LEVERAGE

Legal and technical update: October 2018

Note from the editor

Financial Planning and Advice

October brings us rain, wonderful summer weather and another edition of Leverage. I hope you find the article of Chris Weyer, Legal Adviser in Gauteng, about the opportunities in every day financial planning for your clients, insightful. Ivan Mathee, another Legal Adviser in Gauteng, gives you a glimpse of a day in the life of a legal adviser – definitely not a boring job! We trust you will enjoy this edition.

Happy reading!

momentum

The impact of life changes on the financial plan – identifying the financial planning opportunities

Major life changes include marriage, child birth, job changes, purchasing a home, divorce and death.

I will aim to illustrate the financial planning opportunities under each heading:

1. Marriage and child birth: How about a policy payable to children free of estate duty?

Problem: Death and taxes – polices payable to children attract estate duty.

However, did you know, there is an alternative where policies payable to children are exempt from estate duty?

Financial planning opportunity:

Include the provisions of Section 3(3)(a)(i) of the Estate Duty Act in an ante-nuptial contract According to Section 3(3)(a)(i) of the Act: *"any domestic policy recoverable by a surviving spouse or child of the deceased under a duly registered ante-nuptial or post-nuptial contract is excluded from the definition of deemed property and therefore exempt from estate duty."* Currently, all bequests to spouses qualify for a deduction in terms of Section 4(q) of the Estate Duty Act when determining the dutiable estate, and therefore this section is more relevant in respect of children.

2. Job changes: Preserve versus instant gratification

The temptation to access retirement funds when changing jobs is a reality that should always be discouraged. To illustrate this, let's look at an example of the negative impact this action can have: Jason changed jobs numerous times during his working life. In his last year, he made a withdrawal of R600,000. Jason's taxable retirement benefit in 2018 was R1,500,000. Therefore:

Step 1: Add prior withdrawal and taxable retirement benefit

• Taxable RB in 2018 tax year	R1500,000
• Plus: Taxable prior withdrawal benefit	R600,000**
Total:	**R2,100,000**

**Tax paid on early withdrawal in terms of Table A: (R600,000 -R25,000) X 18% =R143,750

Table A: Tax tables on a lump sum withdrawal 2018/2019:

R0- R25,000	Lump sum tax free
R 25,001 - R 660,000	18% of the amount above R 25,000
R 660,001 - R 990,000	R 114,300 plus 27% of the amount above R 660,000
R 990,001 and above	R 203,400 plus 36% of the amount above R 990,000

Step 2: Tax payable on total from Step 1 in terms of Table B below:

• Tax on R2,100,000 (Table B)	R508,500
• Less: Tax on R600,000 (recalculated in terms of Table B)	R18,000
• Total tax payable:	R490,500

CAUTIONARY NOTE: THIS WLL RESULT IN SERIOUS WEALTH EROSION:

Even though tax of R143,700** was previously paid on the withdrawal of R600,00 (Step 1 above), the tax credit is significantly reduced due to the retirement lump sum tax table now being applied. Therefore, this results in further erosion of the client's retirement funding caused by the prior withdrawal.

Table B: Retirement lump sum tax table (taxable lump sum)

R0 – R500 000	R0
R500 001 – R700 000	18% on the amount above R500 000
R700 001 – R1 050 000	R36 000 + 27% on the amount above R700 000
R1 050 000 +	R130 500 + 36% on the amount above R1 050 000

The prior withdrawal has eroded the client's retirement funds by:

R143,700 (tax paid in terms of Table A) – R18,000 (tax paid on same withdrawal in terms of Table B) = R125,700.

Put differently, the prior withdrawal has cost the client an additional R125,700 in tax payable.

3. Purchasing a home: The euphoria of a new house soon wears off when the bond instalment kicks in. Normally the bond holder is insured, but is this correct?

Problem: What happens if the spouse of the bond holder passes away? Even though the bond holder's income is sufficient to cover the bond, he/she will need to incur significant expenses to fill the void created by the passing of his/her significant other. Such expenses could include: au pair, shuttle services, boarding school, relocation cost, building alterations, etc. All of a sudden, there is a cash flow crunch.

Financial planning opportunity:

Revisit clients that are bonded and discuss insurance cover for their partners /spouses to ensure that when dark times come, they can mourn and not be put out of their residence due to a cash flow crunch.

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4. Divorce: Where there is an "updated and executable " will, there is a happy way

Problem: Has your client updated their will and beneficiary nominations? The testator has three months' opportunity to change his will. If left unchanged, there is an assumption that he/she didn't want to update the will, so whatever the terms of the will were, would remain in force. The former spouse who was nominated as a beneficiary would therefore be able to inherit. Concerning beneficiary nominations on life policies; should your client pass away, the contract that is then in force, is between the insurer and the beneficiary (*Stipulati Alteri*). The insurer is obliged to pay proceeds in terms of the beneficiary nomination, rightly or wrongly so.

As the cliché goes; "the road to hell is paved with good intention". The former spouse and guardian may not be the real problem, having pure intentions. However, Casanova on the white stallion may have impure intentions –, swooping her off her feet only to rob her children of their inheritance and leaving a single parent and the children shattered. While this may sound melodramatic, it is a daily reality for many people who did not have access to proper financial planning.

Financial planning opportunity:
A review of the will and beneficiary nominations should solve this problem and unlock further financial planning opportunities. These include the establishment of trusts (inter-vivos or testamentary) in favour of minor children to provide for their maintenance upon the demise of the parent, while simultaneously protecting the funds and assets therein from potential erosion – wilfully or negligently – by the surviving guardian.

5. Death: The difference between a legal will and an executable will

A legal will is easy to draft. However, an executable will is a different story and can only be drafted together with a financial needs analysis.

The legal requirements for a will:

1. The testator must be older than 16 years of age;
2. The testator must be mentally capable of understanding the consequences of his or her actions at the time of drafting the will. Wills or provisions that are proven to be drafted under duress, undue influence or mistake will be invalid;
3. The will must be in writing. It can be handwritten or printed – just makes sure it's clear. And don't forget to put your name on it;
4. The testator must sign at the end of the will. In addition, if the testator is unable to sign, the following methods of signature are acceptable:
   - A testator may request a person to sign on his or her behalf. In such event, the signature must be made in the presence of the testator, at least two competent witnesses, and a commissioner of oaths. The commissioner of oaths must certify the will and sign each of its pages.
   - A testator may sign a will by making a mark or a thumbprint in the presence of at least two competent witnesses and a commissioner of oaths. The commissioner of oaths must certify the will and sign each of its pages. Witnesses may not sign by making a mark or thumbprint.
5. If the will is longer than one page, the testator (or someone on his behalf) must also sign every other page of the will, anywhere on the page;
6. The testator's signature on the last page must be made or acknowledged in the presence of two competent witnesses who are present at the same time. According to section 1 of the Wills Act, a competent witness is anyone over the age of 14 who is of sound mind and capable of understanding the consequences of his or her actions and can testify in court;
7. The witnesses must sign the last page of the will;
8. Although not a legal requirement, it is recommended that the witnesses also sign every other page of the will;
9. A beneficiary or executor should not sign a will as a witness. If they do, they may be disqualified from inheriting under the will, but the validity of the will not be affected; and
10. While not a formal requirement for validity, it is highly recommended to date your last will and testament to avoid any confusion in case more than one will is found.

Problem: A legally compliant will drafted separately, without having done a financial needs analysis to make provision for sufficient estate liquidity, is a futile exercise. Clients are lulled into a false sense of security by having fulfilled the legal requirements of a will without considering whether their wishes will be able to materialise.

Financial planning opportunity:
An executable will drafted in accordance with the results of a financial needs analysis.
The definition of executable (https://www.thefreedictionary.com/Executable+program):
"Able to be executed" Simply put, the testator's wishes within the will can be complied with.
Momentum offers a comprehensive wills drafting solution, combining best-of-breed industry experience and support in combination with an industry-leading wills drafting tool.
You may have heard and seen advertisements for free wills during Wills Week by various entities within the legal and financial fraternity.
At Momentum, every week is wills week.Using the My-Wills tool and submitting directly online, the financial planner is able to offer clients free wills.

Conclusion

Life follows a cycle, and one's financial plan should therefore evolve accordingly. Along life's journey, careful financial planning can reduce the impact of many unforeseen circumstances.

A parting thought:

"The things you do for yourself are gone when you are gone, but the things you do for others remain as your legacy" – Kalu Kalu.

A day in the life of a legal adviser

By Ivan Matee, Legal Adviser: Advice and Financial Planning

As a field Legal Advisor, I often have to advise financial advisers' clients on the importance of reviewing and/or updating their estate plans and wills owing to changed personal circumstances as a result of divorce or having children.

A client was of the view that, despite her and her husband going through a divorce, she would still stand to benefit in terms of the husband's will. The husband apparently informed his wife that she will remain a beneficiary in terms of his last will and testament, notwithstanding their divorce. Most clients, if not all, are not aware of the risk that Section 2B of the Wills Act, No. 7 of 1953(Act) may pose.

In short, this section of the Act deems the former spouse to have predeceased the testator, should he die within three months of divorce. The effect of this is that the former spouse will automatically be excluded from inheriting, even though she has been nominated as a beneficiary in terms of the will, unless it is clearly expressed in from the will that the deceased wanted or intended his former spouse to benefit.

The section in question creates a three-month default position whereby the former spouse is deemed to have died on the day of divorce and consequently, will not qualify to inherit. It is also clear that the default position envisaged in Section 2B is limited to three months and will not afford any relief if the testator/testatrix dies after three months period. The crux of this section is that the former spouse will not inherit in terms of the will post the three-month period. It could also be that the testator did not intend for the former spouse to benefit in terms of his last will and testament.

The lesson from Section 2B is that, in the absence of a clearly expressed intention to the contrary in the will, the default disqualification applies, whether the testator/testatrix wanted to disinherit his/her former spouse or not. To avoid this, clients should regularly review or update wills and their estate plans.

About Leverage

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