What protection does a so-called protective clause in a will (or trust deed) offer?

By Tiny Carroll

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Most wills include a clause which states something along the following lines:

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"I direct that the inheritance devolving upon any beneficiary under this will as well as the proceeds, the re-investment of such proceeds and the income thereon shall be free from the legal effects, of any present or future marriage of a beneficiary whether married in community or out of community with the accrual."

The purpose of this article is to alert testators and will drafters to limited protection offered by a protective clause. Therefore when it comes to estate planning and will drafting, testators with assets of the type and value that require real protection should consider other options for protecting inheritances, for future generations.

The limited protection afforded by a protective clause will differ according to the party against whom the protection is claimed and whether the marriage is in community of property or subject to the accrual system.

In community marriages

In the case of Du Plessis v Pienaar[1] - Mrs Du Plessis was married in community of property, when she inherited a number of farms, equipment and livestock from her father. The bequest to her was subject to a protective clause similar to the example quoted above. Mr Du Plessis conducted business as a money lender. His business failed and the joint estate was eventually sequestrated. The trustees of the insolvent estate laid claim to Mrs Du Plessis' "separate property".

Mrs Du Plessis argued that the property, inherited by her from her father subject to a protective clause, formed part of her separate estate and was not subject to attachment by the creditors of the joint estate.

The Supreme Court of appeal did not agree. It found that "debts are not incurred by a person's estate - the estate is merely the source from which the debt is recovered". Debts are incurred by the person who is the debtor. When spouses are married in community of property the general rule is that a debt incurred by one spouse is incurred by both spouses.

Because the debt is incurred by both spouses, creditors may look to the estate of each spouse - made up of the undivided interest in the joint estate as well as the separate property that falls outside the joint estate - for satisfaction of their claim. An order of sequestration has the effect of divesting a debtor of his or her whole estate, and there is no provision for sequestrating only part of a debtor's estate.

This decision by the Supreme Court of Appeal confirmed an earlier decision of the Natal High Court in Badenhorst v Bekker[2].

The SCA did go on to confirm that the protective clause is relevant when it comes to how parties may deal with assets during the course of the marriage, and on dissolution of the marriage by death or divorce.

For example:

- Mrs Du Plessis would not have required her husband's consent to dispose of an asset which fell into her separate estate. She would have needed his consent if the asset formed part of the joint estate. Thus for example if Mrs Du Plessis used the income from her farming operations to pay the premiums on a life insurance policy she would not need her husband's consent to nominate her children as the beneficiaries under the policy.
- On dissolution of the marriage by divorce, the assets would not have formed part of the joint estate to be divided between the spouses.
- On the death of Mr Du Plessis, his wife's separate estate would not be included in his estate for the calculation of executor's fees, capital gains tax and estate duty. Capital gains tax and estate duty would obviously only be relevant if someone other than Mrs Du Plessis inherited.

In summary therefore, when it comes to in community of property marriages, separate estate assets will not be protected against the creditors of the joint estate, and will not form part of the joint estate for dealings by the spouses amongst each other.

Accrual marriages

The main feature of the accrual system is that the spouses are married out of community of property and out of community of profit and loss, but that they share "accruals" at the termination of their marriage[3].

During their marriage the spouses have separate estates and each may contract for debts which burden his or her estate, and each spouse may alienate all or any of the assets of his or her estate, subject only to the rule that he or she must not seriously prejudice the other spouse[4].

With reference to accrual marriages the protective clause has little practical value. To put this statement into context it is necessary to distinguish between situations where an inheritance accrues during the course of the marriage and situations where the inheritance accrues before the conclusion of the marriage.

An inheritance which accrues during the course of the marriage

In terms of Section 5 of the Matrimonial Property Act[5] inheritances acquired during the subsistence of a marriage subject to the accrual system are automatically excluded from the accrual estate irrespective of whether the inheritance was subject to a protective clause or not. This protection extends to assets and income acquired with the proceeds or re-investment of the proceeds of an inheritance.

Thus a bequest to a beneficiary who is already married in terms of the accrual system enjoys automatic protection, against the accrual claim of the other spouse on termination of the marriage either by death or divorce.

Spouses are able to contract out of the application of Section 5 if they elect to do so.

An inheritance which accrues prior to the marriage

The Matrimonial Property Act does not make any reference to inheritances which accrued prior to the marriage.

The Act does, however, give prospective spouses the opportunity to exclude specified assets as well as assets acquired by possession or former possession of the assets, from the accrual estate in their antenuptial contract.

It is submitted that where an inherited asset has not been excluded from the accrual system in the antenuptial contract it will be an asset for the purposes of the accrual calculation, on the basis that the prospective spouse who inherited the asset elected not to exclude the assets from the accrual system.

It must be noted that there is a fundamental difference between excluding an asset from the accrual system and including the value of the asset in the commencement value of the parties' estates. As a general rule excluding an asset from the accrual estate will be the better option.

Insolvency of one of the spouses

For the purposes of insolvency, the inherited assets of a solvent spouse will be protected against the creditors of an insolvent spouse. This protection stems from the fact that their marriage is out of community of property and not as a result of the protective clause.

Assets inherited by the insolvent spouse will be subject to attachment by his or her creditors - as was indicated earlier, there is no provision for sequestrating only part of a debtor's estate.

What are the options available to a testator who wishes to protect assets against the creditors or a marital property regime of an heir.

Testators wishing to protect assets from the creditors of an heir or exclude assets from a future marital regime have three possible solutions which will provide the inheritance with better protection than a protective clause in a will:

- Create a discretionary trust and bequeath the assets to the trust for the benefit of the heir and his or her descendants;
- Create a limited right such as a usufruct or fiduciary interest; or
- A combination of the two i.e. bequest to a trust subject to a limited interest in favour of the heir.

Limited interests are notoriously unwieldy and often have significant and sometimes unforeseen estate duty and capital gains tax consequences. For this reason the trust option is preferred.

The costs associated with bequeathing assets to a trust, including estate duty and capital gains tax, are no different from bequeathing assets to a child.

The use of a trust as an asset protection vehicle should only be considered where the value and type of asset(s) warrants the costs associated with the establishment and on-going management thereof.

One can only speculate that the cost of a trust would have been insignificant when compared with the financial loss suffered by Mrs Du Plessis.

Source:

1 Du Plessis V Pienaar NO and Others 2003(1) SA671(SCA)
2 Badenhorst v Bekker NO en Andere 1994 (2) SA 155
3 Introduction to South African Family Law JA Robinson and others
4 Introduction to South African Family Law JA Robinson and others
5 Matrimonial property Act 88 of 1984

ABOUT TINY CARROLL

Tiny Carroll has over 20 years' experience in estate, tax and financial planning for clients. Prior to becoming an estate planning specialist at Glacier Financial Solutions, he was a senior legal analyst at Old Mutual. Tiny has a master's degree in estate law and post graduate qualifications in tax law and trust law is a certified financial planner.
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