
- A marriage by Muslim rites or by religious rites or customary union; and
- Spouses married in terms of the Recognition of Customary Marriages Act.

Maintenance of Surviving Spouses Act

This Act provides that if a marriage/union is dissolved by death, the survivor will have a claim against the estate of the deceased spouse for maintenance until death or remarriage, if the surviving spouse cannot provide for this from his/her own means and earnings.

However, the Act does not make provision for a surviving partner in a permanent life partnership where no marriage was concluded. Such a partner will therefore not be able to claim maintenance from the deceased estate under this Act. They will have to approach the court for possible relief and as the outcome will depend on the circumstances, there is no guarantee of the claim being successful.

Intestate Succession Act

This Act prescribes the order of the distribution of the deceased estate where a person dies wholly or partially intestate. This

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could be because the person did not have a valid Will, or because a certain portion of the Will has been declared invalid or cannot be carried out.

For instance:

- If the deceased dies leaving no descendants but only a surviving spouse, the spouse will inherit the entire intestate estate;
- If the deceased is survived by descendants, and not by a spouse, the descendants inherit the intestate estate;
- If the deceased is survived by descendants and a surviving spouse, the surviving spouse inherits a certain portion with the descendants;
- If there is no spouse or descendants, but there are parents alive, then the surviving parent(s) will inherit the entire estate;
- After these provisions, if none of the above mentioned parties have survived the deceased, provision is made for the deceased's other family members, in a certain order.

It is interesting to note that, due to a legal precedent being set, a partner in a permanent same-sex life partnership, in which the partners have undertaken reciprocal duties of support, would qualify to inherit from the deceased intestate estate even though they have not entered a civil union in terms of the Civil Union Act.

However, a partner in a heterosexual life partnership would not automatically enjoy the same benefit – as the precedent only referred to same-sex relationships.

This could be problematic, and quite traumatic, for a heterosexual life partner who was dependent on the deceased, as he/she will not be considered a spouse and would not automatically be entitled to inherit from the deceased intestate estate. That partner will have to approach the courts for relief and it cannot be assumed that the courts will provide it, as the parties were able to get married or to register a civil union and they opted not to.

Rights at divorce or separation

The abovementioned instances mostly refer to separation at death of a partner or spouse.

All legally recognized South African marriages are governed by the Matrimonial Property Act. The Act makes provision for three different matrimonial property regimes, each with its own rights and obligations, certain limitations, and consequences during the marriage or at the dissolution thereof due to death or divorce.

When a marriage in community of property is terminated by either at death or divorce the joint estate, including any retirement benefits, must be divided equally between the spouses.

When a marriage out of community of property is terminated by either death or divorce, the following consequences ensues –

- Out of community of property including the accrual system:
  - The spouse showing the smaller accrual will have an accrual claim against the other spouse or deceased estate;
  - At divorce, any retirement benefits need to be divided equally, or as agreed upon between the parties, or as ordered by the Court in the divorce order.
- Out of community of property excluding the accrual system:
  - No accrual claim is available;
  - No division of the estate;
  - The non-member spouse has no claim against any retirement benefits; and
  - A surviving spouse could be left destitute.

In all three instances above, a spouse may claim maintenance in terms of the Divorce Act and Maintenance Act (as well as, upon the death of a spouse, the Maintenance of Surviving Spouses Act).

A permanent life partner has no legislated right of recourse at the termination of the relationship, as there is no reciprocal duty of support between such partners. Therefore, a permanent life partner has no enforceable right to claim maintenance or any retirement benefits.

A permanent life partner may apply to court for an order to divide the property of the other partner, if he/she can prove that he/she contributed thereto or increased the value of the other partner's separate property during the relationship; or if the partners are co-owners of the property. However, if a cohabitation agreement or a proven universal partnership doesn't exist, private property acquired by one of the partners before the relationship, will remain that partner's property. However, the ordinary rules of the law of contract, property and unjustified enrichment may be available to an aggrieved partner.

There is no legal definition that exists for a "common law spouse"; it is a term used to refer to a permanent life partner. There is no minimum number of years partners must be together to qualify as a "common law spouse", and there is no automatic right to each other's estate in any long-term relationship. As mentioned above, where a claim is made, the court will have to consider the facts and make a decision. Not all claims are successful.

In summary

As a financial planner, it is imperative to advise clients and make proper provision in accordance with their specific circumstances and relationship status. If a client is in a permanent life partnership or relationship and does not intend entering a legal marriage or civil union, it is important to consider the consequences at the dissolution of the relationship as a result of death, divorce or separation.

The article that follows aims to provide suggestions to prevent some of the undesirable implications that may be encountered if no provision is made.

A "spouse" in a heterosexual, long-term relationship – to be or not to be?

When doing a financial plan, a crucial factor to consider is a client's marriage dispensation, if any. With this in mind, how does one go about when a client is not married, but in a heterosexual, long-term relationship?

As can be seen from the article above, there is not one set of rules to determine whether a person in a long-term relationship qualifies as a spouse. Different Acts have different requirements and some do not recognize it at all. Certainly, the duration of the relationship does not automatically solve the "spouse" problem. Every case must be judged on its own merit.

It is quite clear that one needs to be careful not to generalise and make assumptions when doing financial planning. By assuming certain facts, the consequences can be devastating later on. When married in terms of the Marriage Act, Civil Union Act, or in terms of religious tenets, it is easier to plan as one is either married/in a union or not. There is definite rules regarding beginning, duration and ending of the marital relationship.

The same does not necessarily hold true for long-term relationships. How does one plan when clients are living together, but do not intent to get married? The answer is simply that there is no set plan, as there are too many uncertainties.

Just think of the following:

Donations:

Does my client qualify for donations tax exemption as a "spouse" in terms of the definition? What happens when the exemption has been granted once? Will the partners always be regarded as "married" in future? How does a "break" in the relationship impact the future of the definition? The answers are not cast in stone. During financial planning it is always better to plan for the worst case scenario, because a surplus is always better than a shortfall.

Capital Gains Tax "roll-over"

When assets transfer between spouses due to a donation or death there is a CGT "roll-over" to the spouse. How can one be certain that a client will qualify for the roll-over? Same applies here: beware of trying to use the roll-over just to "save" money or taxes. In financial planning for death, rather make provision for the payment of CGT. A surplus is always better than a shortfall.

Section 4(q) of the Estate Duty Act

In order to get the "spouses'" deduction when determining the dutiable estate in terms of section 4 (q), the parties must be in a relationship (union) intended to be permanent. How does one ensure that this deduction will be available? Rather plan for estate duty – a surplus is always better than a shortfall.

Pension Funds Act

On separation, a partner in a permanent relationship is not entitled to part of the other's pension, but may be viewed as a dependant upon the partner's death. One cannot be sure of the trustees' allocation to dependants, it is therefore best to provide for separate funds for the partner. A surplus is always better than a shortfall.

Maintenance of Surviving Spouse Act

The surviving partner in a relationship has no claim against the deceased's estate in terms of this Act. Where a life partner alleges a duty to support, the burden of proof will be on the surviving partner. Therefore, rather ensure that enough provision is made for the maintenance of the survivor – a surplus is always better than a shortfall.

Intestate Succession Act

Even though court cases exist that expanded the definition of spouse to same-sex partners in a long term relationship under certain conditions, heterosexual partners in a similar relationship do not enjoy a right to inherit in terms of this Act, because they can and could always get married legally in terms of the Marriage Act, which was not the case for same-sex partners. This is arguably one of the biggest hurdles. Without a valid will, a heterosexual life partner will not inherit anything and they will have to approach the courts for relief. When a person is in a permanent relationship it is imperative that he/she has a valid will making provision for the partner.

And some more food for thought:

Are my clients "married" as defined?

In terms of some pieces of legislation, the Commissioner of SARS has discretion when determining if a life partner is a spouse. It must be convinced that the relationship wasn't merely a long-term relationship, but intended to be permanent;

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one can deduct from it that the intention must be to be married, without the formalities.

In other instances the Acts do not make provision for such a "spouse" and in some instances the courts ruled over the application in certain Acts. Furthermore, one must take into consideration the circumstances under which the changes to legislation and court rulings were made.

It was primarily made to allow for same sex relationships at a time when such partners could not enter into a legally recognized union. These days, all couples have a choice to get married or not – the simplified process was introduced through the Civil Unions Act. Therefore, courts may be more reluctant to grant relief to partners who claim to be married, but refused to formalise their commitment through the available channels.

How do I prove a "marriage"?

There are no set rules to abide by in order for a long term relationship to qualify as a "marriage". Every situation needs to be judged by its specific surrounding facts. Take note that it may well be that in many cases there will be someone who, as eagerly as the survivor wants to proof the existence of a "marriage", wants to prove the opposite, for example a former spouse, children from a previous marriage, etc. When does a long term relationship come to an end? Does it end when one partner makes that decision or when they move out from the communal home – what circumstances will be sufficient proof?

Make sure there is proof to confirm the relationship exists – this can be strengthened by an affidavit by each party or a co-habitation agreement. If the relationship is mentioned in the deceased's Will, it will also assist in confirming the existence thereof.

Solution

If legislation can't provide certainty, the financial planning challenge will remain for the foreseeable future. As mentioned above, it is now possible to formalise all relationships and provide legal recognition for it. When faced with a client who is in a long-term relationship without any formalities, there are really two options to ensure the planned outcome of the financial plan, either the parties should formalise their relationship, or they should plan as if they are not spouses – a surplus is always better than a shortfall.

Make sure both their Wills are up to date, valid and executable. If the first dying's Will fails, there is no Act that protects the rights of the surviving partner.

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