CHAPTER 11

ESTATE PLANNING

Learning Outcomes

When you have completed this chapter you will be able to

- briefly explain the meaning of some of the more commonly used definitions found in the South African Estate Duty Act;
- list and briefly describe the property and deemed property of an individual that will form part of his estate;
- list and briefly describe some of the more common deductions allowed against the value of an estate when determining an estate duty liability;
- explain the importance of having a valid will;
- list and describe the formalities required in the execution of a will;
- explain the effects of a divorce on a will;
- explain who is competent to be involved in the execution of a will;
- explain the procedure that will be followed in distributing the estate of a person who died intestate;
- explain the implications on an estate of the Maintenance of Surviving Spouses Act;
- list and explain the use of some estate pegging instruments.

Definition

Estate planning is defined as the arrangement, management and securement and disposition of a person's estate so that he, his family and other beneficiaries may enjoy and continue to enjoy the maximum from his estate and his assets during his lifetime and after his death, no matter when death may occur.

The estate of a person is the net worth of a person at any time. It is the sum of a person at any time. It is the sum of a person's assets less all liabilities at a given time.

Assets include:

- legal rights;
- interests; and
- entitlement to property of any kind.

The purpose of estate planning is to ensure the distribution of a person's property at the time of death is done in terms of the client's wishes and that the person's beneficiaries receive their portion of the estate in the most cost effective way by minimising taxation implications as far as possible.

Effective estate planning requires knowledge of:

- estate duty;
- Capital Gains Tax;
- donations tax;
- matrimonial regimes; and
- laws relating to wills and trusts.

In addition to providing financial security, estate planning also encourages individuals to make important decisions such as:

- appointing a guardian for minor children;
- preferred healthcare practices; and
- securing funeral arrangements.

11.1 ESTATE DUTY

Whenever an individual dies, it becomes the responsibility of the person that winds up his estate, known as the executor, to settle any outstanding debts that may have been left by the deceased.

Once these debts have been settled, there is a final tax that is levied upon the estate, and once this has been paid the executor can pay the balance of the estate to the beneficiaries in terms of the will of the deceased. There are, however, certain special deductions and an abatement allowed before the amount of estate duty needs to be determined. In the process of working through this chapter, we will be able to establish on which of the worldly goods of the deceased, the executor will need to levy the estate duty.

The Estate Duty Act (no. 45 of 1955) (as amended) was promulgated with the express purpose of imposing a final tax (known as estate duty) on the estate of a deceased person.

Estate duty is levied at a flat rate of 20% on the dutiable amount of any deceased person's estate. The calculation of the dutiable amount is done as follows:

Determine	*gross estate* by valuing all the property and deemed property of the deceased
less	*S4q residue*
less	*S4A reduction*
equals	*dutiable estate*

Property includes all assets, whether movable, or immovable, including insurance policies on the life of another person, fiduciary and usufructuary rights enjoyed prior to death and annuities which the deceased was receiving and which now pass on to someone else.

Deemed property includes policies of life insurance payable to the estate but excluding policies payable to a child or spouse in terms of an ante-nuptial or post-nuptial contract, policies taken out for buy / sell insurance purposes where validly set up and policies taken out by persons other than the deceased and under which the proceeds are not payable to the estate or to the family of the deceased. It also includes lump sum benefits from retirement funds, donations, claims from an accrual marriage contract and some other less common items.

Annuities from retirement funds to which the deceased belonged, which became payable as a result of the deceased's death, are not included.

A set procedure for valuing annuities and usufructuary interest is laid down.

There are numerous **deductions**, the most important of which are:

- assets which accrue to a living spouse (by means of a will), funeral and deathbed expenses;
- an accrual claim due to a surviving spouse;
- property situated outside of the country if acquired from a non South African source;

- bequests to approved institutions;
- income tax payable or lump sums due from a retirement fund;
- premiums paid by another person, company or a life policy on the deceased life, plus 6% per annum compound interest; and
- the value of a usufructuary interest on property from a deceased spouse's estate. Usufructuary is a term for a person who has the right to enjoy the products of property he does not own.

11.1.1 DUTIABLE AMOUNT OF AN ESTATE

Once all the deductions have been claimed, one is left with the *net value* of the estate. In order to determine the dutiable amount of the estate, one must now deduct from this net value an amount of R3,5 million (as from 2007). On any amount that now remains, the executor will be required to pay Estate Duty.

11.1.2 WHO IS LIABLE FOR THE PAYMENT OF THE ESTATE DUTY?

It is the responsibility of the executor of the estate to ensure that the estate duty is paid to the Commissioner of Inland Revenue, who collects the duty on behalf of the state. The estate is not, however, fully liable for all the duty payable.

Where a beneficiary in terms of the will of the deceased receives a fiduciary, usufructuary or other like interest, including an annuity not charged against property, the beneficiary is liable for the estate duty. On all other property, the executor is liable to pay the estate duty out of the estate.

Where an insurance policy is payable directly to a beneficiary, the estate duty that is due on the proceeds of the policy will be payable by the beneficiary.

One must remember that, even though a beneficiary can receive the proceeds of an insurance policy directly from the insurer, the proceeds, other than under special circumstances dealt with in Section 6A2, will form part of the gross value of the estate of the deceased. Should the policy pay to the estate of the deceased, the executor is liable for the payment of the estate duty.

Where a policy is paid directly to a beneficiary, the executor is not entitled to his executor's fees on the proceeds of the policy, unless the executor is required to recoup the proceeds in order to settle creditors in an insolvent estate.

Where the estate of the deceased includes a **commuted lump sum** from a retirement annuity or pension fund, the beneficiary is liable for any estate duty on the amount received. Should the commuted value be paid into the estate the executor will be liable for the duty.

Note

For taxpayers who die on or after 1 January 2009, any death benefit lump sum payments from pension, provident, group life insurance, and life insurance policies, will be **exempt from estate duty**.

The executor, who's responsibility it is to ensure that the estate duty is paid, is entitled to recover the duty payable from any beneficiary who becomes liable for the payment of the duty.

11.1.3 REBATE IN RESPECT OF DEATH IN RAPID SUCCESSION

Where any portion of the duty that is to be levied is based on the value of any goods in respect of which duty was already levied on the death of another person who died within the 10 years prior to the death of the deceased, the duty which is attributable to the value of the intended goods is further reduced according to the following scale.

If the deceased dies within two years after the death of the first deceased 100%

If the deceased dies more than two years but at the most four years after the death of the first deceased 80%

If the deceased dies more than four years but at the most six years after the death of the first deceased 60%

If the deceased dies more than six years but at the most eight years after the death of the first deceased 40%

If the deceased dies more than eight years but at the most ten years after the death of the first deceased 20%

However, this rebate may not exceed the amount of the duty which is attributable to the property as a result of its inclusion in the dutiable estate of the first deceased.

11.2 CAPITAL GAINS TAX

For capital gains tax purposes, a natural person is treated as disposing of all of his assets on the day before death. Capital Gains Tax will, therefore, be levied on the growth in the value of the assets, while estate duty will be levied on the net value of the deceased estate. It is one of the many duties of the executor of an estate to settle any tax liability due by the deceased before the estate can be wound up.

At death of a natural person, the day immediately before his death is regarded as the last day of the tax year. The final tax assessment prepared for the deceased by the executor will need to include any capital gain, or loss, that may have arisen as a result of this disposal of the assets of the deceased due to his death.

Note that the annual exclusion from any capital gain during the year of assessment in which a taxpayer dies, is R200 000.

Once this final assessment has been submitted, and all outstanding taxes have been paid, SARS will issue the executor with a tax clearance certificate. Having received this certificate, the executor can continue winding up the estate in the normal way.

Note that there may be cases where a significant capital gains tax charge arises due to the growth in the value of assets, although the deceased estate is heavily in debt and would probably not be liable for estate duty.

Note

This may have an impact on the liquidity of the deceased estate, resulting in the assets having to be sold to meet the CGT liability. Fortunately, paragraph 41 of the Eighth Schedule of the Income Tax Act provides an opportunity for an heir to acquire an asset, provided that he accepts a part of the corresponding CGT liability.

For example, where the CGT due exceeds 50% of the net value of the deceased estate, as determined in accordance with the Estate Duty Act and before taking the CGT into account, the executor of the deceased estate is required to dispose of some assets to pay the tax due.

However, an heir or legatee who would have been entitled to the asset(s) to be sold, may accept both the asset(s) and the liability, on condition that the portion of CGT exceeding 50% of the net asset value, of the estate as determined by the Estate Duty Act, is paid by him.

The liability must be paid within three years of the executor obtaining permission (from SARS) to distribute the asset, and will bear interest, at the rate prescribed from time to time by the Minister of Finance.

It can therefore be seen that any estate plan should take into account the potential liability for capital gains tax that can arise on a person's death. Therefore capital gains tax planning is also an important factor in deciding who will get which assets, as this will have an effect on the CGT liability of the client.

11.3 DONATIONS TAX

Donations tax is levied at a flat rate of 10% on the market value of any property donated. The first R100 000 of property donated by any individual in each year is tax exempt.

Dispositions between spouses and donations to public benefit organisations are tax free.

Any person who in their business capacity who gives gifts is limited to casual gifts to R10 000 in total per annum.

11.4 MATRIMONIAL REGIMES

A matrimonial regime is a property system or systems of property ownership between spouses. These systems provide for the creation or absence of a marital estate. If a marital state is created the following considerations are made:

- how and by whom it is managed;
- what properties are included in the estate; and
- how it will be divided and inherited at the end of the marriage.

It is therefore very important to consider the marital status of the client during an estate planning process.

In South Africa the following laws need to be considered:

- the Marriage Act 25 of 1961 - which prescribes certain formalities when parties wish to marry and which prohibits certain marriages;
- the Recognition of Customary Marriages Act 120 of 1998 - which recognises certain traditional unions which form part of the culture of African people; and
- the Civil Union Act 17 of 2006 - which allows for same sex union.

There are 3 different Marital Regimes in South African Law which are:

- marriages in community of property;
- marriages with an antenuptial contract - which are out of community of property; and
- marriages with an antenuptial contract including an accrual.

11.4.1 MARRIAGES IN COMMUNITY OF PROPERTY

As a general rule it can be said that all marriages entered into in terms of common law, creates communal property and are therefore in community of property. Unless the parties to a marriage specifically request an antenuptial contract, they are married in community of property.

This means that on the termination of the marriage, either by death or divorce, the joint estate is shared equally between the parties, irrespective of the value of their respective contributions to the estate.

All assets as they exist on the date of marriage are joined into one community estate. Any property or assets acquired by either spouse during the marriage becomes part of the community estate. These acquisitions are referred to as the community of profit or loss.

The Matrimonial Property Act 88 of 1984, provides the joint administration of the community estate, in which spouses may not alienate, pledge or negotiate any other right on the communal property without the other spouses consent. In this context property includes:

- physical immovable or movable property;
- shares;
- debentures;
- insurance policies;
- fixed deposits; or
- similar assets.

Inheritances and gifts received from 3rd parties have however been excluded from the communal property.

11.4.2 MARRIAGES WITH AN ANTENUPTIAL CONTRACT

An Antenuptial Contract is a legal document which is drawn up and signed with an attorney and registered at the Deeds Office before two parties are named. If the parties intend not to be married in community of property, then this contract must be agreed before they marry.

This is a contract which details:

- the terms of possession of assets;
- treatment of future earnings;
- control of the property of each party; and
- potential division of the assets and property if the marriage is later dissolved.

Each party has, and maintains, a completely separate estate. Irrespective of who puts what into the marriage, the party who owns the estate is the owner of its contents before, during and after the marriage.

This clearly gives parties absolute independence of contractual capacity and protects the estates of each party against claims by the other party's creditors, but there is no provision for any sharing whatsoever. A party who contributed to the other party's estate whether in cash or otherwise would have a heavy onus to prove that he or she was entitled to anything from that party's estate on dissolution of the marriage.

Where one party stays at home to raise children and does not contribute financially towards the marriage, and the other spouse works and accumulates assets, the former may find herself with nothing and no claim to the assets of the latter. Spouses in marriages concluded out of community or property to 1984 may find relief in this situation from the courts; those marrying out of community of property thereafter will not.

11.4.3 MARRIAGE WITH ANTENUPTIAL CONTRACT INCLUDING ACCRUAL

The Matrimonial Property Act 88 of 1984 brought into being the accrual system which allows for the sharing of assets, but allowing each party in the marriage to retain their contractual independence and separate estate.

Under the accrual system should the marriage dissolve, the value of the assets and both estates are combined and split between the policies.

Important features of the accrual system are as follows:

- each party retains their own estate; and
- at dissolution each estate is calculated separately. The monetary value of the smaller estate is subtracted from the larger estate and the difference is split equally.

11.5 THE DIVORCE ACT NO. 70 OF 1979

Until 1 August 1989, a spouse's interest in a pension, provident or retirement annuity fund were not considered to be part of the gains of divorce. Of course, legally, the particular retirement fund is the owner of the member's interest until withdrawal or retirement from the fund.

In the case of pension and provident funds, this happens when employment ceases. For retirement annuity funds, this applies at retirement or the disability of the member, if earlier. It can, however, in both instances, be as a result of the untimely death of the member.

The size of these pension interests, at date of divorce, is often substantial. Severe prejudice has been caused to many spouses, who were unable to share in the considerable value of these funds on divorce. In many cases, the build up of a retirement fund is the biggest asset of the marriage.

The SA Law Commission recognised this inadequacy in the divorce legislation. This resulted in the Divorce Amendment Act (Act no. 7 of 1989) which came into effect on 1 August 1989. The Act deems the pension interest of a spouse to be part of his assets, and therefore part of the patrimonial benefits of a marriage which are subject to a redistribution on divorce.

Pension interest

in relation to a party to a divorce action who is a member of a **pension fund** (excluding a retirement annuity fund), means the benefit he would have been entitled to if he had withdrawn from the fund (i.e. the benefit due if he had resigned from his employment) on the date of divorce.

Pension interest

in relation to a party to a divorce action who is a member of a **retirement annuity** fund, means the total amount of all contributions made by the member to the fund from his joining the fund to the date of divorce plus simple interest at the rate set out in Section 1(2) of the Prescribed Rate of Interest Act (Act no. 55 of 1975).

The Act applies to all marriages, other than marriages concluded out of community of property after 1984, in terms of which the antenuptial contract excludes community of property, profit and loss and the accrual system. Marriages with antenuptial contracts to this effect **completely exclude** the sharing by each spouse in the patrimony of the other.

Should the member of a pension or retirement annuity fund therefore die before he retires, the executor of the estate will need to be aware of the possibility that the deceased may have been previously married. Should this be the case, and should the divorce have included a distribution of the pension interest, the former spouse of the deceased could end up being one of the major creditors of the estate.

On the other hand, a person who becomes aware of the fact that a former spouse has died, must ensure that any claim against the estate, for the pension interest that he may be entitled to, is submitted in time.

In 2007 this matter was changed and the spouse of the member has the option to immediately claim the share of the benefits **at the time of the divorce**.

Where a non-member spouse elects to take the proceeds in the form of a cash sum rather than a preservation, the tax liability accrues to that non-member ex-spouse.

This is not treated as the one allowed withdrawal against a preservation fund.

As things stand, the change applies retrospectively, to earlier divorces as well.

11.6 LAST WILL AND TESTAMENT

Dying without a will can result in a long and drawn out process in trying to determine who will inherit the assets of the deceased person. In order to ensure that the assets go to the person you would wish to see inherit, it is therefore best to make sure that, at the time of death, a valid will exists.

While a person can, in theory, leave his estate to any person or institution to whom he may wish, there are certain claims against the estate that will override his wishes.

1. Any creditors of the deceased will be asked by the executor to lodge their claims against the estate. The first and principal creditor will be the Receiver of Revenue to whom all outstanding taxes must be paid before any other payments can be made.

2. A testator (client) has an obligation to maintain and educate his minor children. After the payment of creditors this obligation must be catered for before any legacies and bequests can be awarded.

3. In terms of the Maintenance of Surviving Spouses Act (no. 27 of 1990) a surviving spouse has a claim for maintenance against the estate of a first dying spouse. Should the spouse be excluded from the will they can lodge a claim with the executor for a share of the assets.

   This is based on providing for a continued standard of living, similar to that enjoyed before the death of the deceased. Should there be an earlier claim by dependant children these claims will be dealt with at the same time. Where there is a dispute the Master of the Supreme Court will refer the matter to court.

4. Any spouse married in community of property is automatically entitled to a half share of the combined estate. This is not an inheritance, but is considered the surviving spouse's rightful property. Where the couple were married out of community of property, the surviving spouse may end up with nothing.

   Should the marriage, however, have included the accrual system, in accordance with the Matrimonial Property Act, the surviving spouse, in the event of disinheritance, will have a claim against the estate for one half of the accrual. The disinherited spouse will be treated as an ordinary creditor, and will receive the accrual at the same time as other concurrent creditors, but before any distributions as set out in the will.

An important point to note is the fact that **any long term insurance policy that includes a nominated beneficiary will not be affected by the terms and conditions of the will.**

There have been a number of test cases in the past where persons, due to inherit in terms of the will, have taken court action in an attempt to recover money paid to a nominated beneficiary. In all but one of these cases, the courts have ruled in favour of the nominated beneficiary.

It must further be noted that the exception was an extremely unique situation, and the judge's ruling clearly stated that his decision should be considered an exception to the normal practice. This does, however, not preclude the inclusion of the policy proceeds into the estate if the estate is insolvent, and money is needed to settle creditors.

11.6.1 FORMALITIES REQUIRED IN THE EXECUTION OF A WILL

There are certain formalities that must be abided by in order for a will to be considered the valid last Will and Testament of the deceased.

The conditions that are explained herein are not only applicable to the will itself; any codicil or amendment to the will must also abide to these same conditions in order for them to be considered as a valid addition, or amendment to, the will of the deceased. It is always assumed, unless the contrary is proved, that any amendment made to a will is brought about **after** the original will was executed.

(i) The will must be signed at the end by the testator. Should the testator be unable to sign, he may appoint some other person who may sign on his behalf. This other person must, however, sign the will in the presence of the testator, and can only do so when the testator is satisfied with the contents.

(ii) The signing of the will by the testator (or his nominated representative), must be done in the presence of two or more competent witnesses, who must all be present at the time of the signing of the will.

(iii) The witnesses must attest and sign the will in the presence of the testator and of each other. If the will has been signed by another person on behalf of the testator, that person must also be present while the witnesses sign.

(iv) Where the will consists of more than one page, it is necessary that each page (and not only the last page) is also signed by the testator, or his appointed representative.

NB Whilst it is no longer required that the witnesses attest to and sign every page (other than the last page), there is still a school of thought that recommends that they do so.

(v) Where the testator is unable to sign, he may appoint some other person who may sign on his behalf. Alternatively, he may sign the will by making his mark thereon. Should the will have been signed in either of these manners, it is necessary that a Commissioner of Oaths certifies that he has satisfied himself as to the identity of the testator, and that the will so signed is the will of the testator. The Commissioner of Oaths will be required to sign every page of the will. Certification is only possible where the mark is made by the testator, or where the will is signed by the testator's appointed representative in the presence of the Commissioner of Oaths.

Should the testator die after the will is signed by an appointed representative, or where the testator has only made his mark, a Commissioner of Oaths may still certify the will as being a valid document, provided he can satisfy himself as to the identity of the testator, and that the will is, in fact, the last will and Testament of the testator.

It may happen that a person dies before the formalities required for the signing of the will are completed. Provided that a court can then be convinced that the draft document placed before it was intended as the last will of the deceased, the court can instruct the Master to accept the document as the will of the deceased.

11.6.2 EFFECT OF DIVORCE OR ANNULMENT OF MARRIAGE ON A WILL

Where a person has a will, and then dies within three months after his marriage was dissolved by either a divorce, or an annulment in a competent court, it is not a foregone conclusion that the ex-spouse will inherit.

The will, will in fact be implemented in the same manner as it would have been implemented if the ex-spouse had died immediately prior to the dissolution of the marriage. It is only where it appears from the will that the testator intended to benefit his previous spouse notwithstanding the dissolution of the marriage that the previous spouse will be entitled to benefit.

11.6.3 THE MAINTENANCE OF SURVIVING SPOUSES ACT NO. 27 OF 1990

Where a marriage is dissolved by death, the surviving spouse has a claim against the estate of the deceased spouse for the provision of reasonable maintenance until his death or remarriage, in so far as the surviving spouse is not able to provide therefore from his own means and earnings.

The claim for maintenance by a surviving spouse has the same order of preference as would a claim by a dependent child. It will be treated concurrently and, where necessary, the two claims may be reduced proportionally.

The executor may, if he deems it to be necessary, enter into an agreement with the surviving spouse, heirs and legatees, whereby the executor creates a trust, or imposes an obligation on an heir or legatee, for the benefit of the claim of the surviving spouse.

In order to establish the reasonable maintenance needs of the surviving spouse, the following factors should be taken into account:

- the amount in the estate of the deceased available for distribution to heirs and legatees;
- the existing and expected means, earning capacity, financial needs and obligations of the survivor; and
- the standard of living of the survivor during the marriage and his age at the death of the deceased.

A **legatee** is a person to whom the deceased has left a specific item or items, or a sum of money, as a specific mention in his will.

An **heir** is a person who has been mentioned in the will as one who is to share in the residue of the deceased's estate after the payment of all debts and legacies.

11.6.4 ENTITLEMENT OF A SURVIVING SPOUSE AND DESCENDANTS

Should a descendant of a deceased who, together with a surviving spouse is entitled to benefit from the estate of the deceased renounce his right to receive a benefit, the benefit will vest with the surviving spouse. A minor, or mentally ill descendant, will be unable to renounce his right to inherit.

Where it is ruled that a descendant is disqualified from inheriting from the estate of the deceased the estate will devolve, on the basis of the laws of intestate succession as if the descendant had died immediately before the death of the deceased.

Where a descendant of the testator would have been entitled to a benefit in terms of the provisions of a will if he had been alive at the time of the death of the testator, so he has predeceased the testator, the descendants of that descendant will, unless otherwise indicated in the will, inherit his portion of the estate in equal shares.

11.6.5 INTERPRETATION OF WILLS

In the interpretation of a will, unless it is otherwise stated, an adopted child is regarded as being born of his adoptive parents and not of his natural parents.

The fact that a person may have been born out of wedlock must be ignored when determining the relationship to the testator.

Should the testator have mentioned his children in his will, it will include all those who are alive at the time of his death as well as any children who may already have been conceived at that time and who are later born alive.

11.6.6 COMPETENCY TO MAKE A WILL

Every person sixteen years or older may make a will unless, at the time of making the will, he is mentally incapable of appreciating the nature and effect of his act. The burden of proof that he was, in fact, mentally incapable shall rest with the person making the allegation.

11.6.7 COMPETENCY OF PERSONS INVOLVED IN THE EXECUTION OF A WILL

The following persons shall be disqualified from receiving any benefit from the will.

(a) Any person who attests and signs the will as a witness.

(b) Any person who signs the will on behalf of the testator.

(c) Any person who writes out the will (or any part thereof) in his own handwriting.

(d) Any person who is the spouse of such person as mentioned in a, b or c above.

Notwithstanding the above it is possible that, under certain circumstances, the disqualification is set aside and the person will be permitted to receive the benefit.

These special cases are set out below.

(a) A court may declare a person or his spouse to be competent to receive a benefit from a will. The court must be satisfied that the person or his spouse did not defraud or unduly influence the testator in the execution of the will.

(b) A person or his spouse who, in terms of the law relating to intestate succession, would have been entitled to inherit from the testator if there had been no will shall not be disqualified to receive a benefit from the will. The value that will be received by that person or his spouse is not to exceed the value of the share that person or his spouse would have been entitled to in terms of the law relating to intestate succession.

(c) A person or his spouse who attested or signed a will as a witness shall not be disqualified if the will concerned has been attested and signed by at least two other competent witnesses who will not receive any benefit from the will concerned.

It must be clearly understood that the nomination in a will of a person as executor, trustee or guardian is regarded as a benefit and the conditions set out for disqualification would also apply in these instances.

11.6.8 WILLS DRAWN UP IN A FOREIGN COUNTRY

Any will executed in a foreign territory will not be **invalid** in this country, provided that it conforms to the internal law of the state or territory in which it was executed.

It is further necessary that the testator was, at the time of the execution of the will or of his death, domiciled or habitually resident in that state; or must have been a citizen of that state.

These conditions will not apply to a will made by a South African citizen unless the will has been set out in writing.

11.6.9 SUMMARY OF THE WILL SIGNING PROCEDURE

(a) Every page of the will must be signed, or initialled, by the testator.

(b) The last page must be signed by the testator and at least two competent witnesses.

(c) The will must be dated on the last page.

(d) The testator and the witnesses must all sign at the same time in the presence of each other.

(e) Testators must be over the age of 16 years.

(f) Witnesses must be over the age of 14 years.

(g) People who are named as beneficiaries, executors or administrators, and also their spouses, must not witness a will.

(h) Additions or changes to a will must be legible and must be signed in full by the testator in the margin opposite the addition or change. Initials will suffice.

(i) Only the original will need be signed.

(j) For future reference, record the date of the will on the copy.

11.7 INTESTATE SUCCESSION

Death catches most people unawares, and it fairly often happens that a person dies without having drawn up a will. It is also possible that the Master of the Supreme Court may rule that certain conditions set out in a person's will don't conform to criteria acceptable to him, and he can then declare the will (or a part thereof) to be invalid. When this happens, the deceased is said to have died **intestate** and the Intestate Succession Act no. 81 of 1987 (as amended), will determine who will inherit the worldly goods of the deceased once the estate has been wound up.

It must be clearly understood that the conditions of the Intestate Succession Act will only apply in instances where it is not possible to abide by the conditions of the deceased's will. This may be because there isn't one, or because the beneficiary has died before the testator or testatrix, or because the Master has declared the will, or a part thereof, invalid.

(a) Where a person is survived by a spouse, but not by a descendant, the surviving spouse will inherit the entire intestate estate.

(b) Where a person is survived by a descendant, but not by a spouse, the descendant will inherit the entire intestate estate.

(c) Where a person is survived by a spouse and a descendant-

  (i) the spouse will inherit an amount equal to the greater of a child's share of the intestate estate or an amount which is fixed from time to time by the Minister of Justice in the Government Gazette, in 2010 this amounted to R125 000;

  (ii) where the set down amount is greater than a child's share the descendant will inherit the residue, if any, of the intestate estate.

(d) Where a person is not survived by a spouse or a descendant, but is survived -

  (i) by both parents, the parents will inherit the intestate estate in equal shares;

  (ii) by one parent, the surviving parent will inherit one half of the intestate estate and the descendants of the deceased parent will share the other half of the estate. Should the deceased parent not have any descendants the surviving parent will inherit the entire estate.

(e) Should the deceased not be survived by either a spouse, a descendant or a parent the following will occur:

  (i) the intestate estate will be divided into two equal shares. One half will be shared by the descendants of the mother and the other half will be shared by the descendants of the father;

  (ii) where only one of the deceased's parents left other descendants, those brothers and sisters will share the entire intestate estate.

(f) Where the deceased is not survived by a spouse, descendants, parents or descendants of parents any blood relations who are related to the deceased to the nearest degree will inherit the intestate estate in equal shares.

It must be noted that in terms of the Intestate Succession Act illegitimacy will not affect the capacity of one blood relation to inherit from the intestate estate of another blood relation.

Where, however, a child is adopted, the adopted child is now deemed to be a descendant of his adoptive parent/s and not of his natural parent/s. Therefore, an adopted child will have no claim against the intestate estate of a natural parent, unless the natural parent is also an adoptive parent or was, at the time of adoption, married to the adoptive parent.

In determining the value of a child's portion, one divides the monetary value of the estate by the number of children plus one. The plus one is for the surviving spouse's share, where applicable.

Where the deceased is predeceased by one or more of his children, the share due to the predeceased child shall devolve upon the descendants of that child. Should the child have died, leaving no children, the child will not be included in the determination of the value of a child's portion, and the estate will be shared by the surviving children.

It must also be considered that, in a situation where an adopted child can only inherit from the intestate estate of an adopted parent, the adopted parent will also be considered to be an ancestor of the child and will be in a position to inherit from the intestate estate of an adopted child.

Should a descendant of a deceased who, together with a surviving spouse is entitled to benefit from the intestate estate of the deceased renounce his right to receive a benefit, the benefit will vest with the surviving spouse. A minor, or mentally ill, descendant will be unable to renounce his right to inherit.

If there is no surviving spouse, a descendant may still renounce his right to receive a benefit. In this case, the inheritance will devolve as if the descendant had died immediately before the death of the deceased.

Where it is ruled that a descendant is *disqualified* from inheriting from the intestate estate of the deceased, the estate will devolve as if the descendant had died immediately before the death of the deceased.

Traditionally, the intestate succession did not apply to the majority black population which provided for the inheritance in terms of their traditional culture, which allows for the inheritance to be limited to males and direct according to the family tree or line. The legislator has indicated that the old Bantu Administration Act, will be scrapped, which will allow for black women to inherit in the same provisions determined for all South Africans.

POLYGAMOUS MARRIAGES

A Cape High Court ruling in 2008 concluded that, where a man in a polygamous marriage dies intestate, each of his wives would be able to inherit.

11.8 FURTHER FACTORS AFFECTING ESTATE PLANNING

There are a number of factors that may come into play, at the time that the executor wishes to wind up the estate, that will dictate certain of his actions. Some of these factors may have been created by the deceased prior to his death, whilst others may have been created by his will.

It is also possible that, as a result of claims against the estate, the executor may not be able to carry out the final wishes of the deceased. Some of these factors will be considered here, particularly where the use of life insurance may assist in avoiding complications.

11.8.1 CLAIMS AGAINST THE ESTATE

The executor is responsible for the settlement of all the debts that the deceased may have left behind. Should there be insufficient liquidity in the estate, the executor may need to convert some of the assets of the deceased into cash, in order to pay the outstanding debts. This may be to the detriment of the beneficiaries and, therefore, the provision of liquidity needs to be a priority of the deceased whilst he is still able to do so. One must, however, tread with some caution. The proceeds of life insurance policies will, generally, form part of the estate of the deceased. Therefore, where there is a substantial estate, the proceeds of the policies could increase the estate duty liability of the deceased's estate.

11.8.2 THE CREATION OF A TESTAMENTARY TRUST

The introduction of CGT has had a major impact on the use of trusts as an estate planning mechanism. Whilst it is important that you are aware that there are possible reasons to reconsider the use of trusts in estate planning, it is not necessary that you are aware of the problems created by the introduction of CGT.

The information contained in the study material is still relevant and, should the need to use a trust arise, there is no doubt that this will still be done, regardless of the CGT implications. It is perhaps only in the trust deed that certain fundamental changes will arise, primarily in an attempt to minimise any capital gains tax that may arise.

The will of the deceased may make a provision for the creation of a testamentary trust. There are a number of reasons why this may have been done.

(a) The beneficiaries may lack the needed business or investment experience needed to continue the operation of the deceased's business. The business is, therefore, placed in the care of trustees who will ensure, not only the continued well-being of the business, but also the security of the beneficiaries.

(b) The deceased may wish to ensure that the assets he leaves behind are passed on to successive beneficiaries, and are not squandered by his widow or children.

(c) A testamentary trust is probably the most efficient way of passing on assets within an estate to minors, without leaving the assets in the control of an appointed guardian. The assets are placed in the care of the trustees, who ensure that the assets, and/or income, are available for the continued maintenance of the minors until the minors have achieved the required age, at which stage they may inherit. This age (whilst usually age 21) is set by the testator and, on occasion, has been as high as age 45. With the passing of the Childrens’ Act in 2007, this is likely to tend towards 18 in future.

(d) Where the deceased leaves property (like a farm), which is difficult or impossible to divide, the property may be placed in a testamentary trust to ensure the continued operation of the asset. Should there be no trust, the executor may be forced to sell the asset in order to be able to give the heirs their share of the estate, as set out in the will.

11.8.3 ESTATE PLANNING INSTRUMENTS

Donations

By making a donation of an asset whilst still alive, the planner is able to peg the value of the asset donated at its current value. There are a few facts that need to be considered before this route is taken:

(i) the planner must relinquish the control over the asset. He would, therefore, be unable to exercise any direct influence on the management of the asset;

(ii) donations tax will be due upon the value of the donation. A donor may donate an amount of up to R100 000 per annum that will be exempt from donations tax. On any further amount donated in the same year the donor will be liable for donations tax at the current rate of 20%;

(iii) the donation will be included in the estate of the donor at the value at the time of the donation. Any further appreciation of the asset will happen outside the estate.

Inter-vivos trusts

The introduction of CGT has had a major impact on the use of trusts as an estate planning mechanism. Whilst it is important that you are aware that there are possible reasons to consider the use of trusts in estate planning, it is not necessary that you are aware of the problems created by the introduction of CGT. However, should the need for a trust arise there is no doubt that this will still be done, regardless of the CGT implications. In is perhaps only in the trust deed that certain fundamental changes will arise, primarily in an attempt to minimise any capital gains tax that may arise.

The creation of an *inter-vivos* trust occurs during the lifetime of the planner. The planner (creator of the trust) enters into a contract with the trustee/s whereby the creator donates, or sells, certain of his assets to the trust. The trust is set up in order to administer the assets for the benefit of any designated beneficiaries.

The creator will be able to maintain a certain level of control within the trust if he is appointed as a co-trustee. Any appreciation in the value of the assets held by the trust will thereafter accrue to the trust.

Where the transfer of the assets was by means of a donation to the trust, the creator may be liable for donations tax at the time of the donation. The assets will, further, be included in his estate at the value of the donation at the time of his death. The increase that may occur in the growth of the assets may well cancel out any donations tax that may be due, if one considers the amount of estate duty that could be saved.

Selling an asset to the trust does not mean that the trust will need to find the money at that time. The creator can agree that the trust should owe the money to him, payable only upon his death. In the will of the creator, the planner can then make the value of the loan a bequest to the trust.

It is important that the trust provisions contain clear instructions with regards the handling of the assets. Should the creator retain some means of control, whereby he is able to dispose of the assets during his lifetime or at his death, the assets will be included in his estate at their **actual value**, and the purpose of the trust will have been defeated.

Private companies

A further means whereby the planner of an estate can limit the growth within his estate is by forming a private company. Once the company has been formed, the planner can sell the rapidly growing asset to the company.

The sale can take place on a loan account basis with a reasonable rate of interest being charged. The company then owes the purchase price to the seller, who can make the value of the loan a bequest to the company.

The company, when being formed, may be structured as follows:

(i) 200 non-cumulative, non-profit sharing preference shares at R1 each, held by the planner; and

(ii) 100 ordinary shares at R1 each, held by the beneficiaries of the planner.

All shares are to have normal voting rights. The reasons for this form of structure are as follows:

(i) the holder of the preference shares should have no more than 74% of the voting rights within the company. Should he have a greater percentage, he would be in a position to increase the number of ordinary shares within the company, and could choose to take some of these up himself. This could affect the value of his preference shares;

(ii) by structuring the company in this manner, the growth of the assets within the company will be attributed to the ordinary shares. The growth will, therefore, be for the benefit of the planner's beneficiaries, while the preference shares will only retain their nominal value. Estate duty would be saved in the estate of the planner;

(iii) the creation of the loan account within the company will mean that, while the planner is no longer the full owner of the assets, he will still be in a position to keep control of his sold assets.

QUESTIONS ON CHAPTER 11

Mental revision questions

Work through these mental revision questions as a test of your understanding of this chapter. We suggest that you attempt these before tackling the written questions. Please note that suggested answers are not provided as the chapter's text contains the answers.

1. Describe the main characteristics of an annuity as established over the years.

2. Define a family company.

3. Explain what value of an insurance policy must be included in the estate of a deceased if the premiums were paid by someone other than the deceased.

4. What is the maximum fee that an executor may claim for winding up an estate?

5. Explain the rebate in respect of death in rapid succession.

6. Who is competent to make a will?

7. List the people who will be disqualified from inheriting in accordance with the will of a deceased.

8. In accordance with the Intestate Succession Act, who does an adopted child inherit from?

Written questions

Attempt these questions after you have completed this chapter and its mental revision questions. Suggested answers to these questions are at the end of this book.

1. Who is liable for the payment of estate duty?

2. Set out the formalities required in the execution of a will.

3. In order of prior claim - set out the method in which the estate of a person who has died intestate will be distributed.

4. Explain the implications of the Maintenance of Surviving Spouses Act on the estate of a deceased spouse.