

# **ESTATE PLANNING FOR TODAY'S WOMAN**

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## CHAPTER I

### INTRODUCTION

“*Romeo, Romeo! Wherefore art thou, Romeo?*”<sup>1</sup> Perhaps not too long ago this was the plaintive cry of every marriageable girl, and perhaps not too long ago it was quite a sensible call for a marriageable girl. Today however the call doesn't seem to be working as well and today's woman, if she is wise, will try to sculpt her own future. She will not rely too heavily on a Romeo in whatever guise to provide her with financial security for the rest of her life.

Life in South Africa today is fraught with risks ranging from insolvency, unemployment, disablement and divorce to early death as a result of the current high crime rate, heart disease, Aids, and a plethora of other occurrences. How can today's woman plan her life to overcome or be prepared for these events? It has been said that:

Planning is deciding in advance what to do, how to do it, when to do it, and who is to do it. Planning bridges the gap from where we are to where we want to go.<sup>2</sup>

Meyerowitz's<sup>3</sup> definition of estate planning describes it best:

The arrangement, management, securement, and disposition of a person's estate, so that he, his family and other beneficiaries can enjoy the maximum benefits from his worldly possessions during his lifetime and after his death.

Planning an estate is a complex issue, and it would be foolish for a woman to plan her estate without the assistance of a wide range of professionals.<sup>4</sup> Depending on her

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<sup>1</sup> From William Shakespeare's *Romeo and Juliet*, Act II Scene II.

<sup>2</sup> Koontz H and O'Donnell C *Essentials of Management* (New York 1974) 10.

<sup>3</sup> Meyerowitz D Estate and Tax Planning October 1964 *The Taxpayer* 181.

circumstances a woman should at different times consult with a professional estate planner, a lawyer, a bookkeeper, an insurance agent or broker, a bank manager and a financial consultant or investment adviser. Throughout her life she should remain aware that she can control a part of her future if she takes the trouble to preserve and plan the estate which she accumulates during her lifetime.

In this dissertation an attempt will be made to equip today's woman with a broad guideline for the planning of her own estate. All phases of her life will be considered: - from the moment when she becomes competent to make a will, through a business career, marriage, divorce, widowhood to retirement and death.

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<sup>4</sup> See Bobbert MCJ Grondlyne van Strategiese Boedelbeplanning 1976(1)3 *Tydskrif vir Regswetenskap* 7-9.

## CHAPTER II

# ESTATE PLANNING

### 1 WILLS

*"I, born of flesh and ghost, was neither  
A ghost nor man, but mortal ghost.  
And I was struck down by death's feather."  
- Dylan Thomas*

#### 1.1 Background

The first thing that a woman should do as soon as she has accumulated or acquired an estate, is to have a will drawn up. A will can ensure that her wishes with regard to the devolution of her property and the maintenance of her dependants may be carried out after her death. An estate is defined<sup>1</sup> as a person's collective assets and liabilities,<sup>2</sup> a definition emulating an ancient concept and quoted in van der Merwe and Rowland<sup>3</sup> as follows:

Een vermogen of boedel is een geheel van baten en schulden...

It is not unusual for a young unmarried woman to be the owner of sufficient assets to be able to dispose of them in a will. Even before she starts to earn her own income, she may already be the designated beneficiary of a trust fund or of some other inheritance. As soon as she starts to work and earn an income, she may apply for life insurance, join a pension fund, or open a savings account or some other form of investment. Thus the need for the first practical step in estate planning is established.

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<sup>1</sup> See the Little Oxford Dictionary of Current English, Oxford University Press 1969.

<sup>2</sup> See also Bobbert MCJ Grondlyne van Strategiese Boedelbeplanning 1976(1)3 *Tydskrif vir Regswetenskap* 10.

<sup>3</sup> Van der Merwe NJ and Rowland CJ *Die Suid-Afrikaanse Erfreg* (Pretoria 1974) 1.

## 1.2 Formalities of a will

A will is a highly specialised document as far as form and content is concerned, and no woman should attempt to draft her own will without proper consultation of a specialist trained and experienced in all aspects of estate law.

A will has to comply with the requirements of Section 2 of the *Wills Act*.<sup>4</sup> The Act was amended in 1992<sup>5</sup> relaxing some of the more technical formalities that were in force before. In terms of Section 2(3) of the Act the court is now empowered to condone non-adherence to the formalities and to order the Master to accept a document as a will if it is satisfied that it was intended to be the will of the deceased, but not all the formalities of the Act have been complied with. However, in *Ex parte Maurice*<sup>6</sup> and in *Webster v The Master*<sup>7</sup> the court made it clear that under no circumstances would it disregard all the formalities prescribed by the Act.

Any woman aged 16 or over who is at the time of making the will mentally capable of appreciating the nature and effect of her act is competent to make her own will.<sup>8</sup> Even if she is unable to sign the will herself, the will is valid if signed by another person in the presence of and by the direction of the testatrix, provided that it is done in the presence of a commissioner of oaths who certifies accordingly on the will.<sup>9</sup>

## 1.3 Contents of a will

It is of little use if the form of the will is correct but the content is vague and badly drafted, so that the will of the deceased cannot be accurately gauged or implemented.

Meyerowitz<sup>10</sup> says:

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<sup>4</sup> *Wills Act* 7 of 1953.

<sup>5</sup> *Law of Succession Amendment Act* 43 of 1992.

<sup>6</sup> 1995 2 SA 713 (C).

<sup>7</sup> 1996 1 SA 34 (D).

<sup>8</sup> Section 4 *Wills Act*.

<sup>9</sup> Section 2 *Wills Act*.

<sup>10</sup> Meyerowitz D *The Law and Practice of Administration of Estates* (1976 Cape Town) 37.

It has been said that the other bank of the River Styx is lined with the shades of dissatisfied testators waiting to receive the judicial personages who have misconstrued their wills.

There is only one way to avoid this type of dissatisfaction and that is to entrust the task of drafting the will to someone with the necessary skills to do so. A woman should pay particular attention to appointment of the right executor, and to the provisions in the law relating to appointment of a guardian for her minor children.<sup>11</sup> Finally a woman should remember that for the rest of her life she has the prerogative to alter or revoke her will, and any agreement not to revoke her will (*pactum successorium*) is invalid.<sup>12</sup> She should use her prerogative to alter her will to ensure that her will is always up to date with the reigning circumstances in her life.

#### 1.4 Intestate succession

If a woman does not make a will, or her purported will is declared invalid, she will die intestate, and the results could be disastrous.

The current South African statutes on intestate succession distinguish between intestate estates of Black and non-Black people. A Black person is defined in Section 2 of the *Black Administration Act*<sup>13</sup> as:

a person who is, or who is generally accepted as, a member of any aboriginal race or tribe of Africa...

If a so-called non-Black person dies intestate the estate is dealt with in terms of the *Intestate Succession Act*,<sup>14</sup> which determines who the deceased's beneficiaries will be. The estate has to be reported to the Master of the High Court<sup>15</sup> and an executor or

<sup>11</sup> Section 72 *Administration of Estates Act* 65 of 1965.

<sup>12</sup> See *Secretary S A Association v Mostert* 1869 B 231. The only exception is revocation of a joint or mutual will in which massing took place, after the survivor has adiated, or a *pactum successorium* created in an Antenuptial Contract.

<sup>13</sup> *Black Administration Act* 38 of 1927.

<sup>14</sup> *Intestate Succession Act* 81 of 1987.

<sup>15</sup> Section 7 *Administration of Estates Act*.

administrator is appointed to attend to the liquidation of the estate. It is possible that because there is no will, the estate does not devolve upon the beneficiaries the deceased may have had in mind, or in the manner that the deceased may have envisaged. Furthermore the estate may be subject to estate duties which may otherwise have been avoided if there had been proper estate planning.

However, if a so-called Black person<sup>16</sup> dies intestate the results can be even more catastrophic. Section 23 of the *Black Administration Act*<sup>17</sup> determines that certain property cannot be disposed of by will, namely all movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union. Such property must in terms of the Act devolve and be administered under Black law and custom. In terms of Black law and custom<sup>18</sup> a woman is disqualified from being an heir. This concept was challenged in the High Court recently in a very interesting case. An application was brought<sup>19</sup> for an order declaring the rule of African customary law that excludes African women from intestate succession to be inconsistent with the provision of Chapter 3 of the *Constitution of the Republic of South Africa Act*.<sup>20</sup> The application was dismissed, but it seems certain that we have not yet heard the last word on this issue.

All property of a so-called Black person not covered by Section 23 of the Act may be disposed of by will, and if not disposed of by will is regarded as intestate and dealt with in terms of the *Regulations for the Administration and Distribution of the Estates of Deceased Blacks*.<sup>21</sup> In terms of Regulation 4(1) it is not necessary for an executor to be appointed. Where the magistrate in whose area of jurisdiction the deceased Black ordinarily resided considers it desirable, he may issue a certificate to any person whom he may deem suitable, appointing him to represent the estate and to assume responsibility for the payment of debts, the collection of assets and the general administration and distribution of property. In terms of Regulation 4(2) such person has full power and authority to represent the estate in relation to such property, irrespective

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<sup>16</sup> As defined in Section 2 of the *Black Administration Act*.

<sup>17</sup> 38 of 1927.

<sup>18</sup> Joubert WA and Scott TJ (editors) *The Law of South Africa* (Durban 1994) Vol 32 Para 143 at 148.

<sup>19</sup> *Mtembu v Letsela* 1998 2 SA 675 (T).

<sup>20</sup> *Constitution of the Republic of South Africa Act* 200 of 1993.

<sup>21</sup> GN R200 in GG 10601 of 6 February 1987.

of the size of the estate. Unless specifically directed to do so,<sup>22</sup> such administrator need never account to anyone as to how he has wound up the estate. The only official check which such administrator is subject to is the Deeds Office when immovable property is transferred. All that the Deeds office checks is that the person transferring the immovable property has been authorised to transfer immovable property.<sup>23</sup> There is no check on whether the property is being transferred to the correct beneficiary in terms of the Regulations or the applicable Black law and custom. The administrator alone is responsible for these decisions. There is also no clarity on payment of estate duty, as an administrator in terms of the Regulations does not meet the requirements of an executor as defined in the *Estate Duty Act*.<sup>24</sup> The responsibility to lodge an estate duty return and to attend to payment of estate duty rests with the executor of an estate. In previous years, when Black people were limited with regard to the ownership of immovable property, intestate succession in this manner posed little or no problems. Today however, it is not uncommon for a Black person who dies intestate to have a large estate and to own immovable property not covered by Section 23 of the *Black Administration Act*.<sup>25</sup> It seems highly irresponsible to allow an administrator, appointed by a magistrate, to deal with an estate possibly worth hundreds of thousands of Rands, and our legislators would do well to address this issue.

Intestate succession for women of Islamic faith can be equally disastrous, as the Islamic law dictates that all Islamic estates should devolve in accordance with the Islamic faith, and non-compliance is a transgression of the Holy *Quran*. Currently the estate of a woman of Islamic faith who dies intestate will be dealt with in terms of the *Intestate Succession Act*<sup>26</sup> as our statutes make no other provision for this eventuality. Our constitution<sup>27</sup> does, however, in Section 14 (1), entrench every person's right to freedom of conscience, religion, thought, belief and opinion. However, our legislators may need to address the issue more specifically.<sup>28</sup>

## 1.5 Summary

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<sup>22</sup> Regulation 4(3).

<sup>23</sup> Regulation 4(2).

<sup>24</sup> *Estate Duty Act* 45 of 1955 .

<sup>25</sup> 38 of 1927.

<sup>26</sup> 81 of 1987.

<sup>27</sup> Act 200 of 1993.

<sup>28</sup> See *Ryland v Edros* 1997 2 SA 690 (C).

In conclusion in order to avoid the hazards of intestate succession the first thing a woman should do as soon as she has any assets to dispose of, is to have a will drawn to reflect her wishes. Not only should the will provide for liquidation and distribution of her assets, but it should also provide for settlement of her liabilities and estate expenditure and taxes. As her life evolves, her circumstances change and the composition of her estate changes, a woman should amend her will so that it keeps abreast of her circumstances.

## 2 MARRIAGE

*“ For five and twenty years I’ve had my eye on Jim,  
And if he won’t marry me, I’ll marry him. ”*  
- Dan Leno

### 2.1 Background

When a South African woman gets married or becomes involved in any long term relationship, the manner in which she chooses to structure the marriage or relationship will have a profound influence on her estate. This structure will have an effect on her estate not only for the duration of the marriage or relationship, but also upon its dissolution or upon her death or the death of her husband.

A civil marriage between a man and a woman must be contracted as prescribed by the *Marriage Act*.<sup>29</sup> However, there are certain Acts which have their own definition for a married person, and it is not necessarily the same as a marriage as defined by the said *Marriage Act*. A good example of this is the *Income Tax Act*,<sup>30</sup> in which the definition for “married” includes, joined together in a union recognised as a marriage in accordance with any law or custom.

### 2.2 Civil marriages

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<sup>29</sup> *Marriage Act* 25 of 1961.

<sup>30</sup> *Income Tax Act* 58 of 1962, Section 1.

Any woman who chooses to enter into a civil marriage has two basic choices, namely a marriage out of community of property<sup>31</sup> or a marriage in community of property.<sup>32</sup> The archaic concept of marital power of the husband over the person and property of his wife was abolished in all forms of civil marriages during 1993.<sup>33</sup> Yet the restrictions imposed on a woman by virtue of a marriage in community of property may appear as restrictive as if marital power was still in place.

### 2.2.1 Marriages in community of property

When a woman gets married in community of property, her estate immediately loses its individuality and she instead becomes entitled to a an undivided half share in a joint estate. Everything she accumulates after date of marriage becomes part of the joint estate. Although she has the same powers as her husband has with regard to dealing with the joint estate,<sup>34</sup> there are several acts regarding the joint estate which she may not perform without her husband's consent, and some acts even require her husband's written consent.<sup>35</sup> Her husband is placed under the same restrictions. The most disastrous consequence of a marriage in community of property occurs when one of the partners is sequestrated, because it results in the entire joint estate being sequestrated.<sup>36</sup> Similarly upon the death of either of the parties the entire joint estate becomes frozen, and all bank accounts in either spouse's name becomes frozen. The joint estate is then reported and wound up, and not only the estate of the deceased.

### 2.2.2 Marriages out of community of property

A woman would be wise to choose to get married out of community of property by virtue of an antenuptial contract. An antenuptial agreement is drawn up by and signed before a notary, and thereafter registered in the Deeds Office of the parties' choice.<sup>37</sup> The accrual system will apply unless expressly excluded in the antenuptial contract,<sup>38</sup> but no

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<sup>31</sup> Chapter 1 of the *Matrimonial Property Act*.  
<sup>32</sup> Chapter III of the *Matrimonial Property Act*.  
<sup>33</sup> *General Law Fourth Amendment Act* 132 of 1993.  
<sup>34</sup> See Section 14 of the *Matrimonial Property Act*.  
<sup>35</sup> See Section 15 of the *Matrimonial Property Act*.  
<sup>36</sup> Section 21 of the *Insolvency Act* 24 of 1936.  
<sup>37</sup> Section 87 of the *Deeds Registries Act* 47 of 1937.  
<sup>38</sup> Section 2 of the *Matrimonial Property Act*.

woman should enter into such a contract without the proper advice of a consultant experienced in this field. In a marriage out of community of property subject to the accrual system a woman retains control of her own estate for the duration of the marriage, and does not run the risk that the bad debts or insolvency of her partner will affect her property. The accrual as such is only calculated when either death or divorce terminates the marriage.<sup>39</sup> According to a specified formula an equalisation then takes place so that the spouses have equal accruals since the date of the marriage.<sup>40</sup> The accrual system can also be expressly excluded in the antenuptial agreement, with the result that the spouses at no point share community of property or of profit and loss. It is also possible to adopt the accrual system, but to exclude certain assets from the accrual.<sup>41</sup>

### 2.3 Religious marriages

The *Marriage Act* specifically mentions religious blessings of marriages and condones the practice.<sup>42</sup> However, a marriage contracted just by religious rites and not performed as prescribed by the *Marriage Act* will not have the legal consequences that a civil marriage has. For several years Muslim peoples in this country have been entering into marriage according to the customs of the Muslim faith. Our courts have found that such a marriage is not regarded as a valid civil marriage in that it is a potential polygamous marriage that is *contra bonos mores*, and that it does not comply with the provisions laid down by the *Marriage Act* for a valid civil marriage.<sup>43</sup> This perception has been altered since the promulgation of the *Constitution of the Republic of South Africa*,<sup>44</sup> and it appears as if this type of marriage will no longer be regarded as *contra bonos mores* by our courts simply because they are potentially polygamous.<sup>45</sup> However, the position as far as the wife in such a relationship is concerned remains uncertain, and clarity on some issues will only be obtained once a dispute arises and our courts express themselves on the particular issue. In 1976 where a man was married both by Muslim rites and by a civil marriage to two different women, our courts found a reference in his

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<sup>39</sup> Section 3 of the *Matrimonial Property Act*.

<sup>40</sup> See Joubert WA and Scott TJ (editors) *The Law of South Africa* (Durban 1994) Vol 16 Para 133 at 153.

<sup>41</sup> See Section 4(1)(b)(ii) of the *Matrimonial Property Act*.

<sup>42</sup> Section 34 of the *Marriage Act*.

<sup>43</sup> *Ismail v Ismail* 1983 1 SA 1006 (A). See also *Seedat's Executors v The Master* 1917 AD 302, *Momeen v Bassa* 1976 4 SA 338 (D), and *Dauids v The Master* 1983 1 SA 458 (C).

<sup>44</sup> Act 200 of 1993.

will to his “wife” to refer to his wife by civil marriage, and not his wife by Muslim rites.<sup>46</sup> Since the inception of the new Constitution one wonders whether the judgement in this case would be the same if heard today.

## 2.4 Customary unions

Black women may enter into a civil marriage as defined in the *Marriage Act*, but they are also entitled to enter into a customary union, governed by traditional Black Law and custom.<sup>47</sup> What type of marriage she chooses will determine a Black woman’s legal capacity for the duration of her marriage, her rights upon divorce,<sup>48</sup> the legitimacy of her children,<sup>49</sup> and the consequences of her estate upon her death.<sup>50</sup> In terms of the traditional law of the Black people of South Africa polygamous unions are acceptable.<sup>51</sup> However, no Black woman may enter into a civil marriage if she is already a partner in a customary union.<sup>52</sup> By modern standards a customary union is very restrictive to women. A woman literally falls under the guardianship of her husband,<sup>53</sup> a concept similar to the marital power now abolished in all civil marriages. Although at first glance one may argue that this practice is archaic and should be considered *contra bonos mores*, it is evident that customary law is still adhered to and applied by many Black people in South Africa.<sup>54</sup>

## 2.5 Co-habitation

It is not to be recommended that a woman enter into any long-term relationship with a partner that is bound to have proprietary consequences, without planning what form that commitment should take. Planning never seems important while a relationship is without problems. Problems normally arise upon separation, divorce, insolvency or death. A woman who lives with a man in a so-called common-law marriage enjoys none of the benefits that a wife in a civil marriage does. She has no claim to

<sup>45</sup> See *Ryland v Edros*.

<sup>46</sup> *Momeen v Bassa*.

<sup>47</sup> Joubert and Scott (eds) *The Law of South Africa* Vol 32 Para 17 at 17.

<sup>48</sup> Joubert and Scott (eds) *The Law of South Africa* Vol 32 Para 52 at 58.

<sup>49</sup> Joubert and Scott (eds) *The Law of South Africa* Vol 32 Para 40 at 39.

<sup>50</sup> Section 23 of the *Black Administration Act*.

<sup>51</sup> Joubert and Scott (eds) *The Law of South Africa* Vol 32 Para 8 at 6.

<sup>52</sup> Sections 22(1) to 22(5) of the *Black Administration Act*.

<sup>53</sup> Joubert and Scott (eds) *The Law of South Africa* (Durban 1994) Vol 32 Para 6 at 6.

<sup>54</sup> See J Mynhardt’s judgment in *Mthembu v Letsela* at 688B.

maintenance from the man, nor does she have any right to an inheritance from him.<sup>55</sup> On the contrary she may find upon dissolution of the relationship that she has contributed for years to the building up of an estate to which she has no claim, or that she can only stake a claim to it through litigation.<sup>56</sup> Careful estate planning would avoid this unnecessary pitfall. Far from having any advantages being a common law wife has certain decided disadvantages.<sup>57</sup> Thus in terms of the *Insolvency Act*<sup>58</sup> a woman living with a man as his wife is regarded as his wife, and upon the sequestration of her partner all her property automatically vests in the trustee of the insolvent estate to be released therefrom only under certain conditions.<sup>59</sup>

## 2.6 Summary

It is clear that, given a woman's own personal circumstances and her religious convictions, entering into a marriage (or not) is not a simple decision. Deciding on the right partner is not the only problem, and deciding on the right form of marriage is equally important. She will bear the consequences of her choice for the rest of her life. Assisted by the sound advice of a legal expert in this field she should be in a position to make the best choice.

## 3 INVESTMENTS AND INSURANCE

*"I detest life-insurance agents; they always argue that I shall some day die, which is not so."*  
- Stephen Leacock

### 3.1 Background

Estate planning should never be equated with an exercise in tax avoidance.<sup>60</sup> There is as much need for the planning of a woman's estate which is not likely to create income

<sup>55</sup> Hahlo HR *The South African Law of Husband and Wife* (1975 Cape Town) 35.

<sup>56</sup> See *Isaacs v Isaacs* 1949 1 SA 952 (C).

<sup>57</sup> Joubert WA and Scott TJ (editors) *The Law of South Africa* (Durban 1992) Vol 16 Para 17 at 22.

<sup>58</sup> Section 21(13) of the *Insolvency Act*.

<sup>59</sup> Sections 21(1) and 21(2) of *Insolvency Act*.

<sup>60</sup> Bobbert *Tydskrif vir Regswetenskap* 4.

tax problems or attract high estate duties as there is in the case of a woman whose estate is potentially wealthy.<sup>61</sup> Through careful estate planning a woman can ensure optimum maintenance for herself and her dependants during her lifetime and during unforeseen hardships brought about by unemployment, economic recession, disablement, retirement or death. Every woman would be well advised to provide for all these eventualities as if she were an unmarried woman. In other words she should make the planning her own responsibility, and not trust that someone else is taking it care of.

### 3.2 Short term investments and insurance

Saving to provide for unforeseen expenses that may arise should form part of every woman's budget. What proportion of her income should be saved, and how she should invest or save the money will depend on her income and on the state of the country's economy at any given time. There are many professional advisers<sup>62</sup> available who can assist a woman in this regard, and she should also follow the advice expressed in the press and financial magazines from time to time. Traditionally safe investments with a bank or building Society will attract predictable growth but will be taxable at fairly high rates.<sup>63</sup> Some may say investing with banks or building societies in Africa is not as safe as it used to be after the billion-Rand collapse of the United Merchant Bank in Zimbabwe in April 1998, and the threat that other banks in Zimbabwe could also sink.<sup>64</sup> More speculative investments carry more risk but often have higher yields. However, the market is highly volatile and investments should be re-assessed regularly.

Apart from savings a woman can insure herself against a specified loss or damage anticipated in the future. This is known as indemnity insurance.<sup>65</sup> The most obvious examples are insurance against theft and destruction of her property, including motor vehicles and immovable property. Today medical insurance has also become a virtual necessity as hospitalisation as a result of a motor accident, major surgery or diseases such as malaria could run into hundreds of thousands of rands.

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<sup>61</sup> Meyerowitz *The Taxpayer* 181.

<sup>62</sup> See *Durr v Absa* 1997 3 SA 448 (A).

<sup>63</sup> Only the first R2000,00 of taxable interest earned is exempt from tax – Section 10(1)(l) of the *Income Tax Act*.

<sup>64</sup> Meldrum A Zimbabwe Bank Crash Brings Fear About Others 2 May 1998 *The Saturday Star* 4.

<sup>65</sup> Joubert WA and Scott TJ (editors) *The Law of South Africa* (Durban 1988) Vol 12 Para 34 at 29.

### 3.3 Long term investments and life insurance

Long term investment planning for the duration of a woman's lifetime is a more difficult exercise, but is an essential tool of estate planning.<sup>66</sup> Any long-term investment at this stage should be approached with caution, as all forms of income are now scrutinised annually in the budget presented by the Minister of Finance. In 1997 a tax of 17% was introduced on the interest and nett rentals earned by retirement funds, which tax must affect the eventual yield of an investment. In 1998 that tax was increased to 25%. No one knows what will be announced next year or the year thereafter. Several of the recommendations made by the Katz Commission of Inquiry into Taxation are still on the drawing board, and none of them should ever be discounted when planning one's estate.

A life insurance policy<sup>67</sup> taken out on her husband's life in which the woman is the beneficiary can stand her in good stead if he should pass away before her and she has small children still dependant on her. Similarly a life insurance policy on her life could aid him if she were to pass away suddenly.

Most life insurance policies also have the benefit of disability cover, which provides protection if a person is declared unable to continue with their chosen career as a result of an accident or some other tragedy.<sup>68</sup>

### 3.4 Income tax and estate duty

A woman should always consider how any investment or insurance policy would affect her income tax liability and later her estate duty liability. This field of study is so complex and changes so often, that no ordinary person is able to keep up with it. As long as a woman knows that she has to bear the consequences of these taxes in mind, for the rest she will have to rely on her financial advisers.

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<sup>66</sup> Jordaan J H *Boedel en Finansiële Beplanning – 'n Praktiese Gids* (1988 Kaapstad) 47.

<sup>67</sup> Section 1(1) of the *Insurance Act* 27 of 1943.

<sup>68</sup> Jordaan *Boedel en Finansiële Beplanning – 'n Praktiese Gids* 58.

Very few contributions towards savings or investments are tax deductible for a woman. She can structure her medical aid contributions so that a portion thereof is paid to her by her employer as salary, and this contribution will then be a tax-free benefit.<sup>69</sup> She may also deduct pension fund contributions<sup>70</sup> and retirement annuity fund contributions<sup>71</sup> subject to a maximum amount that is revised from time to time. No other savings or investment contributions are tax deductible. The lump sum that she obtains from a life policy of which she is the beneficiary is tax-free. The benefits of an endowment policy are normally tax free, depending on how the policy is structured. Pension income is taxable, as are annuities in certain cases.<sup>72</sup>

Until 1997 only income earned or originating in South Africa was taxable, and our tax system was based exclusively on "source". During 1997 Parliament approved the Katz Commission's recommendation that tax should be paid on income earned anywhere in the world and it was duly legislated.<sup>73</sup> The significance of this is that interest earned on off-shore investments, which may now total R400 000,00,<sup>74</sup> will now be taxable in South Africa.

### 3.5 Saving for retirement

Retirement is something that every woman needs to plan for herself. Currently a State pension is R 490.00 per month, and is payable to any woman who has reached the age of 60.<sup>75</sup> It is awarded only if a woman meets certain criteria laid down from time to time in Regulations issued under the *Social Pensions Act*.<sup>76</sup> It is unlikely that this old age pension will be increased in the future, other than to keep abreast of inflation. What the ideal amount is to have to retire on and how to go about saving for retirement will differ from woman to woman, and her needs will continually change as her circumstances change. Even if she is married, she should take out insurance policies and retirement annuities in her own name. This way she is automatically covered in the event of the death of or divorce from her spouse. Furthermore sharing the benefit of estate

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<sup>69</sup> See Section 18 of the *Income Tax Act*.

<sup>70</sup> Section 11(k) of the *Income Tax Act*.

<sup>71</sup> Section 11(n) of the *Income Tax Act*.

<sup>72</sup> Section 10 of the *Income Tax Act*.

<sup>73</sup> Sections 9C and 9D of the *Income Tax Act*.

<sup>74</sup> Exchange Control Manual 6.1.1.

<sup>75</sup> Section 1 *Social Pensions Act* 37 of 1973.

<sup>76</sup> Act 37 of 1973.

planning jointly has several income tax advantages, and in many instances also leads to a reduced premium, for example where the wife is younger than her husband.

### 3.6 Summary

Bearing in mind all the complications involved in making sound investments, it bears repeating that before a woman commits her income towards anything, she should consult a reputable, experienced consultant in this regard. Although a woman may not always be able to attain the financial goals set by insurance agents and brokers, at least she will have an idea of what she needs to work towards.

## 4 BUSINESS

*“ Business underlies everything in our national life, including our spiritual life.”*  
- American President Woodrow Wilson – 1912

### 4.1 Background

A woman who manages her own estate soundly can arrange her business affairs in several different ways. The reasons for considering different forms of businesses and undertakings are universally to protect her estate against the erosion of income tax and estate duty, and to avoid the insolvency or liquidation of her estate.

The most popular forms of enterprise are sole proprietor, partnership, Close Corporation, Company, or a trust. Because trusts are such a useful instrument in estate planning, they will be discussed separately.

Whether a woman is married or not, and how she is married, will influence the manner in which she may conduct her affairs. If she is married in community of property she will need her husband's consent to make certain business decisions, except if these decisions are taken in the ordinary course of her business.<sup>77</sup> If a woman is unmarried, or married out of community of property, she may choose whatever avenue she wishes

to conduct her business in. Women who are adherents of the Islamic faith will also be obliged to abide by the prescriptions of the Islamic laws relating to trade and commercial activities. A description of the various forms of enterprise follows.

#### 4.2 Sole proprietor

A sole proprietorship is usually a relatively small business in which the capital of only one person is invested.<sup>78</sup> As sole proprietor a woman will be the only person in charge of the management of her own business, in other words she will be her own boss. On the other hand the disadvantage is that she will bear all the responsibility for the business. She will not be able to separate the income generated by the business from her other personal income for income tax purposes.<sup>79</sup> If the business is profitable she can launch herself into the highest income tax bracket applicable to natural persons. She also places all her personal assets at risk should the business fail, because she then runs the risk of her personal estate being sequestrated.<sup>80</sup> Furthermore, if her business enterprise proves successful, she will, by accumulating increasing wealth in her own personal name, be exposing her personal estate to the maximum rate of estate duty levied from time to time.<sup>81</sup> Finally, it is not easy for an heir to continue with a sole proprietorship after date of death, and the delay in transfer of the business to the new heir can in fact be detrimental to the business.<sup>82</sup>

#### 4.3 Partnership

There are no statutory formalities for the creation of a partnership, and a partnership is not a legal person with an identity separate from that of its members.<sup>83</sup> All that is basically required is a valid partnership agreement that should preferably be in writing.<sup>84</sup> A partnership can consist of between two or more persons, but less than twenty.<sup>85</sup> There are managerial advantages to a partnership as opposed to sole proprietorship

<sup>77</sup> Section 15(6) of the *Matrimonial Property Act*.

<sup>78</sup> Cilliers HS *ao Company Law* (1977 Durban) 1.

<sup>79</sup> See the definition of "person" and "Company" in Section 1 of the *Income Tax Act*.

<sup>80</sup> Cilliers *Company Law* 1.

<sup>81</sup> Section 4 of the *Estate Duty Act*.

<sup>82</sup> Jordaan *Boedel en Finansiële Beplanning – 'n Praktiese Gids* 138.

<sup>83</sup> Sharrock R *Business Transactions Law* (1992 Cape Town) 281.

<sup>84</sup> de Wet JC and Yeats JP *Die Suid-Afrikaanse Kontrakereg en Handelsreg* (1964 Durban) 556 – 579.

<sup>85</sup> Section 31 of the *Companies Act* 61 of 1973.

because the responsibilities and duties can be shared. However from an income tax<sup>86</sup> point of view the result is no different to that of sole proprietorship, and as far as insolvency is concerned, the position is worse. Creditors may levy execution against the assets of individual partners once all the partnership property has been exhausted,<sup>87</sup> and need not do it proportional to such partner's share in the partnership. The same results as a sole proprietorship are obtained with regard to growth of a woman's personal assets, and her estate is therefore also exposed to the same estate duty risks.

If one considers the fact that in addition to all the disadvantages already mentioned a successful partnership has to sustain a fiduciary relationship akin to that between brothers and spouses<sup>88</sup> then it is hard to imagine under what circumstances a partnership would be recommended. Most professional occupations such as attorneys and medical doctors are now also allowed to organise themselves as Incorporated Companies rather than partnerships.<sup>89</sup>

#### 4.4 Companies

In general terms a Company can be described as an association of members with legal personality who have a common, usually commercial, purpose and of which the membership is transferable.<sup>90</sup> In contrast to a sole proprietorship or a partnership a Company must comply with several statutory formalities prescribed in the *Companies Act*,<sup>91</sup> and this can prove to be costly and cumbersome. However, a Company as a legal entity has the advantage of being owner of its own assets, and liable for its own debts.<sup>92</sup> The shareholders of a Company and their personal estates are therefore not liable for the debts of the Company, except insofar as the shareholders have signed personal sureties or guarantees for such debts.<sup>93</sup> One of the greatest advantages of a company is perpetual succession,<sup>94</sup> which means that ownership is easily and speedily transferable, either during a woman's lifetime, or after her death. For purposes of

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<sup>86</sup> See Section 66(15) of the *Income Tax Act*.

<sup>87</sup> Sharrock *Business Transactions Law* 288.

<sup>88</sup> *Wegner v Surgeon* 1910 TPD 571.

<sup>89</sup> See for example Section 23(1) of the *Attorneys Act* 53 of 1979.

<sup>90</sup> Joubert WA (editor) *The Law of South Africa* (Durban 1994) Vol 4 Para 1 at 7.

<sup>91</sup> Act 51 of 1973.

<sup>92</sup> de Wet and Yeats *Die Suid-Afrikaanse Kontrakereg en Handelsreg* 462.

<sup>93</sup> See also *Braitex (Pty) Ltd v Snyman* 1998 2 SA 138 (A).

income tax a Company is taxed completely separately and in a different manner to a natural person, as prescribed by the *Income Tax Act*<sup>95</sup> from time to time.

#### 4.5 Close Corporations

In 1984 the *Close Corporations Act*<sup>96</sup> was promulgated as a form of corporate entity which is simpler and more inexpensive to form and administer than a Company. Initially Close Corporations enjoyed certain tax advantages which Companies did not, but these have disappeared since 1 March 1990, when dividends derived by South African residents were all declared tax exempt. It is uncertain whether the tax exemption for dividends will remain in place forever. Close Corporations are therefore taxed in exactly the same manner as Companies. However, Close Corporations are still favoured by persons who require the benefits of a legal entity, but for whom the formation and maintenance of a Company are too cumbersome.<sup>97</sup> The membership of a Close Corporation is limited to 10 members,<sup>98</sup> and is limited to natural persons.<sup>99</sup> A trust *inter vivos* is expressly excluded from holding membership in a Close Corporation.<sup>100</sup> Whereas a Close Corporation also has the advantage of perpetual succession that a Company has, its greatest disadvantage is that its members will in certain instances become personally liable for the Corporation's debts.<sup>101</sup>

#### 4.6 Husband's estate

What is also very important for a woman to take note of, is not only what effect her own business dealings will have on her estate, but also what effect her husband's business dealings will have on her estate. If her husband becomes involved in a sole proprietorship, partnership, Close Corporation or Company which goes insolvent or

<sup>94</sup> Cilliers *Company Law* 2.

<sup>95</sup> Act 58 of 1962.

<sup>96</sup> *Close Corporations Act* 69 of 1984.

<sup>97</sup> Allan A ao *Close Corporations Act 1984 – A Basic Introduction* (1984 Port Elizabeth) 2.

<sup>98</sup> Section 28 of the *Close Corporations Act*.

<sup>99</sup> Section 29 of the *Close Corporations Act*.

<sup>100</sup> Section 29 of the *Close Corporations Act*.

<sup>101</sup> Section 43 of the *Close Corporations Act*.

becomes liquidated in circumstances where he is somehow personally liable, it could also have an effect on her estate.<sup>102</sup>

#### 4.7 Summary

As is the case with investments and insurance, a woman would be wise to follow the advice of professional consultants when structuring her business affairs. Every business which she controls, and every investment which she makes, will have its own merits, and whether she should do business or make an investment in her own name or in the name of a partnership, Close Corporation or Company will depend on the circumstances. Each form of enterprise has its own income tax implications, its own estate duty implications, and its own advantages, disadvantages and risks. There is no blanket recommendation that will suit everyone and every instance. What is important to consider every time, though, is what impact the business will have on her estate as a whole.<sup>103</sup>

## 5 TRUSTS

*"I don't trust him. We're friends."*  
– Bertolt Brecht

### 5.1 Background

Unlike a Close Corporation or a Company, a trust in our law is not regarded as being vested with a separate legal personality,<sup>104</sup> as its assets vest in the trustees from time to time, and not in the Trust itself. However, in this country trusts have evolved into a useful tool not only for estate duty purposes, but also for income tax planning and for the provision of maintenance of minors, disabled dependants and surviving spouses. Trusts are controlled by the *Trust Property Control Act*<sup>105</sup> and if utilised correctly can prove to be more useful than either Close Corporations or Companies are in estate management and planning. However, to select the use of a trust (or any other form of

<sup>102</sup> Section 21 of the *Insolvency Act*.

<sup>103</sup> Jordaan *Boedel en Finansiële Beplanning – 'n Praktiese Gids* 220 and 224.

<sup>104</sup> See *CIR v Macneillie's Estate* 1961 3 SA 833 (A) and *CIR v Emary* 1961 2 SA 621 (A).

<sup>105</sup> *Trust Property Control Act* 57 of 1988.

enterprise for that matter) merely for its tax benefits would be a mistake, because the volatility of legislation could well render the existing tax benefits useless or limited within a very short period of time. A trust has several advantages unrelated to taxes, for example continuity, limited liability, and protection of legally disabled beneficiaries.

## 5.2 Trust *inter vivos*

A trust can be created *inter vivos* in which case it comes into being by way of an agreement between a founder and one or more trustees, for the benefit of beneficiaries.<sup>106</sup> The trustees are invested with the task of administering certain assets on behalf of and for the benefit of one or more beneficiaries. The trust deed must be in writing and be registered with the Master of the High Court, Pretoria. The main disadvantage of a trust is that a person may lose control over his assets to his own detriment. For this reason it is essential that a trust be planned very carefully in collaboration with professional people. Several aspects need to be addressed in the trust document and under no circumstances should a woman just make use of a standard form to create a trust. At the same time that a trust is created the will of any person who obtains any testamentary rights in the trust deed should also be brought into line with the trust deed.

Once a trust is registered it can only be amended under specific circumstances.<sup>107</sup> It is essential to draft a trust in such a manner that it can be amended should changing legislation necessitate amendment. Of the utmost importance to the founder will be the appointment of trustees, and the determination of the income and capital beneficiaries. Especially the appointment of trustees has in the past led to much conflict, and here too the consequences of divorce on the terms of a trust must be borne in mind. The founder should only appoint trustees that she can trust, and should ensure that the powers of the trustees are clearly set out in the trust document, as the trustees derive all their powers from the trust document.

A trust *inter vivos* is a very useful instrument used in estate planning to peg growth in a person's estate with a view to limiting exorbitant estate duties. Currently estate duty is

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<sup>106</sup> See *Crookes v Watson* 1956 1 SA 277 (A).

<sup>107</sup> See *Crookes v Watson* and *Hofer v Kevit* 1996 2 SA 402 (C).

levied at 25% on nett assets after allowable deductions. The percentage was raised to 25% from 15% in 1996. Upon termination of a trust and transfer of the capital to the beneficiaries no capital transfer tax is payable. There is a possibility that this may change if capital transfer tax is introduced some time in the future, as has been considered by the Katz Commission.

A trust *inter vivos* is also a useful tool during a person's lifetime for saving on income tax. Unfortunately trusts remain a target of the fiscus, and it is uncertain for how long one will be able to utilise a trust *inter vivos* in its current form. During the 1998 budget income of less than R100 000,00 earned by a trust was declared taxable at 35%, and income in excess of R100 000,00 at 45%. During the same budget it was also announced that losses incurred by trusts would no longer be allowed to be passed on to beneficiaries who previously could set the loss off against other income they may have earned. The loss can, however, be retained in the trust and be carried forward to the following tax year. In 1996 trusts were also designated to pay transfer duty at the same rate as Close Corporations and Companies, thus losing the advantage trusts had of paying transfer duty at the same rate as individuals. Nevertheless, trusts remain a useful tool for tax planning.

The pitfalls of a trust as far as a woman is concerned are not only to be found in any trust she may create in her own interest, but in the trust which her husband creates and in which she may or may not be a capital or income beneficiary. As long as there is no discord in the marriage, the woman runs no risk, but as soon as she is faced with divorce or disinheritance, she may face disastrous consequences should she not have planned adequately in her own estate. Even a woman married out of community of property with the accrual system, will find it hard to obtain anything from her husband's estate should he disinherit her and leave everything in trust to his children. Sections 8 and 20 of the *Matrimonial Property Act* do provide some comfort in that a woman will be able to approach the courts for relief if she is of the opinion that her husband's conduct in disposing of assets in a certain manner will severely prejudice her. The recommendation therefore is that a woman should be alert to the influence that a trust that her husband creates has on her own estate.

### 5.3 Trust *mortis causa*

A trust *mortis causa* can be created by a testatrix in her will, and will have the same objectives as an *inter vivos* trust. A trust *mortis causa* has several advantages, including the protection of assets from creditors, from suspect guardians of minor children and often from the beneficiaries themselves.

#### 5.4 Summary

Although trusts are not yet widely used in South Africa, and may seem strange and unknown to most people, they remain an exciting tool in estate planning. No woman's estate planning would be complete unless she has thoroughly considered the use of a trust. Unfortunately legislation regarding trusts remains the target of amendment, and therefore a woman should always remain abreast of the developments in this regard. It is anticipated that the recommendation in the 1987 Report of the Margot Commission that trust pay capital transfer tax every 15 years will eventually be implemented.<sup>108</sup>

## 6 DIVORCE

*"Take me back as your First Wife.."*

*"You can go and milk a moth-eaten, flea-infested zebra. I do not want you, no matter in what guise."* – Credo Mutwa

### 6.1 Background

Although it is said that marriage remains the cornerstone of our society,<sup>109</sup> it is also true that many marriages end in divorce. Unfortunately therefore divorce is a fact that must be borne in mind while a woman plans her estate. If she has planned her financial affairs well she will be relatively unaffected by the proprietary consequences of divorce, and can devote her energies to the other unpleasant and often traumatic consequences of divorce. If she has not planned her estate well then she should plan the proprietary consequences of her divorce well. Firstly she should consider all the various aspects of

<sup>108</sup> Price Waterhouse *Standard Trust Income Tax Guide 1997/1998* 253.

<sup>109</sup> *van der Westhuizen v van der Westhuizen* 1996 2 SA 850 (C) at 852J.

estate planning when negotiating a divorce settlement agreement.<sup>110</sup> Secondly she should optimise the assets which she can take possession of, either as a result of a marriage in community of property or the accrual system or a divorce settlement. She should consider all the assets in the marriage, including life insurance and investment policies, pension benefits and annuities. She should consult with her divorce lawyer to have some of the benefits in terms of insurance policies ceded to her, or ask to be compensated otherwise in the settlement agreement in lieu of such policies on her name.

## 6.2 Will

A married woman is inclined to favour her husband as the universal heir of her estate. When she gets divorced, it is imperative that she changes her will to reflect the beneficiary of her choice under the changed circumstances. Section 2B of the *Wills Act*,<sup>111</sup> states:

If any person dies within three months after his marriage was dissolved by divorce and that person executed a will before the date of such dissolution that will shall be implemented in the same manner as it would have been if his previous spouse had died before the date of divorce, unless it appears from the will that the testator intended to benefit his previous spouse notwithstanding the divorce.

This enactment will therefore for a period of three months after date of divorce protect the woman who forgets to change her will. However, it is preferable that she changes her will simultaneously with the divorce proceedings, especially if she has young children whom she would like to provide for. A woman who is awarded sole guardianship<sup>112</sup> of a minor child in a divorce action should also nominate a guardian<sup>113</sup> for the child in her will.

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<sup>110</sup> Section 7(1) of the *Divorce Act* 70 of 1979.

<sup>111</sup> Act 7 of 1953.

<sup>112</sup> Section 6(3) of the *Divorce Act*.

<sup>113</sup> Section 72 of the *Administration of Estates Act*.

### 6.3 Marriage in community of property

A woman married in community of property is upon divorce entitled to half of the nett joint assets, and it is advisable that the parties sign a settlement agreement setting out how the assets should be divided. Section 9(1) of the *Divorce Act*<sup>114</sup> does however provide that the court may under certain circumstances make an order that one party in favour of the other forfeits the patrimonial benefits of the marriage. A woman may need to take advantage of this provision if the breakdown of the marriage is as a result of the substantial misconduct of her spouse.

### 6.4 Marriage out of community of property

A woman married out of community of property with the accrual system is upon divorce entitled to half the accrual of both parties' estates since the date of marriage.<sup>115</sup> She also is entitled to relief in terms of Section 9(1) of the *Divorce Act* whereby the court can declare that her spouse forfeits his right to the accrual.

A woman married out of community of property before the inception of the *Matrimonial Property Act* in 1984, may find herself at a disadvantage if she has nothing in her estate but has during the marriage contributed towards the increase of her spouse's estate. Section 7(3) of the *Divorce Act* provides that the court may on application by one of the parties to that marriage order that a part of the assets of the other party be transferred to the first-mentioned party. Our courts first applied this principle in the land mark decision of *Beaumont v Beaumont*.<sup>116</sup>

### 6.5 Common law marriage

If a woman faces not divorce but separation from a partner to whom she was not officially married, she has no statutory claim for either a division of assets or maintenance. The court may order a division of assets if it can be proved that she and

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<sup>114</sup> Act 70 of 1979.

<sup>115</sup> Section 3 of the *Matrimonial Property Act*.

<sup>116</sup> 1987 1 SA 967 (A).

her partner were co-owners of certain assets.<sup>117</sup> She will not be entitled to any maintenance from her partner.<sup>118</sup>

## 6.6 Customary union

As a customary union is based upon an agreement between a Black woman's father or guardian and the groom (or his father and guardian), and she herself is not party to the agreement, she is very often not party to the dissolution agreement either.<sup>119</sup> As a Black woman in a customary union is traditionally not the owner of any property.<sup>120</sup> Apart from personal belongings, she does not stand to gain much upon dissolution of a customary union. It will be interesting to note the development of our law in this regard after the judgement in *Mthembu v Letsela*<sup>121</sup> in which it was alleged that the customary law rule barring a woman from intestate succession was invalid as it was discriminatory.

## 6.7 Religious marriage

A woman married by religious rites in terms of Islamic law will find herself in a similar position as a woman married by customary union. As her marriage was contracted in terms of Islamic law, so Islamic law provides for the dissolution of marriages.<sup>122</sup> It is unlikely that she will be able to enforce a division of assets or obtain a maintenance order against her husband in terms of current legislation.<sup>123</sup>

## 6.8 Pension and retirement benefits

In terms of Sections 7 and 8 of the *Divorce Act* a woman may as part of a divorce settlement assume half of her husband's pension fund allocation as at date of divorce, and the court may order that an endorsement to this effect be noted on the records of the pension fund. This has been the position since 1989,<sup>124</sup> and a woman should do everything in her power to ensure that she receives this benefit if she is entitled to it.

<sup>117</sup> *Isaacs v Isaacs*.

<sup>118</sup> Joubert and Scott (eds) *The Law of South Africa* Vol 16 Para 17 at 21.

<sup>119</sup> Joubert and Scott (eds) *The Law of South Africa* Vol 32 Para 52 - 67 at 58 - 84.

<sup>120</sup> Joubert and Scott (eds) *The Law of South Africa* Vol 32 Para 46 at 50.

<sup>121</sup> 1998 2 SA 675 (T).

<sup>122</sup> Jordaan *Boedel en Finansiële Beplanning – 'n Praktiese Gids* 225 and 226.

<sup>123</sup> See *Ismail v Ismail* and *Ryland v Edros*.

<sup>124</sup> See *Ngalwana V Pension Interest and Divorce Cases* November 1997 *De Rebus*, 759.

## 6.9 Summary

Divorce can have a profound effect on many aspects of a woman's life, and will somehow have an effect on her estate. She should therefore be an active participant in the divorce proceedings, and thus ensure that the effect of divorce on her future estate is not as devastating as it could be.

## 7 EMIGRATION

*"The land of my fathers. My fathers can have it."*  
- Dylan Thomas

### 7.1 Background

Emigration has become fairly commonplace in South Africa today. On the one hand one can attribute this to political events, but on the other hand it can be ascribed to the fact that with the advances of modern technology, communication and transport, the global village is becoming smaller. It is a sign of the times that now more than ever before people are leaving the country to pursue lucrative careers elsewhere. Even where parents don't consider emigration, they must bear in mind that their children might. According to the Human Sciences Research Council the percentage of graduates with doctorates in Medicine from the University of Cape Town who are living abroad is currently as high as 43%.<sup>125</sup> To this extent estate planning must take cognisance of the fact that it may be desirable at some time in the future to emigrate and to transfer assets abroad or to provide for heirs or dependants who may be living abroad.

### 7.2 Investments abroad

Until recently it was illegal for individuals to make investments abroad.<sup>126</sup> On 11 March 1998 the Finance Minister, Trevor Manuel, announced in his budget speech that

<sup>125</sup> Newsletter of the HSRC Register of Graduates 1998 19.

<sup>126</sup> Exchange Control Manual issued by the South African Reserve Bank (1996 Pretoria) Para 5.6.

individuals would in future be allowed to invest R400 000,00 in offshore investments, raising the limit from the R200 000.00 introduced the previous year. Approval for such investments will only be given once a clearance certificate has been obtained from the South African Revenue Services.

### 7.3 Transfer of capital abroad

An allowance to make investments abroad, does not, however, alleviate the limit placed on moving capital out of the country if one decides to emigrate. Upon emigrating a family is allowed to take out a travelling allowance of R100 000.00 per adult person over 12 years, a settling in allowance of R400 000.00 per family unit, and personal assets and motor vehicles to a value of R1 000 000.00.<sup>127</sup> Any existing offshore investments will be deducted from the settling in allowance. After emigration all assets remaining in the country become blocked, and only the income generated by such assets may be remitted abroad. The blocked funds may be used for certain purposes as prescribed from time to time in the *Exchange Control Regulations*.<sup>128</sup>

Very strict regulations have been laid down with regard to the transfer of capital and income to non-resident South African beneficiaries of an *inter vivos* trust.<sup>129</sup> An *inter vivos* trust established shortly before emigration will be regarded with suspicion, but it will not be a problem to remit income as well as capital abroad if the trust was founded and funded long before the emigration of the beneficiary.

Cash bequests and proceeds of legacies due to non-resident beneficiaries may be remitted to them in terms of reigning Exchange Control Regulations.<sup>130</sup> Similarly remittance of monthly pension payments and annuities from retirement annuity policies is allowable.

### 7.4 Summary

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<sup>127</sup> Exchange Control Manual Para 5.6.2.5 (d).

<sup>128</sup> Regulations issued in terms of the *Currency and Exchanges Act* 9 of 1933.

<sup>129</sup> Exchange Control Manual Para 5.5.6.

<sup>130</sup> Exchange Control Manual Para 5.5.5.2(a).

Whether or not it is worth investing abroad at a low interest rate but in foreign currency as a hedge against inflation and the devaluation of the South African Rand is a personal decision. No decision in this regard should be made without proper consultation of a professional adviser in this field. What should be accepted however, is that offshore investment as an integral part of estate planning is here to stay. The early establishment of an *inter vivos* trust to forestall the potential problem of transferring capital out of the country at a future date is to be recommended.

## 8 RETIREMENT

“Whenever I prepare for a journey I prepare as though for death. Should I never return, all is in order. This is what life has taught me.” - Katherine Mansfield, Journal 1922

### 8.1 Background

If one has travelled the long journey to retirement without consequence, and can afford to retire financially secure, there are very few estate planning decisions left to make.

### 8.2 Will

A proper will, however, remains a priority, and should as always reflect the testatrix's latest wishes, based on the current circumstances in her life. As often as her circumstances change, she should have her will altered to adjust to those circumstances.

### 8.3 Estate planning

If a woman after retiring is fortunate enough to be in receipt of not only a state pension but instead another pension, annuity, or interest from investments, it stands to reason that until she dies she will have decisions to make regarding her estate. If her estate is sizeable enough she will be subjected to paying income tax. Most women who retire at the age of 60 or 65 are dependent for the rest of their lives on a fixed or predictable income, e.g. a determined amount in pension annuities or interest. It is of utmost

importance that she realises that she may still live for another 20 years, and should therefore protect her income from the ravages of income tax and inflation.

Lump sum benefits from life insurance policies are not taxable, whereas a portion only of a lump sum received in terms of a pension or annuity is tax-free.<sup>131</sup> Only a certain portion of a pension or annuity may be received in cash, and the balance normally has to be invested. Professional advice should be obtained in these instances, because the legislation as far as this is concerned changes virtually from year to year. A woman should consider carefully how she should invest the balance of her lump-sum benefits that she is not allowed to receive in cash. It is always advisable to try and guarantee an income until death and to have it linked to the inflation rate at the same time. A pension or annuity received monthly is subject to income tax,<sup>132</sup> and since 1998 widow's pensions stemming from benefit funds are also taxable.

If, after retirement, a woman has a large estate which appears as if it is going to be subject to estate duty, it is not too late then to do the necessary estate planning in order to avoid unnecessary estate duties. Unfortunately, not even a retired woman of 60 or 65 years of age faces the future without the risk of divorce or perhaps even insolvency or disability. Therefore the same precautions spelled out before herein apply to her as well.

#### 8.4 Summary

Estate planning never ceases being important until date of death. Even after retirement a woman should take an avid interest in her financial affairs so that she may enjoy the years of her retirement, and be assured that after her death her estate will be administered as she would have wanted.

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<sup>131</sup> Second Schedule of the *Income Tax Act*.

<sup>132</sup> Section 1 of the *Income Tax Act*.

## CHAPTER III

### CONCLUSION

The rise in feminism has brought today's woman more liberties and opportunities, but also more responsibilities. If she wants to be treated as an equal, she must be able to take care of herself and fend for herself and her dependants. Armed with the necessary advice and assistance, I am confident that she is able to. She has the prerogative to make her own will. Should she choose to get married she has a range of different marriage forms to choose from. She is able to trade in her own name, and can decide how she wishes to trade. She can save money in her own name for unexpected events, and can take out insurance against inevitabilities. If she needs to get a divorce, she has the right to negotiate a settlement best suited to her future. Even after retirement, if she has planned well, she can decide how she will spend her retirement. Unlike before, she is not lost or entirely dependent on a Romeo. Perhaps the next time you see Juliet standing on the balcony, you will hear her singing the popular Aretha Franklin refrain:

*"Oh yes I am wise, but it's wisdom from the pain. Guess I've paid the price, but look how much I've gained. If I have to I can do anything. I am strong, I am invincible, I AM WOMAN!"*

## BIBLIOGRAPHY

- Allan A a o *Close Corporations Act 1984 – A Basic Introduction* (1984 Port Elizabeth)
- Bobbert MCJ Grondlyne van Strategiese Boedelbeplanning 1976(1)3 *Tydskrif vir Regswetenskap*
- Cilliers HS a.o. *Company Law* (1977 Durban)
- Cronjé DSP *Die Suid-Afrikaanse Persone- en Familiereg* (1991 Durban)
- de Wet JC and Yeats JP *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1964 Durban)
- Exchange Control Manual issued by the South African Reserve Bank (1996 Pretoria)
- Hahlo HR *The South African Law of Husband and Wife* (1975 Cape Town)
- Hockley H E *The Law of Insolvency in South Africa* (1968 Cape Town)
- Jordaan J H *Boedel en Finansiële Beplanning – 'n Praktiese Gids* (1988 Kaapstad)
- Joubert WA (editor) *The Law of South Africa* (Durban 1982) Volume 4
- Joubert WA and Scott TJ (editors) *The Law of South Africa* (Durban 1988) Volume 12
- Joubert WA and Scott TJ (editors) *The Law of South Africa* (Durban 1992) Volume 16
- Joubert WA and Scott TJ (editors) *The Law of South Africa* (Durban 1988) Volume 31
- Joubert WA and Scott TJ (editors) *The Law of South Africa* (Durban 1994) Volume 32
- Meldrum A Zimbabwe Bank Crash Brings Fear About Others 2 May 1998 *The Saturday Star*
- Meyerowitz D Estate and Tax Planning October 1964 *The Taxpayer*
- Meyerowitz D *The Law and Practice of Administration of Estates* (1976 Cape Town)
- Ngalwana V Pension Interest and Divorce Cases November 1997 *De Rebus*
- Price Waterhouse *Standard Trust Income Tax Guide 1997/98* (Durban 1998)
- Seymour SM *Bantu Law in South Africa* (Cape Town 1970)
- Sharrock R *Business Transactions Law* (1992 Cape Town)
- Van der Merwe NJ and Rowland CJ *Die Suid-Afrikaanse Erfreg* (Pretoria 1974)

## TABLE OF STATUTES

*Administration of Estates Act 66 of 1965*

*Attorneys Act 53 of 1979*

*Black Administration Act 38 of 1927*

*Close Corporations Act 69 of 1984*

*Companies Act 61 of 1973*

*Constitution of the Republic of South Africa Act 200 of 1993*

*Currency and Exchanges Act 9 of 1933*

*Deeds Registries Act 47 of 1937*

*Divorce Act 70 of 1979*

*Estate Duty Act 45 of 1955*

*Income Tax Act 58 of 1962*

*Insolvency Act 24 of 1936*

*Insurance Act 27 of 1943*

*Intestate Succession Act 81 of 1987*

*Law of Succession Amendment Act 43 of 1992*

*Maintenance of Surviving Spouses Act 27 of 1990*

*Marriage Act 25 of 1961*

*Matrimonial Property Act 88 of 1984*

*Regulations for the Administration and Distribution of the Estates of Deceased Blacks*

Government Notice R200 in Government Gazette 10601 of 6 February 1987

*Social Pensions Act 37 of 1973*

*Trust Property Control Act 57 of 1988*

*Wills Act 7 of 1953*

## TABLE OF CASES

- Beaumont v Beaumont* 1987 1 SA 967 (A)  
*Braitex (Pty) Ltd and Others v Snyman and Others* 1998 2 SA 138 (A)  
*CIR v Emary NO* 1961 2 SA 621 (A)  
*CIR v Macneillie's Estate* 1961 3 SA 833 (A)  
*Crookes v Watson* 1956 1 SA 277 (A)  
*Dauids v The Master and Others* 1983 1 SA 458 (C)  
*Durr v Absa Bank and Another* 1997 3 SA 448 (A)  
*Ex parte Maurice* 1995 2 SA 713 (C)  
*Hofer and Others v Kevit NO and Others* 1996 2 SA 402 (C)  
*Isaacs v Isaacs* 1949 1 SA 952 (C)  
*Ismail v Ismail* 1983 1 SA 1006 (A)  
*Momeen v Bassa and Others* 1976 4 SA 338 (D)  
*Mthembu v Letsela and Another* 1998 2 SA 675 T  
*Ryland V Edros* 1997 2 SA 690 (C)  
*Secretary SA Association v Mostert* 1869 Buch 231  
*Seedat's Executors v The Master (Natal)* 1917 AD 302  
*Van der Westhuizen v van der Westhuizen and Another* 1996 2 SA 850 (C)  
*Webster v The Master and Others* 1996 1 SA 34 (D)  
*Wegner V Surgeson* 1910 TPD 571