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WRS Fiduciary and Tax

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PRAEFATIO (FOREWORD)

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"Gather ye rosebuds while ye may, old time is still a flying and this same flower that smiles today, tomorrow will be dying". This is the opening phrase of the poem "To the Virgins, to Make Much of Time" by Robert Herrick and it is an apt phrase to encapsulate the very spirit of financial planning – essentially it comes down to simply saying that once an opportunity has presented itself, one must act swiftly to make the best use of it or risk losing it forever. After all, an opportunity knocks but once.

It is most certainly a time of uncertainty, ranging from trade tensions between the United States of America and the Peoples Republic of China causing some turmoil on an international level right to the outright defiance of North Korea to cease their missile testing programmes. Of course, one does not even need to look to the far east to find world-altering views as we have recently gone through our 6th democratic elections and suffice to say many were surprised with the outcomes.

The world of corporate financial planning itself has also recently been subject to some upheaval, with the new budget speech being delivered, the maiden budget speech of Tito Mboweni, and the country as a whole let out a collective sigh of relief as it seemed that there was relatively little which was impacted this time around, however as with most things in life it would seem that the devil is in the detail - refined dividend stripping rules were introduced by way of section 24BA of the Income Tax Act which aims to curb the usage of dividends in asset for share transactions even more.

These new provisions are deemed to be effective from 20 February 2019 without any finality on how the wording of this legislative refinement will look like. Of course, for the clever and the creative, this is nothing more than an opportunity to let their natural talents shine through in order to find new ways of addressing such transactions.

No crystal ball exists to be certain of the future, nor is there any guarantee that one can take every single factor into account when preparing a financial plan, however having a skilled team of professionals assisting you can never hurt.

We here at WRS Fiduciary and Tax, which functions in association with S-BRO FUND MANAGERS (PTY) LTD & S-BRO FINANCIAL ADVISORS (PTY) LTD, and in conjunction with our trusted contributors, take great pride in providing bespoke financial planning solutions to cater for each and every client and it is our sincere belief that it takes a little bit of creativity, a pinch of cleverness and generous helping of truly caring about our clients to ensure that your business thrives and that your loved ones are cared for should the worst befall you.

Though it may be hard for each of us to look to the future, or to contemplate our own mortality by looking at insurance matters or to the drafting of Wills, there can be no doubt that leaving anything to chance where there is an alternative is, to say the very least, a terrible idea and could lead to an extremely detrimental situation.

So, let me leave you with the conclusion to Robert Herrick's poem as an additional motivation to revisit, and if necessary, revise any plans which you may have in place –
"Then be not coy, but use your time and while ye may, go marry, for having lost but once your prime, you may forever tarry"

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1. AUTHORITY TO ACT – TRUSTEES OF A TRUST: SIT UP AND TAKE NOTICE, IT'S NOT RUBBER STAMPING …

By Edrick Roux (LLB (UP))
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A trust, being a *sui generis* legal entity, requires that there are certain individuals which must be appointed to act as the representatives of the entity in order to attend to the day to day management of the trust, as well as to ensure that the trust is operated for the benefit of the beneficiaries and in accordance with the provisions of the trust deed.
Unlike a company, where an agent of a company which has not yet been incorporated can enter into agreements on behalf of such a company, which then simply can be ratified in accordance with the necessary rules and provisions, a trustee cannot act on behalf of a trust which has not yet been registered with the Master of the High Court.

It must be noted that although a trust does not technically need to be registered with the Master of the High Court in order to be a valid trust, such non-registered trust would not experience the protection of the Trust Property Control Act. This type of trust falls beyond the scope of this article.

A trustee derives his authority to act from the Letter of Authority which is issued by the Master of the High Court, which also serves as proof that the Master of the High Court has registered the trust. It is moot that where a Letter of Authority has not been issued, that the trustees cannot act on behalf of the trust (except for defending the assets).

However, the question arises as to whether a trustee who has taken a decision on his own may bind the trust to an agreement. This question does require some additional context in order to be fully explored.

First and foremost, it must be noted that the trustees of a trust are bound by the provisions of the trust deed, which dictates not only what decisions the trustees may take, but also how such decisions are to be taken. It can be done –

1. by way of a majority vote between the trustees; and or
2. by way of a unanimous decision taken by the trustees.

From an estate duty and a risk perspective, there is no doubt that the second option, being that decisions should be taken by unanimous vote, at least for the majority of decisions, should be required, notwithstanding that this may add to the administrative burden of getting things done in the trust. This also provides a safeguard against abuse of the trust.

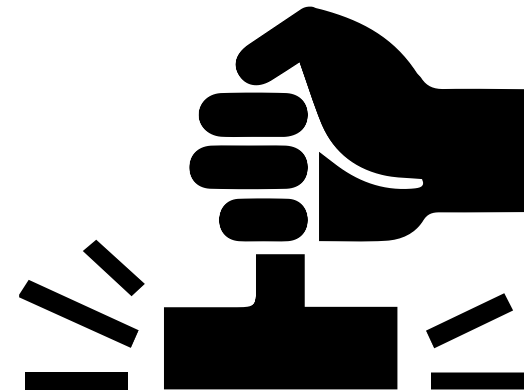
Should no provisions be contained in the trust deed, then the default position is that a unanimous decision must be taken by the trustees *(Coetzee v Peet Smith Trust and Others 2003 (5) SA 674 (T).*

In the event where the decision-making provisions are not followed, i.e. not all the trustees were consulted in respect of a decision, or only the majority consented where unanimous consent was required, then the action taken following such a decision would be *ultra vires* and accordingly invalid, whether done *bona fide* or not. However, to the outside world the decision may look perfectly valid. We have however many examples in case law where the external contracting parties, which concluded agreements with the unauthorised trustees, want to be freed from the contractual bounds of these agreements by arguing the invalidity of the agreement, many a times successfully. When the outsider party indeed wants to enforce the agreement, we have seen the Company Law principle *"the Turquand – rule"* being argued but only with limited success and not endorsed by the Supreme Court of Appeal.

1. AUTHORITY TO ACT – TRUSTEES OF A TRUST: SIT UP AND TAKE NOTICE, IT'S NOT RUBBER STAMPING ...

*I*n this regard some scenarios may better explain the situation -

1. Where the action of the trustee is authorised by the trust deed (eg may distribute a trust asset to only one of the beneficiaries) and only the decision-making provisions where not adhered to (eg a unanimous decision was not taken because one of the trustees did not attend the meeting);
2. Where the action of the trustee is not authorised by the trust deed (eg may not distribute a trust asset to only one of the beneficiaries) and the decision-making provisions were not adhered to (eg a unanimous decision was not taken); or
3. Where the action of the trustee is authorised by the trust deed (eg may distribute a trust asset to only one of the beneficiaries), and it is further required that a subminimum number of trustees must be in office (eg three) but there are only two trustees appointed and the decision-making provisions were not adhered to (eg the decision was taken by only the one trustee);



In scenario 1 it is clear that the trustee only lacked authority and no capacity limitation existed. This situation caters for a situation where the actions of the trustees could be ratified by the remaining trustee in line with the provisions contained in the trust deed. Should such a ratification occur, then it is clear that the action taken by the trustees will be valid and shall then bind the trust against the outside contracting parties.

In scenarios 2 and 3 above, the trust deed has set out rules which limits the capacity of the trust. The trust is prohibited to (i) distribute a trust asset to only one beneficiary (scenario 2) and (ii) must have a certain number of persons appointed as trustees (scenario 3). The erroneous decision-making processes followed in scenario 2 and 3 can not be rectified by ratification because of the capacity limiting conditions in the trust deed. In these scenarios the trustees cannot bind the trust.

2. ENDOWMENTS - FRIENDS OR FOE

By Justin Glanz (B.Comm Law, LLB, CFP)
WRS FIDUCIARY & TAX (PTY) LTD & S-BRO FINANCIAL ADVISORS (PTY) LTD

In an ever-developing financial industry, endowments are often overlooked as a useful investment vehicle. If you are a high income tax payer (above 30%) and looking for an investment where growth is possible while also saving on tax, an endowment might be a viable option for you.
Endowments are in essence an insurance policy without life cover. It is an after-tax investment vehicle which offers flexibility and a wide range of investment options such as equities, property, bonds and cash. It should be seen as a long-term investment option since the usual term before an endowment reaches maturity, is five years.

To know whether it is the right product for you, one needs to consider the advantages and disadvantages.

Advantages
i. Endowments offer greater tax efficiency for high income earners who are above the 30% tax rate. The income tax rate for individuals can go as high as 45%, while income tax in an endowment is at a flat rate of 30% (for both individuals and trusts). Capital gains tax (CGT) can also be up to 18% for an individual, whilst it is also capped at 12% within the endowment. By utilising an endowment, you will effectively lower your income tax rate if you are in a tax bracket of 30% and above.

ii.Tax administration is also simplified, as tax is paid within the endowment and paid on behalf of the investor, as opposed to a tax return where you must declare taxable interest, dividends and CGT on investments that were held personally.

iii. Endowments can also be used as an estate planning tool. Even though the funds within the endowment will form part of your estate for estate duty, it is possible to nominate a beneficiary on the policy. The endowment policy will then pay directly to that nominated beneficiary. This is advantageous because the policy will bypass the estate (the beneficiary will not have to wait for the estate to be wound up) and provide immediate liquidity to the beneficiary. An additional advantage of nominating a beneficiary and consequently bypassing the estate, the policy will not attract executor's fees, thus saving 3.5% (excluding vat) in the estate.

iv. When the endowment reaches maturity, most commonly after 5 years, you will have tax-free access to your money through a lump sum or regular withdrawals. All future withdrawals will also be tax free.

v. Unlike with retirement savings, you are not restricted to a certain level of equity exposure (regulation 28 limitation). If you have the appetite for it, all your funds can be placed in equities or offshore. After the five-year restricted period has passed, you can also draw income from the endowment without being limited to a specific level of allowed drawdowns, as in the case with living annuities.

vi. By committing to wait five years before the endowment reaches maturity, it also puts you in a better position to experience growth by going through the ups and down cycle of investments.

2. ENDOWMENTS - FRIENDS OR FOE

vii. Another advantage that is often overlooked but arguably one of the most important, is the insolvency protection that the Long-Term Insurance Act offers on endowments. If the policy is in force for three years (before insolvency), the entire endowment will be protected against creditors. Once the policy has reached maturity, the protection will continue for a further five years. There are certain requirements that needs to be met for the protection to apply. Contact your financial advisor to evaluate whether the protection will apply to you.

Disadvantages

i. Endowments are taxed at a flat rate of 30% for income and 12% for CGT. If you are an individual that falls within a lower tax bracket than this, it would not be to your advantage to invest in an endowment as you will effectively be increasing your tax rate. There are, however, other options that can be explored as discussed in the below paragraph.

ii. If you are just starting the process of optimising your tax, endowments might not be the first place to start. Because the fund will be paying the tax on your behalf, you will not utilise your tax rebates when investing in an endowment. Investments and rebates such as the tax-free savings, interest rebates and CGT exemptions, might be prioritised first. If you still pay tax in excess of 30%, an endowment can be considered for additional savings.

iii. If liquidity is of importance, an endowment might not be the best option since access to the funds are generally limited to one partial- or full withdrawal in the first five years depending on each company's rules.

iv. Even though executors' fees can be bypassed through the nomination of a beneficiary on your endowment policy, the value of the endowment will still form part of your estate for estate duty purposes. The first R3,5 million of the estate will however be exempt from estate duty.

Conclusion

If the following applies to you, an endowment might be a viable option to consider:

You are a high-income earner
- You have a need to optimize your tax position
- Liquidity is not of importance
- You are in need of an estate planning tool
- You want to explore investment vehicles for growth
- You require protection against creditors

Financial advice has never been a "one-size fits all" industry. It all depends on your personal circumstances and needs, and it is very important to discuss this in detail with your financial advisor. The obvious benefits of an endowment can however not be ignored.

3. THE TWO FACES OF A TRUST – LIKE ONE, DISLIKE THE OTHER

By Dr Stefan Strydom (LLD, CA(SA))
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The urban legend of Edward Mordrake reminds me of the features of a discretionary trust which can cause either happiness or sadness, depending on the circumstances.

It was said that Edward Mordrake was a young, intelligent, and good-looking English nobleman who had everything one could ask for from life, but also, in addition to his handsome, normal face, Mordake possessed a terrifying disfigurement: another face on the back of his head. This horrifying second face was that of a beautiful young girl. Despite the loveliness of the strange visage, there was no doubt it possessed an intelligence of its own, but that "of a malignant sort." Edward Mordrake was constantly plagued by his "devil twin," which kept him up all night whispering "such things as they only speak of in hell." The young lord was eventually driven mad and took his own life at the age of just twenty-three, leaving behind a note ordering the evil face be destroyed after his death, "lest it continues its dreadful whispering in my grave.

A discretionary family trust is known as the pearl of estate planning, because it can place assets beyond the reach of the fiscus' death taxes at the estate planer's death. This is because the assets can be placed in trust and therefore *de facto* control resides in the trust and not in the individual, but these assets can, to a great extent, be administered and controlled by the individual. This separation between the legal control and enjoyment of benefits within the trust, makes it a unique estate planning instrument.

This great feature of a trust can however also causes the disfigurement of the family harmony, just as the evil little back - of – the - head - missy did to Edward Mordrake.

A typical discretionary trust makes provision for a class of beneficiaries, none of which become entitled to trust benefits before the trustees decide to distribute any benefits to them. If the trust beneficiaries do not understand that they are merely possessive of a hope to receive something in the future, problems are eminent. They are not clothed with any entitlement to the trust benefits. That subjective expectation of the trust beneficiaries must be very carefully nurtured. The estate planner which implemented the trust must take responsibility for educating the trust beneficiaries of their rights in the trust and to tell them about his wishes. Many of the court cases surrounding family trusts are caused by uncertainty about the beneficiaries' rights and the founder's wishes.

Growth assets are typically held in trust and are often made available to an operational entity. Another aspect which can cause great uncertainty, is the question whether a market related rent needs to be levied by the trust. This is often the reason for in-house quarrels. Can the trustees be held responsible if they do not levy a market related rent? The rental amount for the use of an asset is based on the mutual assent of contracting parties and they can decide what the quantum should be, but, can the trustees of the trust, as the lessor, be said to not have acted with reasonable care and diligence if they did not levy a market related rent? In my opinion the trustees, in exercising their fiduciary duty, must consider the beneficiaries' position from a holistic perspective.

3. THE TWO FACES OF A TRUST – LIKE ONE, DISLIKE THE OTHER

If it is more advantageous to the beneficiaries to levy a below market related rent from a risk or asset protection perspective, then such considerations should be taken into account when the fiduciary duties of the trustees are questioned. Say for example that the operational entity has made significant losses, then, the levying of a market related rent would probably necessitate external finances.

Another contentious aspect is whether one or more of the beneficiaries are allowed to use some of the assets of the trust for free, or for a below market rental amount. On the one hand can it be said that the trust would be prejudiced if a below market related rent is not levied from the beneficiary which uses the asset/s. On the other hand it can be argued, justifiably so in my opinion, that if a market related rent had been levied that the trustees could have, if they so chose, distributed all or some of the rent to that beneficiary. What would be the difference between allowing the beneficiary the free use of the asset/s or distributing all rent levied from that beneficiary to that beneficiary? It is after all a discretionary trust and the trustees are normally afforded the right to benefit only a chosen beneficiary/ies if they so choose.

These examples are indicative of the difficult decisions faced by trustees these days. A trust remains a very handy tool to the avail of estate planners, but the trust beneficiaries need to be pertinently informed of their rights. They become increasingly informed about the legal aspects of trusts and with the wrong information they can become a real enemy of the trustees.

4. RETIREMENT
A TIME TO DO WHAT YOU WANT TO DO, WHEN YOU WANT TO DO IT, WHERE YOU WANT TO DO IT, AND, HOW YOU WANT TO DO IT, BUT WHAT IF YOU CANNOT AFFORD IT?

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"The art is not in making money, but keeping it" – Proverb

More than ever, we are bombarded by the importance of saving. We often see and read statements or quotes about financial freedom or financial independence:

"Do not save what is left after spending, but spend what is left after saving" – Warren Buffet

The importance of saving and planning for the future has never been so highlighted as it is now. We read about it in the Sunday newspaper, we discuss it at social gatherings, encounter it with financial advisors and notice the billboard statements. With all this information available, informed South African's are still short of savings for the future and, more specifically, for retirement.

The 10X South African Retirement Reality Report suggests that there is no evidence that the crisis in retirement planning in South Africa has improved at all in the last 20 years. Statistics from the Sanlam Benchmark Survey indicated that between 14% and 19% of South African's (who are members of retirement funds) would be able to maintain their standard of living. Most members would only be able to replace 40% of their final salary at retirement. This said at the backdrop of all the legislative changes in recent years to improve these statistics. A number of proposals to reform the retirement industry were announced and subsequently implemented with two of the focus areas on preservation and improved savings.

Considering that most people cannot continue the same standard of living at retirement age, some are forced to remain in the workforce for as long as possible.

However, members of a retirement fund were previously forced to retire from the fund as they reached the maximum retirement age of that fund. The need to delay a member's retirement was addressed with a number of legislative changes in the last four years. Three significant changes have enabled a member to retire from his retirement fund and preserve the fund value until he finally exits the workforce or has to supplement his income.

• Firstly, the prescribed retirement date was removed, and a member could from 1 March 2015, choose which date he wants to retire from his retirement fund if the rules allow it. Unfortunately, some fund rules (pension and provident) still stipulate a normal retirement age and not all funds were able to deal with inactive members after they reached their normal retirement age (according to the rules of the fund).

• The second amendment addressed this barrier and from 1 March 2018, members were able to transfer their retirement benefit to a retirement annuity fund from which they could access it at a later stage. A member of a pension or provident fund is now not limited by the fund rules but can make use of a tax-free transfer to a retirement annuity fund. However these changes are not attractive to a provident fund member as upon transfer, the retirement annuity fund rules will apply when the member eventually takes his retirement benefit from the

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retirement annuity fund. Currently, a provident fund member has the option to access the full retirement fund value as a cash payment upon retirement, where a retirement annuity fund limits it to one-third of the retirement fund value.

• The most recent and third amendment addresses the need for a provident fund member to delay their retirement and keep the option to access the full fund benefit as a cash payment at retirement. From 1 March 2019, a member who retires from their fund can transfer their post-retirement benefit to a preservation fund. A significant difference between a pre-retirement withdrawal (upon resignation or retrenchment) transfer to a preservation fund and a post-retirement benefit transfer to a preservation fund is that the "retired" member will not be entitled to the one withdrawal that is available to a pre-retirement withdrawal transfer.

Consequently, a member of a pension fund at normal retirement age, can remain an inactive member of the pension fund, or transfer the full retirement benefit to a pension preservation fund or a retirement annuity fund.

Similarly, a member of a provident fund at retirement age can remain an inactive member of the provident fund or transfer the full retirement benefit to a provident preservation fund or a retirement annuity fund.

The effective date is 1 March 2019 and the implications thereof is that only a member that retires after 1 March 2019 will have this option to transfer the fund value to a preservation fund.

The "art" is to keep your money and refrain from drawing from the retirement fund value until it is financially necessary.

5. ESTATE PLANNING IN A FARMING ENVIRONMENT - WHERE THERE'S A WILL, THERE'S ... 50 RELATIVES!

By Piet Swanepoel (B.Iuris, LLB, Advanced Tax Certificate, Advanced Post Graduate Diploma Financial Planning, FPSA®)
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Research have shown that people in general make certain mistakes regarding estate planning. I am going to discuss some of the common mistakes made in this article.

i. The most common mistake is failure to get it done because people are unsure of what to do, who gets what - and believe there will be time to get the plan in place later.

ii. Another common mistake is the perception that they should keep estate plans a secret during their lifetime. To communicate your will and estate plan, is one of the best ways to head off conflict and hard feelings among family members. If there are technical details, involve your lawyer or other experts in the process to explain these matters. Maintain an estate plan portfolio and let the right people know where these documents are kept along with other essential records that will be needed upon your death. Estate planning is frequently more about family relationships than it is about asset transfers and tax planning.

iii. The issue of how to treat on-farm versus off-farm heirs can be a particularly difficult issue. A common estate planning scheme would leave all assets to children equally. When farming is involved and land is left to children as tenants in common, complex questions arise. Does an on-farm, active farming child pay rent to non-farming siblings, or should there be another form of reimbursement? Legislation regarding the distribution of farm property to more than one owner should also be taken into account. In certain circumstances, the estate planner will have to make decisions about what will be fair or equitable to all, even though it may not be equal. Then he or she have to communicate such decisions. If you don't, your legacy may be children who are estranged from one another because you did not share your decisions with them.

iv. Sufficient liquidity in an estate provides the key to a quick and efficient estate settlement. However, hidden costs are often the cause of insufficient liquidity in an estate. When someone dies, all liabilities, costs and taxes in the estate have to be paid before the remainder of the assets may be distributed in accordance with the will. Usually people only think of the liabilities in the estate when quickly calculating whether there will be enough funds available in the estate. The costs in an estate include, amongst others, executor fees, the Master of the High Court's fee, valuation and advertising costs, funeral costs as well as transfer costs relating to property.

Tax payable in an estate include mainly estate duty, capital gains tax and income tax. A lot has been written about estate duty and capital gains tax. An example of how income tax can have a negative cost effect in your estate, is section 9HA, that was added to the Income Tax Act in 2016. In short it entails that when someone dies after 1 March 2016, all his assets, including his stock, are deemed sold at market value. For a farmer his livestock and game are his stock.

The above-mentioned stipulation was already applicable to capital assets, including land, and capital gains tax is payable in this regard. Previously, capital gains tax was also payable on the difference between the market value and the

5. ESTATE PLANNING IN A FARMING ENVIRONMENT - WHERE THERE'S A WILL, THERE'S ... 50 RELATIVES!

standard value of the livestock in an estate. (The standard value of livestock is a very low tax value linked to livestock in terms of the Income Tax Act). Game has a standard value of nil. From the point of view of capital gains tax, the effective maximum tax rate is around 18% of the taxable profit (the difference between the base cost and the market value).

The impact of section 9HA of the Income Tax Act is that livestock and game will now be liable to income tax instead of capital gains tax. The maximum income tax rate could be as much as 45% of the value of the livestock and game. The increase in cost (in the form of tax) in the estate is around 27% of the value of the livestock and game in the estate. Should the value of the livestock and game in your estate be R1 million an amount of as much as R270 000 will be payable in additional income tax in the estate.

The above-mentioned problem should not be viewed in isolation. The best solution is to have a specialist conduct proper estate planning. Proper estate planning has several advantages. One of the advantages of estate planning is that the estate can be structured in order to benefit optimally from the structures in the Income Tax Act that provide a tax advantage. This does not only relate to death, but also to save tax during life and to bring about huge savings in terms of estate-related costs.

Proper estate planning includes looking in detail at the feasibility of the will, the stipulations of trust deeds and whether these are in accordance with the latest legislation and court judgements, the cash flow in the estate, provision for the care of dependents and succession planning for businesses.

The lack of adequate records a great heartache for the executor of the estate. Maintain a recordkeeping system that can be found and used by others at the time of your death. Keep all records in a safe place yet still accessible to those who need them when you are gone. Sit down with your executor and have a show-and-tell session, explaining where everything is located.

Once you have an updated estate plan in place, do not just put it on the shelf and forget about it. Estate planning documents - wills, trusts and other important documents - should be reviewed on a regular basis. Take the time and effort on a regular basis to make sure that your true wishes will be carried out. The peace of mind you have will be worth it.

6. GUARANTEED LIFE ANNUITIES vs LIVING ANNUITIES RETIREMENT SAVINGS NOT ENOUGH, WHAT NOW …?

By Jevaune van der Merwe: Professional Accountant (SA) / Post Grad Diploma in Financial Planning (UFS)
Director: S-BRO FUND MANAGERS (PTY) LTD & S-BRO FINANCIAL ADVISORS (PTY) LTD

Will my retirement savings be enough?

The question that keeps a lot of people up at night has no definite or simple answer. Market risk, changing regulatory environment, longevity, sustainability of insurance companies and many more are all factors that has an impact on this topic.

You cannot read tomorrow's newspaper today.

As an independent financial advisor in the industry, this saying is very important and it is important to make the client aware of it. All we can use is historical data to make future projections and be sure to give the best advice to the client at all times.

I want to focus on two post-retirement investment vehicles namely Guaranteed Life Annuities and Living Annuities.

A GUARANTEED LIFE ANNUITY is designed to give maximum protection and certainty of income for the remainder of the retiree's and/or his spouses' life. With annual increases to fight inflation the Guaranteed Life Annuity gives the retiree the ability to draw up a budget post-retirement and know exactly if the income they will receive will meet their expenses. This however is not as simple as it sounds as research shows that a retiree's income needs between the age of 60 and 70 vary a lot due to travelling and leisure activities as well as the possibility of debt or a financial dependent child. This tends to stabilise as you become 70 and there is a lot more certainty around exactly what income you will need. By the time you reach 80 your income needs will be primarily focussed on health as this is your main concern. The downside of the life annuity is that your capital is not preserved at death. This means that in the event of death the capital remains in the hands of the insurer. This makes some retiree's uncomfortable but there is some sort of positive to this. The retiree has the option to choose a guaranteed term, usually 10 or 15 years which is the minimum period that the income will continued to be paid, either to the second life assured, if the principal life assured pass away (usually spouse), or to the nominated beneficiaries (usually children or other heirs) if both the principal and second life assured passed away. This life annuity can also contain a capital maintenance element which means that part of the funds is contributed to a life policy which will ensure that when the annuitant pass away that the initial capital amount invested (or a lower amount if chosen) will be paid to the estate (or to the nominated beneficiary) as policy proceeds.

On the other hand we have LIVING ANNUITIES which offers much more flexibility in regards to your investment. The retiree can choose the funds they want to invest in according to their risk appetite, they have the option to choose how many income they want to draw form the investment (current legislation allows to choose between 2.5% and 17.5%) and most importantly the remainder of the capital is not lost when the retiree pass away, but the nominated beneficiary/ies will have the option to either continue drawing income or commute the plan as a whole. Commuting the Living Annuity will have tax implications by taxing the amount commuted according to SARS' retirement tax tables and using the data of the person that passed away.

6. GUARANTEED LIFE ANNUITIES vs LIVING ANNUITIES RETIREMENT SAVINGS NOT ENOUGH, WHAT NOW …?

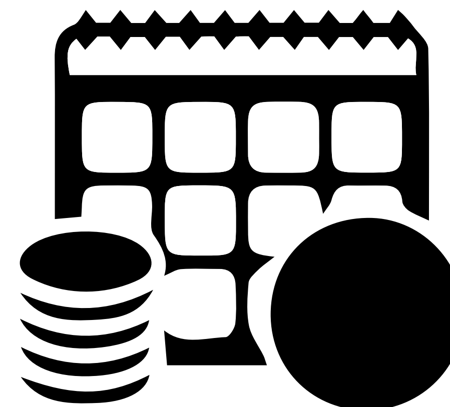
Research has shown that the risk of longevity is a reality. People are getting older and the Living Annuity cannot last forever, even if the minimum amount is drawn. If the retiree can manage to draw 4% or even 5% they will be fairly safe with the conservative and low risk funds that are available, but if the they draw 6% or more, the risk of the funds being depleted during the retiree's lifetime becomes a reality.

What is the best option then remains the big question.

There is now definite answer but there are options that will suit every individual's specific needs. I am of opinion that a combination of the Guaranteed Life Annuity and the Living Annuity is the closest to the right answer. The percentage allocated to each will vary from person to person and the funds available for investing. If the investment amount allows you to allocate a percentage to the Guaranteed Life Annuity that will field your fixed monthly needs, or a big portion thereof, and you are willing to take a bit of risk, I will certainly allocate the rest thereof to the Living Annuity.

Insurance companies have seen the need for diversification in post-retirement vehicle options and offer solutions to fit our needs. A combination of the Guaranteed Life Annuity and two or more Living Annuities that offers the option to convert to a Guaranteed Life Annuity at a later stage, is the answer. The percentages allocated to each will vary from client to client according to their personal needs. By diversifying your available funds in this way will certainly give flexible options to the retiree to adopt as your needs change.

With everything above taken into account, there is still no post-retirement investment vehicle to save a too - little pre-retirement savings amount. It is therefore very important to get good advice from a financially savvy independent financial advisor to do a proper retirement analysis and to start saving for your old day as soon as possible. It is never too late to start saving.



7. FAMILIAL FOUNDERS IN THE CONTEXT OF TRUSTS – LIKE FATHER, LIKE SON

By Riaan Vlotman BCom (Law) LLB LLM
Director: HAASBROEK & BOEZAART INC. ATTORNEY, NOTARY AND CONVEYANCER
PREVIOUS LECTURER AT THE UNIVERSITY OF PRETORIA

Familial Founders - The conveyancing and practical benefit of using a relative as a founder

The familial relationship between the founder (often also referred to as the donor and less often as the settlor) of an inter vivos or mortis causa trust and its beneficiaries, holds a benefit which is frequently overlooked in the transfer of trust property by the trustees to the beneficiaries of such trust.

The Transfer Duty Act, 40 of 1949 imposes a transfer duty which is payable to the South African Revenue Services on the transfer of immovable property from one entity to another, based on the fair market value or consideration paid for such property (whichever is the highest).

This legislation is however renowned for numerous exemptions which apply under various circumstances, with the ineluctable and unfortunate consequence that some of the lesser known and -utilized exemptions often being overlooked, such as the exemption discussed herein. The relevant provisions of the Transfer Duty Act and the Estate Duty Act, 45 of 1955 appear as follows: -

Section 9(4)(b)(ii) of the Transfer Duty Act, 40 of 1949 (as amended) - Exemptions from duty

(4) No duty shall be payable-

(b) where trust property is transferred by the administrator of a trust in pursuance of the will or other written instrument in pursuance of which the administrator was appointed-

(ii) to a relative as contemplated in the definition of 'relative' in section 1 of the Estate Duty Act, 1955 (Act 45 of 1955), where the trust was founded in terms of such other written instrument by a natural person for the benefit of such relative: Provided that no consideration is paid directly or indirectly by such relative in respect of the acquisition of such trust property

Section 1 of the Estate Duty Act, 45 of 1955 (as amended) - Definitions

'relative'*, in relation to any person, means the spouse of such person or anybody related to him or his spouse within the third degree of consanguinity, or any spouse of anybody so related, and for the purpose of determining the relationship between any child referred to in the definition of 'child' in this subsection and any other person, such child shall be deemed to be related to its adoptive parent in the first degree of consanguinity.*

This essentially holds that immovable property registered in the name of a trust can be transferred to a beneficiary under such trust without incurring any transfer duty liability, as long as the following requirements have been met:

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i. Transfer of an immovable trust asset is effected to a beneficiary (or such beneficiary's spouse) defined in the written trust instrument;

ii. Such beneficiary is a relative of the founder within the third degree of consanguinity (such as a grandchild, niece, child, etc.); and

iii. No consideration has been paid or will need to be paid, whether directly or indirectly, for the acquisition of such immovable trust asset.

Once these requirements have been met and proven to the satisfaction of the South African Revenue Services upon submission of the transfer duty declaration and all relevant supporting documents, a transfer duty exemption certificate will be issued. It is submitted that the following documents may be called upon by the South African Revenue services to prove that the requirements have been met:

i. A copy of the trust deed as confirmation that the transferee is a beneficiary as defined therein;

ii. A copy of any written agreement, resolution or document in terms whereof the decision of the trustees to effect transfer to such beneficiary has been encapsulated – it is submitted that such document should expressly provide that no consideration has been or will be paid by the transferee, whether directly or indirectly;

iii. A valuation of the pertaining immovable property to corroborate the fair market value of such property – the South African Revenue Services usually accepts 2 (Two) independent valuations provided by estate agents; and/or

iv. Proof that the transferee is a relative within the third degree of consanguinity – it is submitted that an affidavit similar in form and content to the Next-of-Kin affidavit used in the reporting of a deceased estate with the Master of the High Court should suffice, barring any request by the South African Revenue Services to the contrary.

This transfer duty exemption certificate, once issued, will then be lodged at the relevant deed's office as part of the supporting documents to effect the registration of the envisaged transfer of the immovable trust property.

The brief exposition above of the potential benefit in section 9(4)(b)(ii) of the Transfer Duty Act serves to remind members of the legal fraternity and other advisors to trustees and trust beneficiaries of this arrow residing in the quiver of legal advice which can (and should wherever possible) be utilized to the benefit of the beneficiaries of a trust.

8. FRICTION WITH FOREIGN INCOME – A LOOK AT THE NEW RULES FOR FOREIGN EARNED INCOME

By Leanne van der Walt
H.Dip Tax and General Tax Practitioner (SA)
CYPRESS FINANCIAL GROUP (PTY) LTD

National Treasury implemented "new" legislation regarding foreign earned income but does not sit well with all. Section 10(1)(o)(ii) will be effective on 1 March 2020.

Current Laws
The "old" section 10(1)(o)(ii) of the Income Tax Act allowed an exemption from tax in South Africa for a salary earned while rendering services outside of South Africa, provided that certain days are spent out of the country. To qualify for this exemption, the physical presence test should not be met to be an ordinary resident in South Africa and it entails the following: an employee needs to have spent more than 183 full days (including a continuous period of more than 60 full days) outside of South Africa working, in any 12 month period.

Proposed changes
In the 2017 National Budget Speech, the Minister of Finance stated that a new tax legislation will be introduced as concerns were highlighted regarding the number of South African residents who were working overseas. These residents potentially enjoyed the benefit of double non-taxation or they pay significantly lower tax rates in other counties.

A draft legislation was presented in August 2017 and it sought to repeal the whole section. This would have left South African residents working abroad to pay full tax on their remuneration earned through foreign services and they could only rely on the foreign tax credit provisions to claim back taxes. There was a huge public outcry and National Treasury reconsidered the full repeal. They proposed to keep the exemption but to enforce a threshold on the salary earned abroad.

From 1 March 2020, South African residents who spend more than 183 days in employment outside the country will be subject to South African taxation on any foreign employment income that exceeds R1 million.

Who will be affected?

There are three groups of RSA residents affected by the revised section:

1) Those working overseas of their own will (for example a teacher teaching English in China);

2) Companies that send employees overseas for work; and

3) RSA residents who have emigrated, but have not emigrated financially, may also be affected by the changes.
Concerns regarding the new legislation for the above-mentioned groups:

1) Determining whether, for example, a voluntary offshore worker, will meet the R1 million threshold;

2) Whether these offshore workers are actually declaring their income and submitting tax returns;

8. FRICTION WITH FOREIGN INCOME – A LOOK AT THE NEW RULES FOR FOREIGN EARNED INCOME

3) A portion of this group will cease residency in totality, therefore exiting SA's tax base, creating a loss of taxable income streams;

4) For multinational employers, the new legislation creates uncertainty and hampers planning going forward due to the lack of clarity around their obligation. With the old legislation it was not necessary to withhold employees' tax if they were certain that the requirements would be met. The employer's role is also not clear, as it is still uncertain if they need to collect or withhold the tax on the remuneration of the employee;

In the 2019 Budget Speech it was proposed that, to prevent monthly withholding of income tax both in South Africa and the host country, South African employers be allowed to reduce their monthly local PAYE withholding by the amount of foreign taxes withheld on the employment income.

If you are a South African living abroad (non-resident) and can prove to SARS that you are not an ordinary resident in South Africa, then the new tax law should not apply.

It is clear from the above that the new legislation will cause much uncertainty regarding how the legislation will be applied and put into effect and very little guidance are coming from National Treasury and SARS at the moment.

9. INVESTMENT COMMENTARY 2018 and 2019

By Nols Odendaal (CFP)
Director: S-BRO FUND MANAGERS (PTY) LTD & S-BRO FINANCIAL ADVISORS (PTY) LTD

2018

2018 was a year that investors would like to forget. Not only was it a year of negative results in the investment arena, but investors were also shuffled between volatility in extreme ways. The equity market almost collapsed just to regain values in the last week to a remarkable 4.3% in December. It left the market with a result of -8.5% for the year.

SA listed property minimised its downward spiral with 1.1% in December but still ended with a negative 25.3% for the year. This sector started the year with undesirous rumours of the Resilient group and never recovered in full. There was a remarkable downfall in the property sector worldwide together with the concern of the Companies' mathematical calculations of how long it will take to gain and restore values in this sector. Currently (June 2019) the sector still has not recovered from last year's losses, but the valuations of this sector is currently very attractively, but it remains very risky.

The star of asset classes was interest bearing investments where Bonds performed 0.6% in December to end the year on 7.7%. It was marginally higher than the index of short-term fixed interest or money market investment instruments in South Africa (STeFI Index), which delivered 7.3%. The Income Plus sector returned 0.82% in December and ± 9.85% for the year. This portfolio is invested in high performance assets with their main focus on investments with integrated rates.

2019

After an extremely difficult year in 2018 the Equity Market experienced a very positive run in January to April 2019 with risk on sentiment returning.

The Equity market gained 8.0% in the first quarter of 2019, almost recovering the losses experienced in 2018. Resources was the best performing sector, and gained 4.6%, while Financials was heavily hit and lost 4.8% in the first quarter. The Equity again gained momentum in April resulting in a 4,2% positive. Financials was the best performing sectors in April with an increase of 7,6%. It just shows how volatility plays a role in the markets.

Then came May. A decrease in May saw the Equity market lost 4.8%, tracking major global indices. Financials depreciated 1.9%, whilst Industrials lost 6.1% and Resources 5.3%. The worst performing share in May was Sasol, which lost 23% following the news that the Lake Charles Project will now cost $1bn more than originally estimated.

We do however detect positive sentiment about the rest of the 2019 year. As always, the politics, locally and offshore will have a great influence on this.

10. SNIPPETS & FOOD FOR THOUGHT:

Dividend Stripping Rules might need to be fleshed out:

As alluded to in the foreword, there have been some amendments to the dividend stripping rules which are aimed at curbing the abuse of using such dividends during the course of asset for shares transactions, however it must be noted that Kyle Mandy, head of Tax Technical at PWC Africa explicitly stated that there will need to be substantial changes to existing legislation in order to curb any such abuse. (see https://www.moneyweb.co.za/mymoney/moneyweb-tax/more-clarity-on-dividend-stripping-rules-expected-in-july/)

Not Quite Grease Lightning but Still based on Electronic Developments:

With the fourth industrial revolution imminent and increasing reliance being placed on technology in the workplace, the question must be asked as to how long it will be before the legal profession fully catches up. Unfortunately the wheels of justice grind slowly and it takes some time before laws can be amended to incorporate future developments, yet there is already sufficient authority for electronic cancellations of contracts (by way of an email no less – see Spring Forest Trading v Wilberry (725/13) [2014] ZASCA 178)) so the question is how long will it be before other agreements and consents (such as trusts and potentially even Wills) follow suit?

Bloody Hand made Bloody Difficult:

Every law student knows about the principle of the Bloody Hand Rule, but for those laypersons among you this rule amounts to the exclusion of an individual who has caused the death of the deceased from being a beneficiary of the estate. It goes a little bit further than this but it is still sufficient for this discussion. Now the question becomes this – in the event where the deceased was killed by an individual who is a beneficiary of a discretionary trust, and all assets as are bequeathed to this testamentary trust, will the trust deed be amended to exclude him as beneficiary or will the bequest be tainted by the Bloody Hand Rule because this individual forms part of the group of potential beneficiaries?

11. STRANGER THAN FICTION:

Humorous till the end:
Leaving instructions for what should happen to your finances after your death is a serious matter – but for some the temptation to cause mischief or raise a smile from beyond the grave is too much to resist.

WILLIAM SHAKESPEARE

The "second-best bed" Poor Anne Hathaway, aka Mrs Shakespeare, has gone down in history as being snubbed by the Bard from beyond the grave. In his will, Shakespeare left her his "second-best bed" while the vast bulk of his estate went to his daughter Susanna.

ANOTHER KIND OF TROUBLE

In 2004, billionaire hotelier Leona Helmsley left instructions for her $4bn (£2.5bn) fortune to be spent caring for dogs, having apparently re-thought an earlier draft that left it to the poor. Her nine-year-old Maltese, Trouble, received $12m (£8m) in the will, with her grandchildren either cut out or ordered to visit their father's grave annually in order to inherit their share.

Trouble's inheritance was later cut to just $2m (£1.2m) by a judge, although the dog still needed to go into hiding amid death and kidnap threats.

HENRY HEINE AND THE FUTURE SPOUSE

For some embittered spouses a last will and testament is actually a last chance to insult their life partner one more time. So it was for German poet Heinrich "Henry" Heine who left his estate to his wife, Matilda, in 1856 on the condition that she remarry, so that "there will be at least one man to regret my death".

Ouch.

(https://www.theguardian.com/money/2015/aug/25/10-strangest-wills-finances-death)

12. QUESTIONS

YES / NO – answers (answer sheet on the 3rd last sheet)

1. Is there a difference between a critical illness benefit policy and terminal illness benefit policy?
2. If you have a living annuity, can you invest all your funds in offshore funds?
3. Will the proceeds from a terminal illness benefit paid to a third party be subject to estate duty?
4. If a farmer sells all his tractors and livestock to a company in terms of section 42 of the Income Tax Act (without any tax implications) in exchange for shares in that company, will he incur income tax if he sells that acquired shares within 18 months?
5. If a farmer sells all his tractors and livestock to a company in terms of section 42 of the Income Tax Act (without any tax implications) in exchange for shares in that company, will he incur capital gains tax if he passes away within 18 months since acquiring it?
6. Can a buy-and-sell policy qualify for the keyperson estate duty exemption?
7. If a person is a co – member of a Close Corporation can he bequeath his co – membership interest to whom he wants, and the other members has no recourse against it?
8. A person's retirement funds will be considered as part his assets for divorce purposes, but will that person's funds in his Living Annuities also be taken into account?
9. Can a person repudiate a specific legacy earmarked for him, but still benefit by reason of being part of the residue heirs?
10. Can a testator cater for a pre – legatee, a legatee and a heir in his will?

13. ANSWER SHEET

	YES / NO
Question 1:	
Question 2:	
Question 3:	
Question 4:	
Question 5:	

	YES / NO
Question 6:	
Question 7:	
Question 8:	
Question 9:	
Question 10:	

14. FIDUCIARY & TAX

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- Estate Planning
- Administration of Estates
- Wills
- Trusts – creation / audits
- Independent Trusteeships
- Tax Consultation
- B-BBEE Restructuring
- Corporate Restructuring
- Business and Personal Insurance
- Investments

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