

*Welcome*

# ESTATE PLANNING AND TRUSTS

Your pathway to *professional* development



# Welcome

## Presenters:

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Your pathway to *professional* development



## INTRODUCTION & AGENDA

### 1. Estate planning

- |  |     |
|--|-----|
| a. Fundamentals  | LvV |
| b. Davis Committee 1 & 2 reports & Treasury - Latest legislation & FISA's comments | LvV |
| c. Drafting of Wills   | LvV |
| d. Typical errors / mistakes in Wills  | LvV |
| e. Testamentary reservation clause   | LvV |
| f. Discussions   | SS  |

### 2. Estate Administration

- |  |    |
|--|----|
| a. S 9HA & 25 - Introduction           | SS |
| b. S 9HA - Income Tax implications     | SS |
| c. S 9HA - CGT implications            | SS |
| d. S 9HA - VAT implications            | SS |
| e. S 9HA - Roll over relief provisions | SS |

## INTRODUCTION & AGENDA

### 2. Estate Administration (cont.)

- |  |     |
|--|-----|
| f. Buy and sell agreements                                 | SS  |
| g. Excess contributions to RA's - Estate Duty implications | LvV |
| h. Attribution of Estate Duty - practical implications     | LvV |
| i. Accrual system  | LvV |
| j. Latest relevant Court cases                             | LvV |

### 3. Trusts

- |  |     |
|--|-----|
| a. Section 7C  | LvV |
| b. Possible Solutions & Financial Statements following S7C | SS  |
| c. Latest Chief Master's Directive                         | SS  |
| d. Recent Court cases                                      | SS  |
| e. Employee Share Trusts                                   | SS  |
| f. B-BBEE trusts   | SS  |

# 1. ESTATE PLANNING

# Estate Planning (a)

- Meyerowitz describes estate planning as:  
*“The arrangement, management and securement and disposition of a person’s estate so that he, his family and other beneficiaries may enjoy and continue to enjoy the maximum from his estate and his assets during his lifetime and after his death, no matter when death may occur.”*
- Estate planning is not just “planning for when you die”.
- Estate planning has to be flexible, e.g. what happens when the “surviving spouse” (usually the wife) dies first, or circumstances or tax laws change?
  - E.g. The scheme to put huge single premiums into RA’s
- Estate planning is not just about saving taxes – it has to be appropriate in the specific circumstances.

# Three Main Areas to Consider

- Logical Issues
- Emotional Issues
- Technical Issues

# Logical Issues

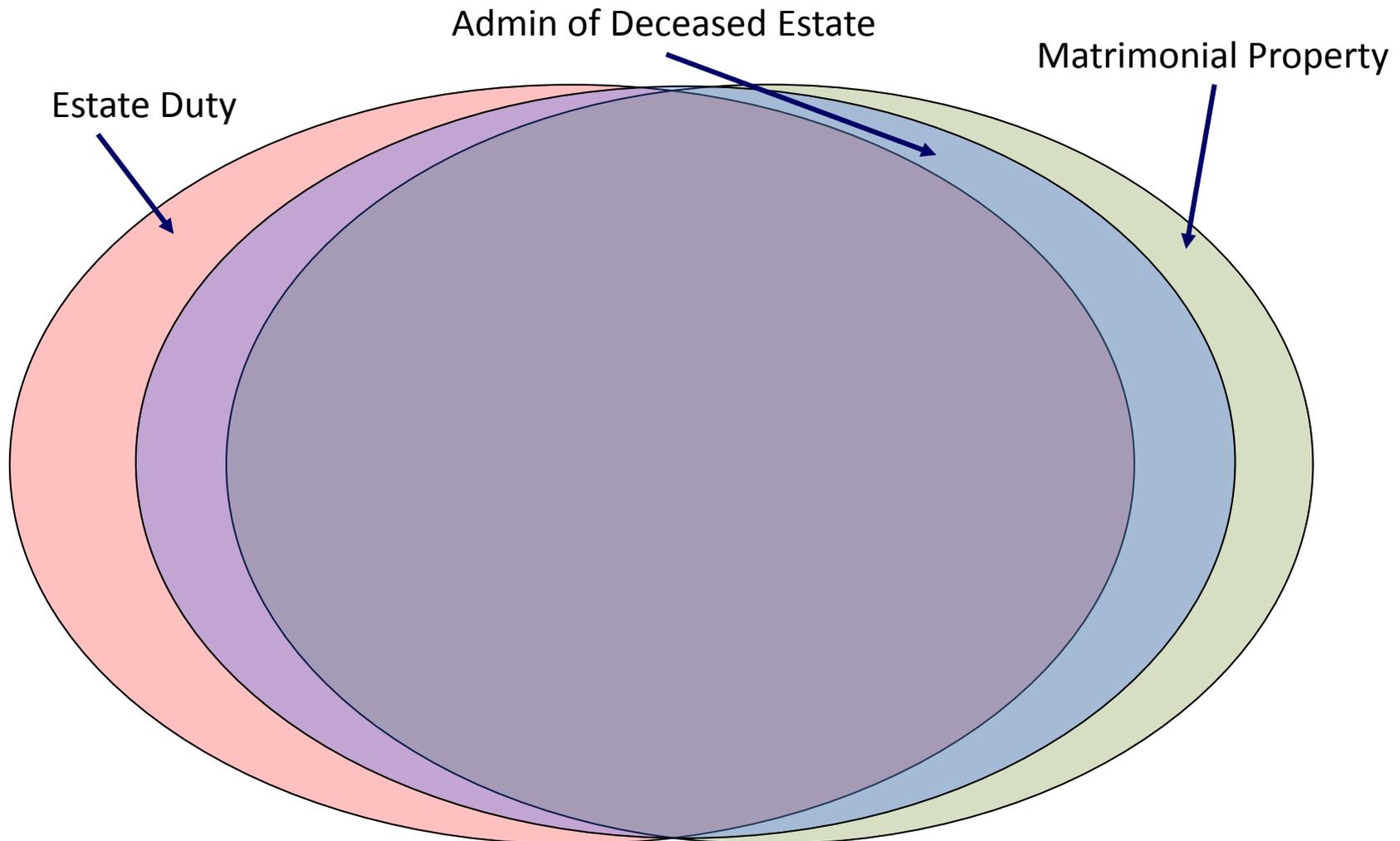
- Is the client married? Under what marital regime?
- If so, do they have children?
- What do they do for a living?
- How financially literate are they?
- Are there business interests?
- Is the client or spouse or child(ren) a trustee or beneficiary of a trust?
- How old are the clients and the children?
- Do they have wealthy parents?
- What is the income of the client/spouse/child(ren)?
- Retirement funds?

# Emotional Issues

- How important is control to him/her/them?
  - Ruling from the grave
- How much trust is there in the family?
- Is it a first or subsequent marriage?
- Are there “problem” children?
- Are there debts of honour to be paid?
- Religious issues

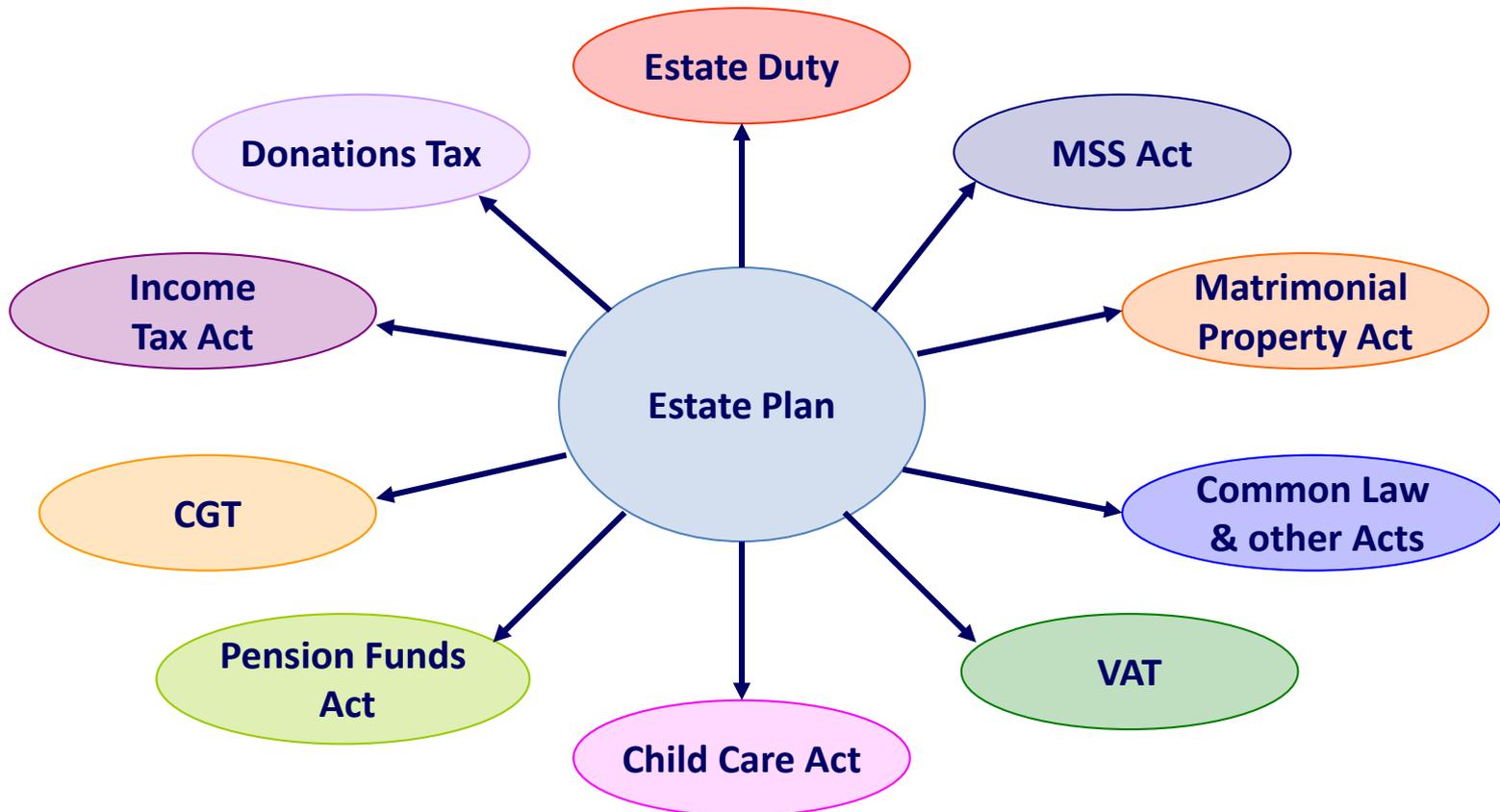
# Technical issues - Complexity

- An estate is not an estate is not an estate!



# Technical issues - complexity

- More than twenty pieces of legislation can have an impact



# Which instruments can be used?

- **Will**
- **Retirement funds**
- Life Insurance
- Business entities
- Contracts
- **Trusts**
- **Limited interests**

### Recommendations on trusts

- The flat rate of tax for trusts should be maintained at its existing levels.
- The deeming provisions of section 7 and 25B (i.e. the “conduit” principle) should be repealed, insofar as they apply to RSA resident trust arrangements.
  - A trust is a conduit by nature and in law. Creating a fiction just for tax that it is not would be undesirable and lead to confusion.
- The deeming provisions of section 7 and 25B should be retained in non-resident trust arrangements.
  - Harsh to treat all distributions from offshore trusts as income. A rebuttable presumption can be used.
- Trusts should be taxed as separate taxpayers and all trust income be taxed in the trust.
  - Undesirable as it ignores the conduit nature of a trust
- Only relief to the rule should be the “special trust”. The definition should be revisited by National Treasury.
- Do not implement transfer pricing adjustments in the event of financial assistance or interest-free loans being advanced to trusts.

# The Davis Tax Committee (DTC)

(1<sup>st</sup> interim report on estate duty – 2015) (2)

## Estate duty

- The sec 4(q) deduction for bequests to a surviving spouse should be abolished – reasons:
  - Families in SA come in various forms
  - Deduction could be unconstitutional (?)
- The portable sec 4A standard abatement should be abolished and could be replaced by an accelerated standard abatement
  - **What about this being unconstitutional? Flawed logic.**
- Increase the standard abatement to R6m (x2)

# The Davis Tax Committee (DTC)

(1<sup>st</sup> interim report on estate duty – 2015) (3)

## Donations tax

- Limit the exemption for inter-spousal donations to exclude donations of company shares and fixed property
  - Originated from a mistaken belief that people would marry and bequeath or donate to a spouse just to avoid taxes?
  - Unfair towards spouses who assisted in creating the wealth locked into the shares or properties

# The Davis Tax Committee (DTC)

(1<sup>st</sup> interim report on estate duty – 2015) (4)

- No increase in the estate duty rate
- CGT is not a wealth tax (?) and should be retained at death
  - The fact remains that the same event (death) triggers both CGT and ED
- Close the loophole w.r.t. Retirement fund benefits

# Further comments submitted

- Support the retention of the 20% flat rate for estate duty and donations tax. The effective rates should now also be equalised.
- Proper enforcement and disclosure of income and capital gains vested in beneficiaries will stop any substantial “tax leakage” in trusts.
- “Abuse trusts” should be indentified through a multi-point test (like par 57 of the 8<sup>th</sup> schedule) and income then taxed in the trust.

# The Davis Tax Committee (DTC)

(2<sup>nd</sup> and final report on estate duty – 2016) **No further comment invited**

- Abolish sec 4(q) deduction
- Increase the sec 4A standard abatement to R15m
- Increase the estate duty rate from 20 per cent to 25 per cent of the dutiable value of an estate exceeding R30 million
- Remove the CGT roll-over to spouse and introduce a R1m year of death exclusion
- Abolish exemption for inter-spousal donations except to the extent of reasonable maintenance (**how long is a piece of string?!**)
- “Transfer of assets in terms of a divorce order should be subject to the exemptions (?) similar to a death benefit for estate duty and CGT. However the taxpayer’s **death benefit** abatements or **subsequent** divorce abatements would be reduced by the quantum of any allowances claimed during the taxpayer’s lifetime.” (my emphasis)

# The Davis Tax Committee (DTC)

(2<sup>nd</sup> and final report on estate duty – 2016) **No further comment invited**

- “SARS should establish comprehensive records of all bare dominium and trust arrangements.” All holders of part interests in property should submit tax returns irrespective of income levels.
- Retain exclusion of retirement funds from property for estate duty purposes, and increase the R350,000 cap for deductible contributions to compensate for inflation.
- In order to prevent the diminution of estates in anticipation of death, the section 56 (1)(c) exemption (donation mortis causa) should be removed.
  - **What is this about? The DMC has been killed by sec 3(3)(b) of the EDA since 8 November 2005!**

# The Davis Tax Committee (DTC)

(2<sup>nd</sup> and final report on estate duty – 2016) **No further comment invited**

## Trusts

- Extend sec 3(3)(d) of the EDA to situations of interest free or low interest loans by a „connected person” to the trust. (**superseded by new sec 7C of the ITA?**)
- Examine all new trust registrations for legal compliance (SARS).
- Donors and beneficiaries in all vested trust arrangements to be subject to stricter disclosure. All trust interests should be known for ED purposes in case of death.
- In discretionary trusts:
  - Income only to be taxed in hands of beneficiary if deed provides that once vested, irrevocably vested.
  - In all other cases, income and capital gains to be taxed in the trust.

# So, what do we learn from DTC?

- Accepted the **conduit principle** in trusts, with measures to limit abuse
- Refused to venture into a positive identification of trusts which are aimed at tax avoidance
- Adamant that interspousal deductions for ED and exemptions for DT are unconstitutional
- Clear that **the wealthy**, and not the middle class, **is the target**.
  - First R15m exempt from ED; and
  - only net estates above R45m to be taxed at higher rate
- Treasury does not agree with everything – 7C instead of 3(3)(d)

# Requirements for a valid will (c)

- If you don't do it right, your client's family could lose a lot of money
- *"It is a never-ending source of amazement that so many people rely on untrained advisors when preparing their wills, one of the most important documents they are ever likely to sign."*  
(Leach JA in *Raubenheimer v Raubenheimer* [2012] ZASCA 97)
- Although there are ways to get round the problem if the formalities have not been complied with, they are always expensive and time-consuming.
- The deceased client's family is unlikely to trust a planner who did not get it right the first time.

# Formalities required by Wills Act

- Signature on each page and at end of will document by testator
- Signature by two competent witnesses in the presence of the testator and each other at end of document
- Good practice to let witnesses sign each page
- Testator can sign:
  - by making a mark, or
  - someone else can sign on behalf of testator in his presence and by his direction
  - In both cases, Commissioner of Oaths must certify the identity of the testator and that the document is his/her will.

# Questions

- Can the testator sign alone and then afterwards give the will to the witnesses, tell them that the signature is his/hers and let them sign in his and each other's presence?
- Can one witness sign with the testator, and the other witness later, as long as both witnesses and the testator are present when the second witness sign?
- Can the witnesses just initial instead of full signature? Or by making a mark?
- A client tells you that she wants to make a new will in which she wants to reduce a bequest to her one son, as he does not pay her rent for one of her houses in which he lives. He also tries to take control of her affairs. She also tells you that she had been treated in the past for a mood disorder. What do you do?
- Another client wants to know whether she can buy a pro-forma will form from CNA and help her mother to make a will by filling in the blanks on the form and getting her mother to sign the will?

# Questions

- Your client is terminally ill and too weak to sign the will you had prepared by the time you arrive at the hospital. He is apparently fully conscious and rational. What do you do?
- Mr S signed a will some years ago in which he bequeaths everything to his two daughters. Two weeks before his death he asked you to have a new will drafted for him in which he bequeaths everything to one daughter and her children.

He said it is because his other daughter has shown no interest in maintaining a relationship with him.

After his death the disinherited daughter brings a court application to claim half the residue of the estate on the basis that her father disinherited her because she married a man from a different race group.

What do you think will be her chances of success?

# Substitution

- If descendants and the surviving spouse inherit jointly, and a descendant renounces, that portion goes to the surviving spouse (S 2C(1))
- If a descendant dies before the testator, or renounces, or is disqualified, his/her descendants will represent *per stirpes* (S2C(2))
- This provision subject to:
  - The provisions of S. 2C(1)
  - A contrary provision in the will
- Similar provisions in Intestate Succession Act, 81 of 1987.

# Typical errors in wills (d)

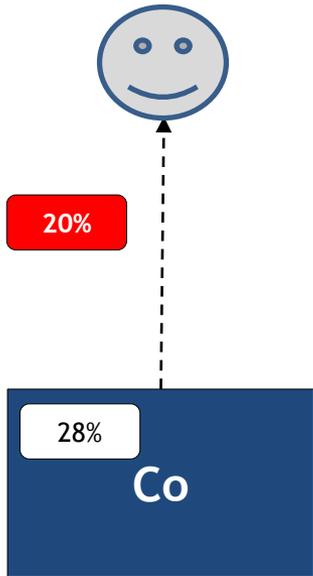
- **Inaccurate wording**
  - Remember the “golden rule”. Extrinsic evidence usually not admissible.
- **Cash / Money**
  - Usually means all physical cash, bank balances, sometimes other forms of investment, but not unbanked cheques
- **Business**
  - If a sole proprietor, what does it mean?
- **Registered in my name / in my possession**
  - Which house if the testator died after deed of sale, but before transfer
- **The contents of ...**
  - “... my garage ...” The rubbish, my tools, the Porsche usually parked there?
- **Personal effects**
  - Any valuables in there?
- **Usufruct over money ?**

# Testamentary reservation clause (e)

- Usually a clause that gives the founder the power to prescribe a formula for distribution of capital to existing beneficiaries of the trust.
- Sometimes also the power to transfer the founder's special rights to a "successor in title".
- If limited to prescription of a formula for distribution, usually in order.
- Have seen cases where the right was also reserved to add and remove capital beneficiaries.
- This could become problematic. Mere statement that founder may not benefit himself or spouse may not suffice.
- The danger lies in sec 3(3)(d) of the EDA. If it can be said that the founder could dispose of the property for his own or his estate's benefit, 3(3)(d) could be invoked.
- No case law on sec 3(3)(d).

# 1. ESTATE PLANNING - (f) Discussions

## INCOME TAX

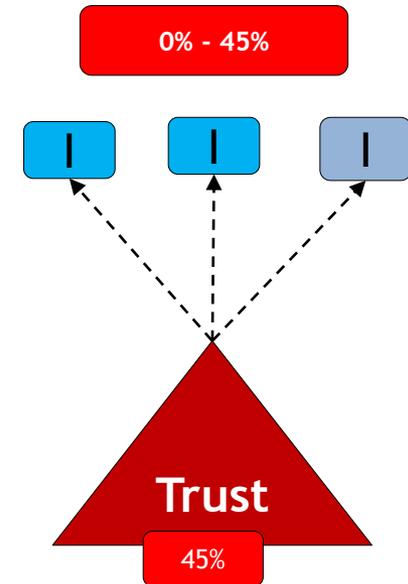
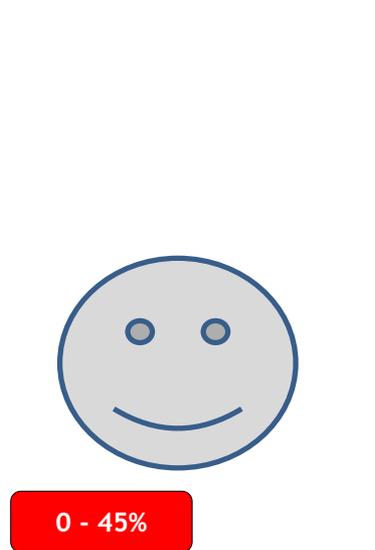


### Pre Budget

Net profit before tax	100.00	
Income Tax	-28.00	
After income tax Profit	72.00	
Dividend tax	-10.80	(15/100)
	<u>61.20</u>	<u>-38.80</u>

### Post Budget

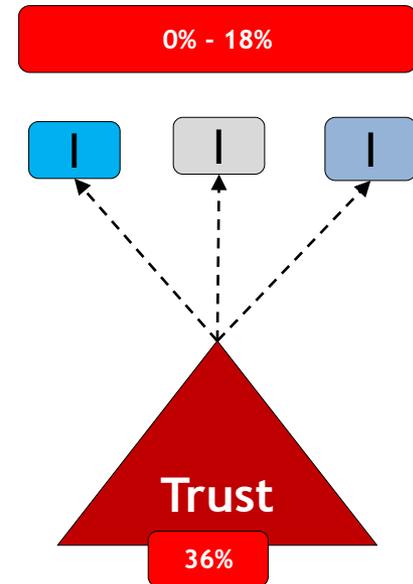
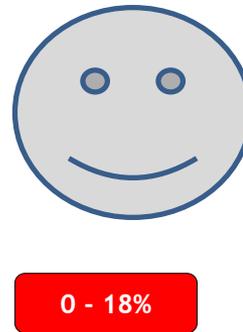
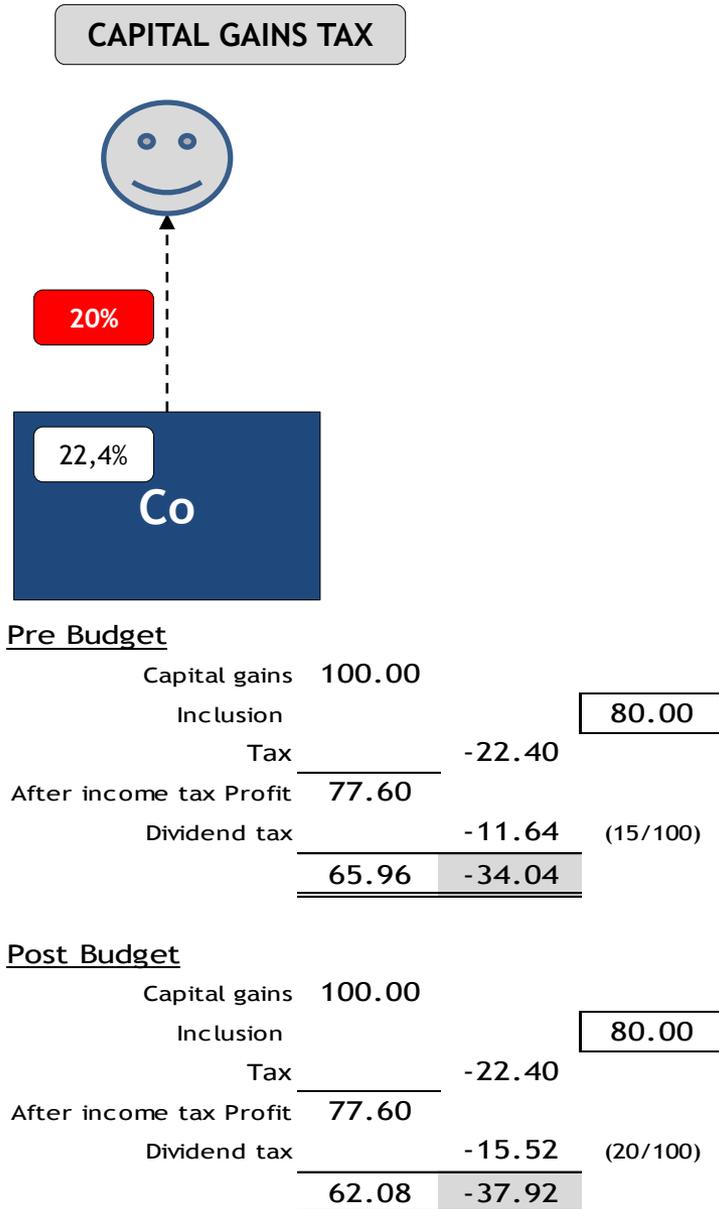
Net profit before tax	100.00	
Income Tax	-28.00	
After income tax Profit	72.00	
Dividend tax	-14.40	(20/100)
	<u>57.60</u>	<u>-42.40</u>



Flow through Principle

Attribution Rules

# 1. ESTATE PLANNING - (f) Discussions



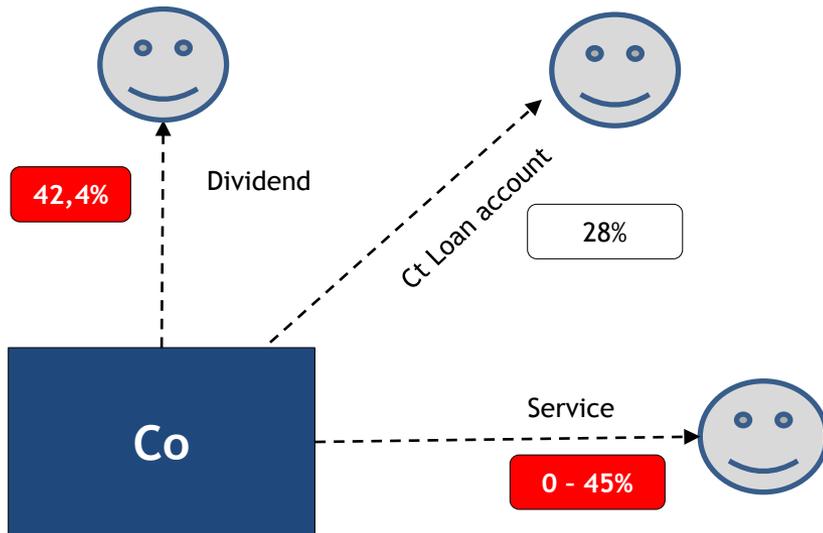
Flow through Principle

Attribution Rules

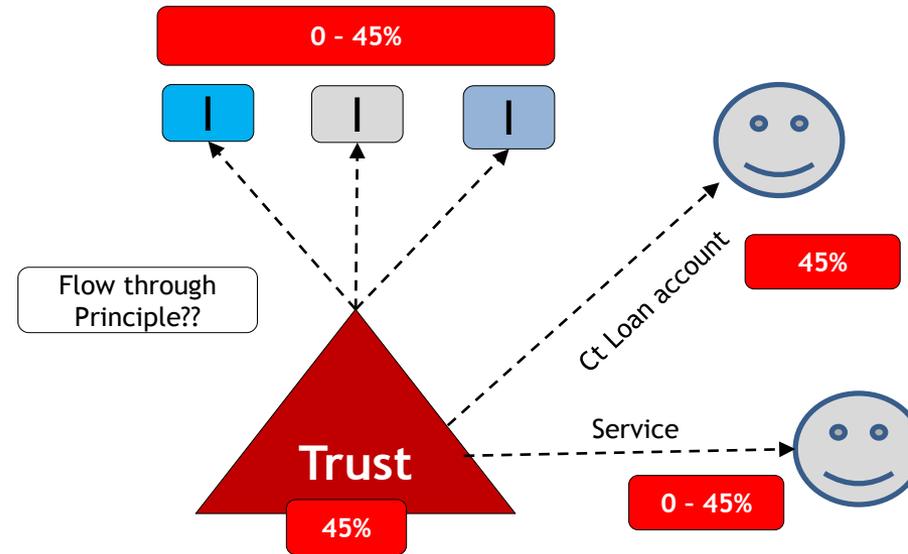
# 1. ESTATE PLANNING - (f) Discussions

## RENTAL PROPERTIES

Tax cost of extracting taxable income to the individual from a company?



Tax cost of extracting taxable income to the individual from a trust?

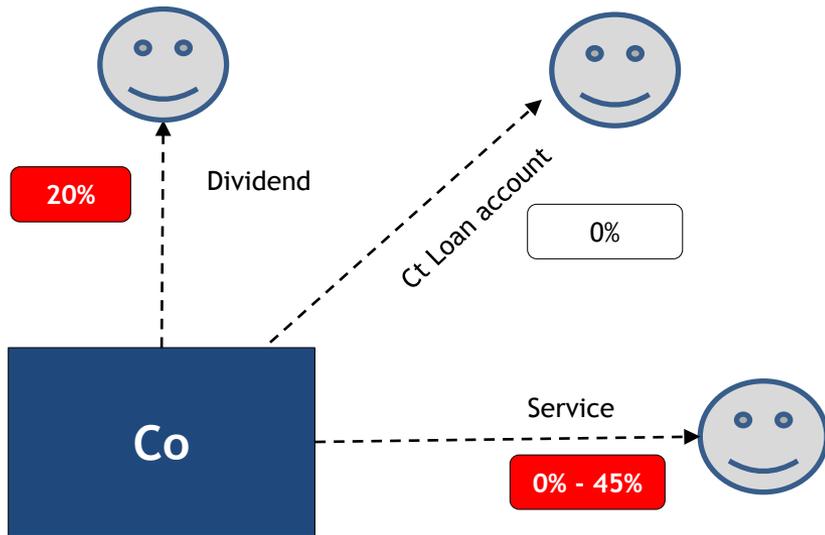


If flow through principle abolished -  
 Convert to a company?  
 Would it be cheaper to extract funds from the entity? YES

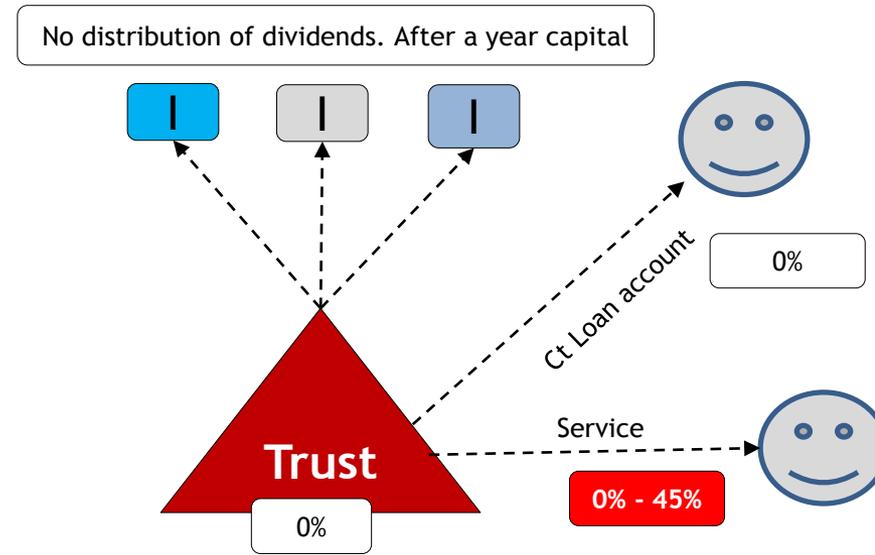
# 1. ESTATE PLANNING - (f) Discussions

## SHARES

Tax cost of extracting tax exempt income to the individual from a company?



Tax cost of extracting tax exempt income to the individual from a trust?



S7C- create a counter loan to person to whom the trust is indebted.

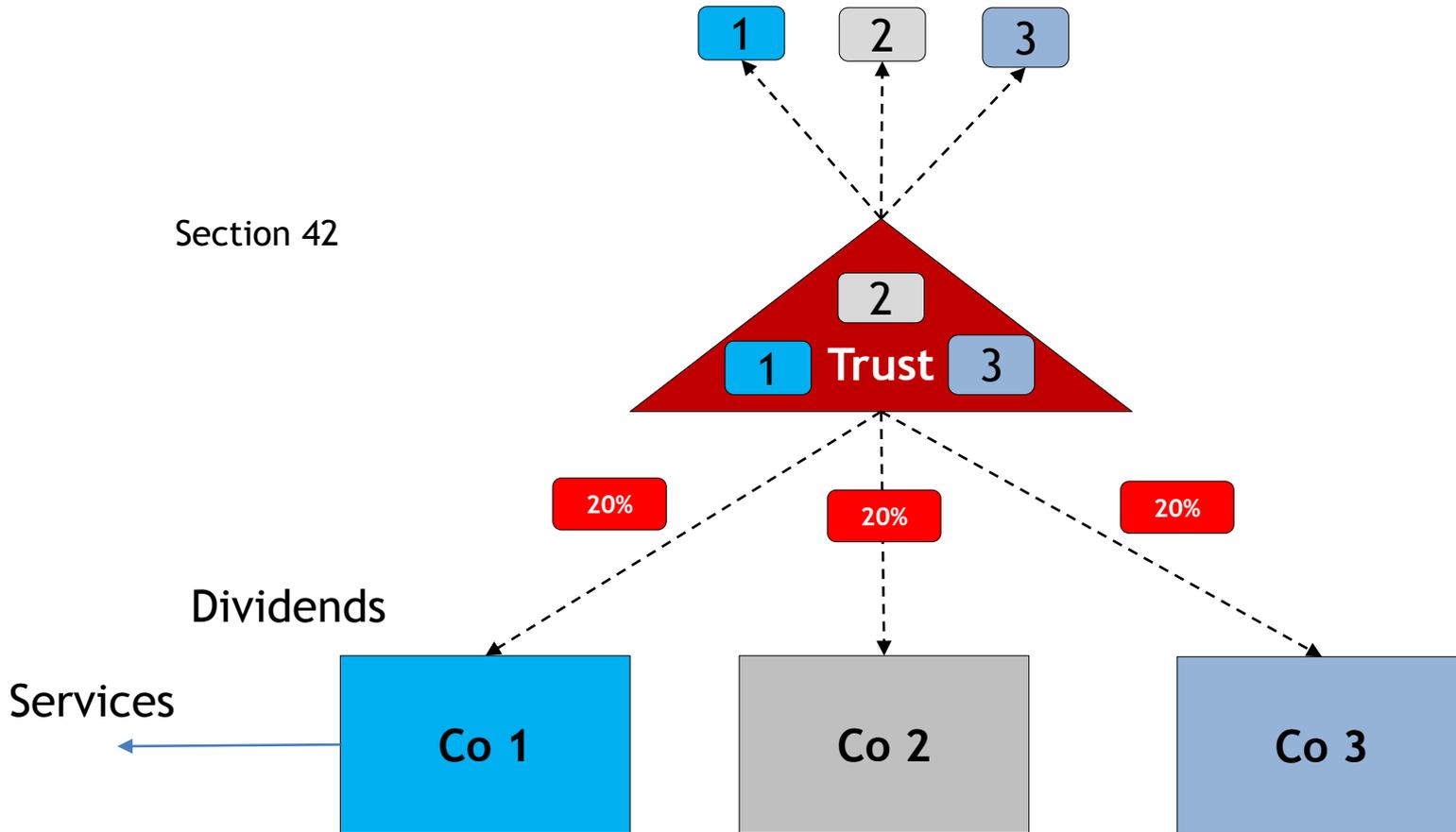
If flow through principle abolished

Problem 1 is - Capital gains when disposing capital asset

Problem 2 is - Capital gains when assets are to be distributed to future generations

# 1. ESTATE PLANNING - (f) Discussions

SUCCESSION



## **2. ESTATE ADMINISTRATION**

# Income tax and CGT in a deceased estate

- Deceased estates resulting from deaths up to 29 February 2016 were treated as conduits between the deceased, and heirs and legatees
  - Income accruing prior to death taxed in the deceased's hands
  - Income after death taxed in the heir's hands
  - Capital gains taxed in the deceased's hands as a disposal to the estate
  - Capital gains in the estate only in the case of a sale in the course of administration
- Deaths from 1 March 2016 the deceased estate is now a separate taxpayer due to
  - Changes to [section 25](#) of the ITA, and
  - the replacement of par 40 of the 8th Schedule by section [9HA](#) of the ITA

# Sections 25 and 9HA

- Section 25 and 9HA now provides that:
  - any asset that is transferred to an heir or legatee is transferred at the **cost at which the estate acquired it** (i.e. market value at date of death), whether it is capital or income in nature;
  - Any asset that is transferred to the surviving spouse is transferred at the **cost at which the deceased acquired it.**
- Therefore the estate will now pay income tax on any asset of an income nature (stock-in-trade) and CGT on any asset of a capital nature sold by the estate.
- The estate is regarded as a natural person for income tax purposes, but without the benefit of any rebates.
- Stated reason for the change is to preserve tax symmetry.

## 2. ESTATE ADMINISTRATION (a) Sections 9HA & 25

### TAXATION LAWS AMENDMENT ACT 2015

Changes the income tax dispensation applicable to DECEASED ESTATES

**1 March till date of death - pre - death**  
(New section 9HA) Tax effect of Deceased Person **Value entering the deceased estate**

(section 9HA(1) - deemed to dispose of assets @ market value (3 exclusions))

(section 9HA(2) - if bequeathed to RSA resident surviving spouse - roll over)

(section 9HA(3) - if bequeathed not to spouse - deemed to have happened @ m value)

Amend par 40 / 41 of the 8th Schedule Apply to persons - die before 1 3 2016

Amend section 25

## 2. ESTATE ADMINISTRATION (a) Section 9HA & others

### Amend section 25 Tax effect of Deceased Estate / Surviving Spouse / Heirs Type of taxpayer (5) / Entering value (2) / Exit value (3 & 4)

(section 25(1) - income accruing after death = that of the deceased estate)

(section 25(2a) - asset to the estate which is earmarked to go to other heirs (section = value - m value)

(section 25(2b) - asset to the estate which is earmarked to go to surviving spouse - roll over value)

(section 25(3) - asset disposed by estate to heir - equal to the value the estate acquired it from the deceased)

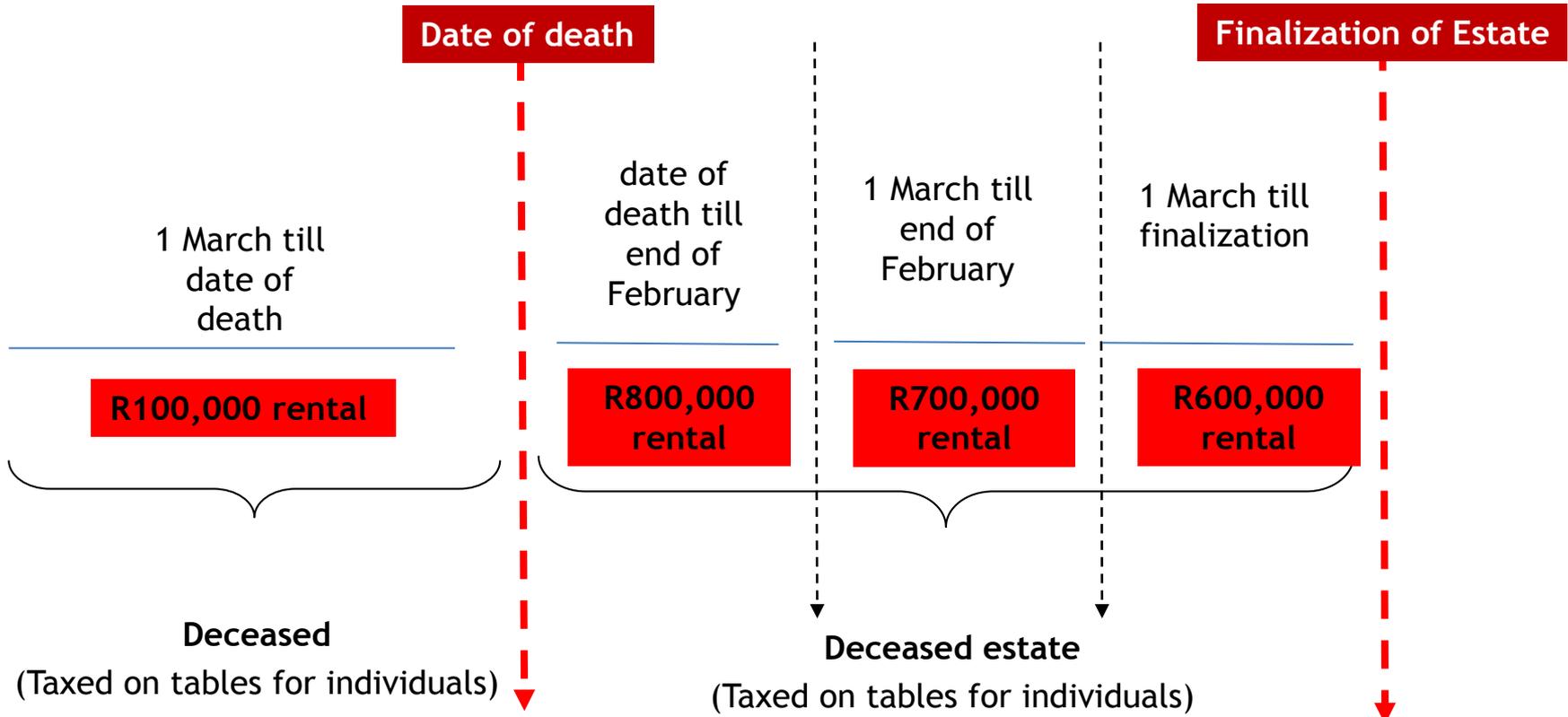
(section 25(4) - asset disposed by estate to surviving spouse - equal to the value the estate acquired it from the deceased)

(section 25(5) - deceased estate = natural person (not primary, secondary and tertiary rebates)

(section 25(6 & 7) - CGT > 50% of the net value of the estate

## 2. ESTATE ADMINISTRATION (b) Section 9HA - INCOME

### PREVIOUS DISPENSATION - INCOME TAX - SECT 25:



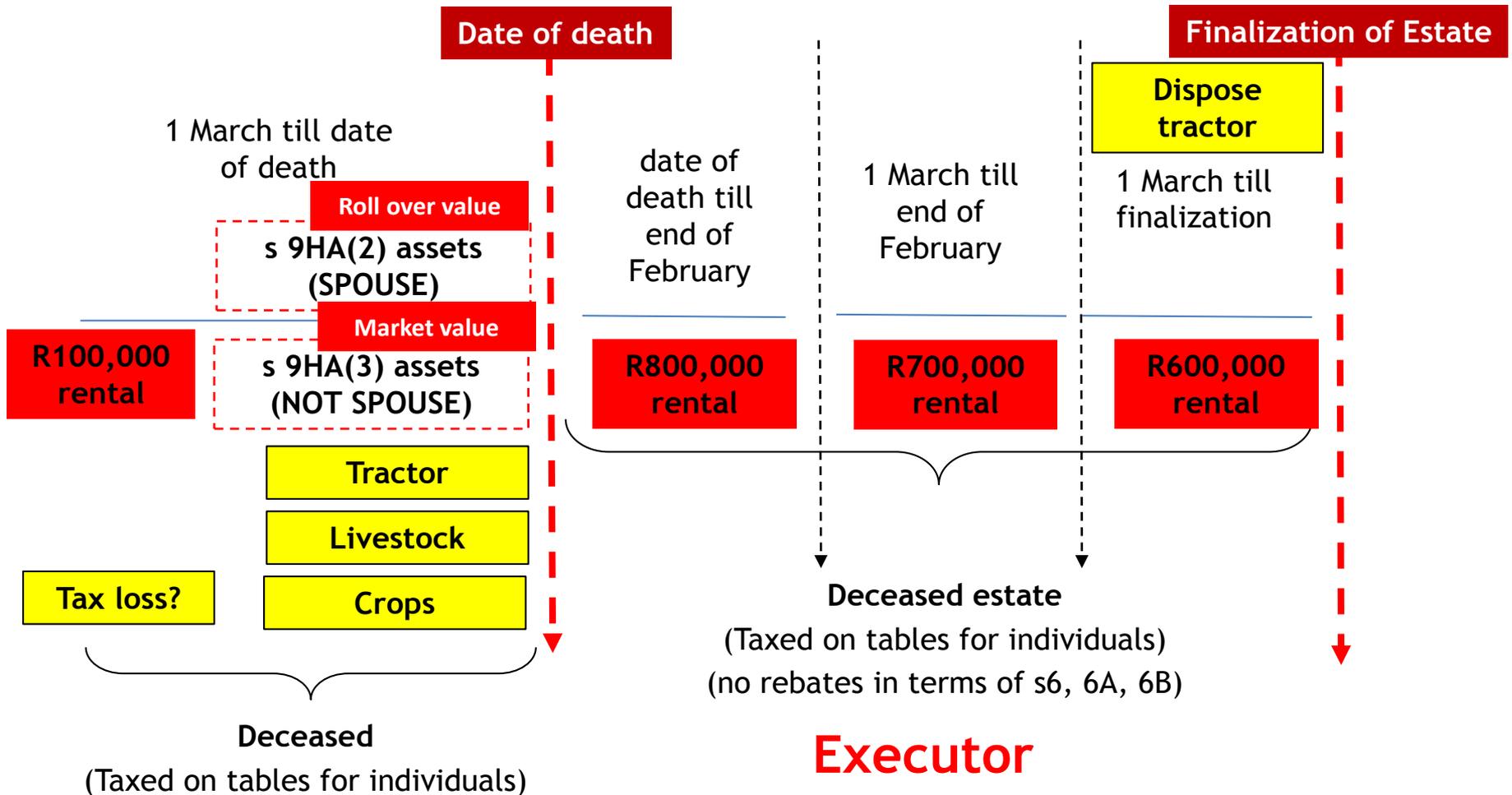
**Executor or Legatees or heirs**

(A / B / C)

## 2. ESTATE ADMINISTRATION (b) Section 9HA - INCOME

### NEW DISPENSATION - INCOME TAX - SECT 9HA & 25:

#### 7. VALUE INTO THE ESTATE = VALUE OUT OF THE ESTATE

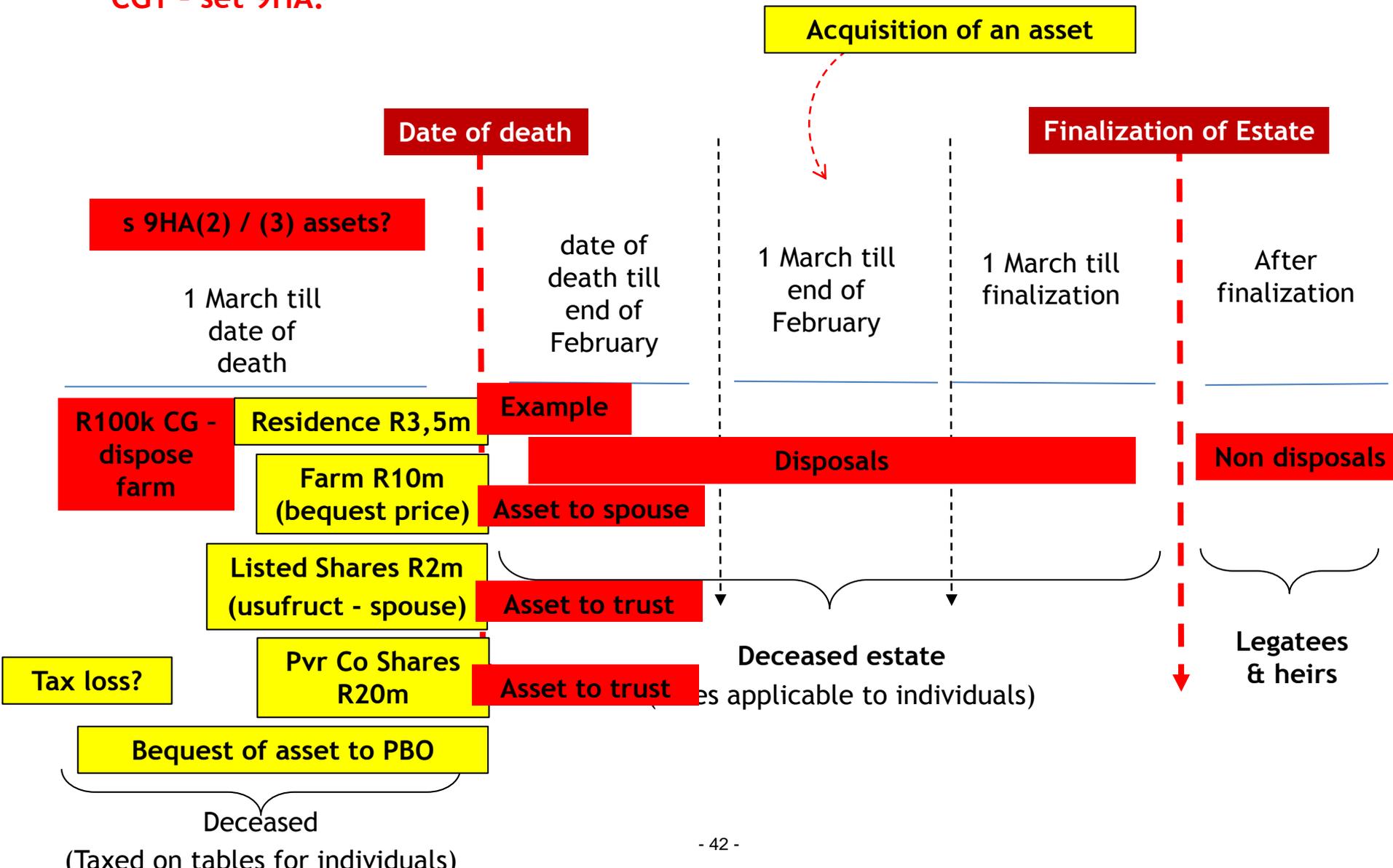


## 2. ESTATE ADMINISTRATION (b) Section 9HA - INCOME

- Income before death
- Income after death
- Assessed Losses
- Livestock
- Depreciable assets
- Dispose depreciable assets

## 2. ESTATE ADMINISTRATION (c) Section 9HA - CGT

CGT - set 9HA:



## 2. ESTATE ADMINISTRATION (c) Section 9HA - CGT

- Primary residence **(Example)**  
 Does not impact the CGT implications - market value of farm less base cost if bequeathed to NON SPOUSE
- Farm (Bequest price)  
 For Estate duty purposes: Bequest of asset to spouse on condition bequest price to be made to other heir - reduce spousal deduction
- Capital Losses / Normal tax losses    2 Separate Taxpayers - unlike sequestration
- Private Co shares    Must be valued for Estate Duty Purposes - inherent CGT liability and dividend tax liability can be deducted
- Small Business Assets    A business of which the market value of ALL its gross assets <R10m  
 Disregard R1,8m of the capital gain attributable to the disposal of an 'active business asset' which -
- Usufruct
- Bare dominium

  - had been held for a continuous period of at least five years before the disposal,
  - that natural person had been substantially involved in the operations of the business;
  - that natural person had attained the age of 55 years or the disposal was in consequence of ill-health, other infirmity, superannuation or death.

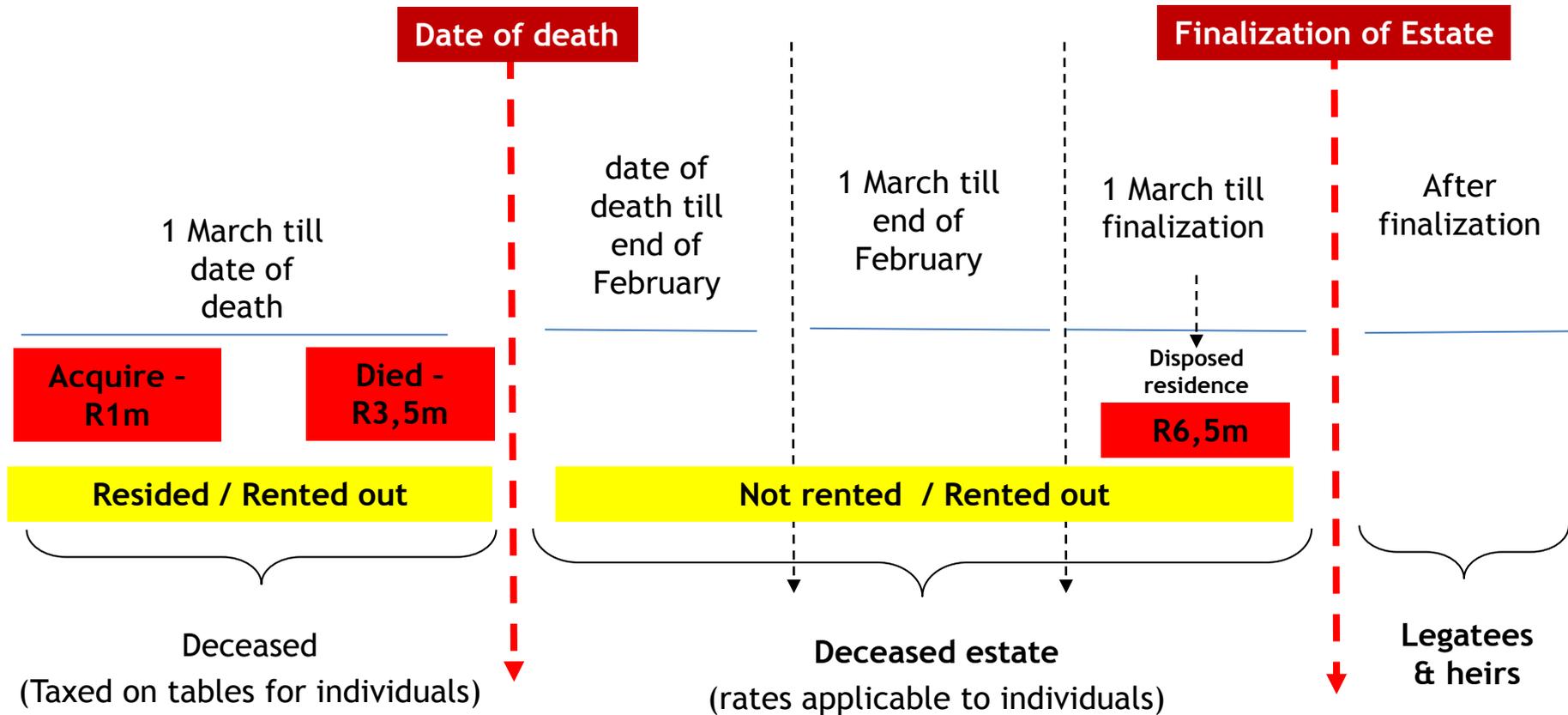
## 2. ESTATE ADMINISTRATION (c) Section 9HA - CGT

### CAPITAL GAINS - before and after death

#### Facts:

- Sarel acquired a residence after the valuation date at a cost of R1 million;
- He lived in the residence as his primary residence for five years before letting it for five years;
- He died at the end of the 10-year holding period while renting a flat overseas;
- The residence was valued at R3,5 million on his date of death;
- His executor sold the residence to a third party after 3 years for R6,5 million.

## 2. ESTATE ADMINISTRATION (c) Sect 9HA - CGT



## 2. ESTATE ADMINISTRATION (c) Section 9HA - CGT

### CAPITAL GAINS - before and after death

#### Result:

#### Prior to death:

- Primary residence exclusion?
- Must he have owned the residence at his death?
- Apportionment?
- CGT - rebate at death?

#### After death:

- Primary residence exclusion?
- What did the executor do with the property after his death?
- Apportionment?
- CGT - rebate?

## 2. ESTATE ADMINISTRATION (c) SARS

### New Information

#### 12 December 2016 - Estate Reform (SARS document)

System changes pertaining to Estates were introduced on 9 December 2016 in line with key legislative requirements.

#### Purpose

The changes optimises the processing of deceased estates and lighten the administrative burden on executors of deceased estates.

#### The changes are mainly for:

- New dispensation in respect of persons who die on or after 1 March 2016.
- This will be done by creating a **new income tax record** for the deceased estate.
- The deceased estate will, therefore, be subject to **a second income tax registration (new income tax entity)**.
- The deceased estates for deaths on or after 1 March 2016 will **no longer** be required to register for Special Trusts Type A.

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## 2. ESTATE ADMINISTRATION (c) SARS

### New Information (cont)

#### Second Income Tax Registration - when:

- Deceased estates of taxpayers who passed away on or after 1 March 2016; and
- Where the executor of the estate had received post date of death income, or there was certain acquisitions/disposals of assets by the executor after date of death will be subject to the second income tax registration.

#### Executor

The executor (registered representative) requesting the second income tax reference number must be the same as the executor on record at SARS in respect of the **taxpayer's income tax reference number to date of death.**

#### How apply

The application for the second income tax reference number can be processed via **eFiling or at a SARS branch.**

## 2. ESTATE ADMINISTRATION (c) SARS

### New Information (cont)

If the executor was replaced after the taxpayer records were marked as a “Deceased Estate”, **a letter of appointment** must be provided in order to change the representative details.

The banking details for the “to date of death” and “post date of death” registrations must be the banking details of the **deceased estate provided by the executor and must not be the banking details of the deceased taxpayer.**

Where the banking details used in the first registration differs from those in the second registration, the representative must provide and meet all **FICA requirements** to change the banking details of the deceased estate.

Please note:

**The second registration will not be automatically registered when the taxpayer record is marked as a “Deceased Estate”.**

## 2. ESTATE ADMINISTRATION (d) VAT

Section 53(1)(b) of the VAT Act - **the deceased person and the deceased estate are deemed to be one and the same person.**

### **Was the deceased a VAT Vendor / Must the Estate register for VAT?**

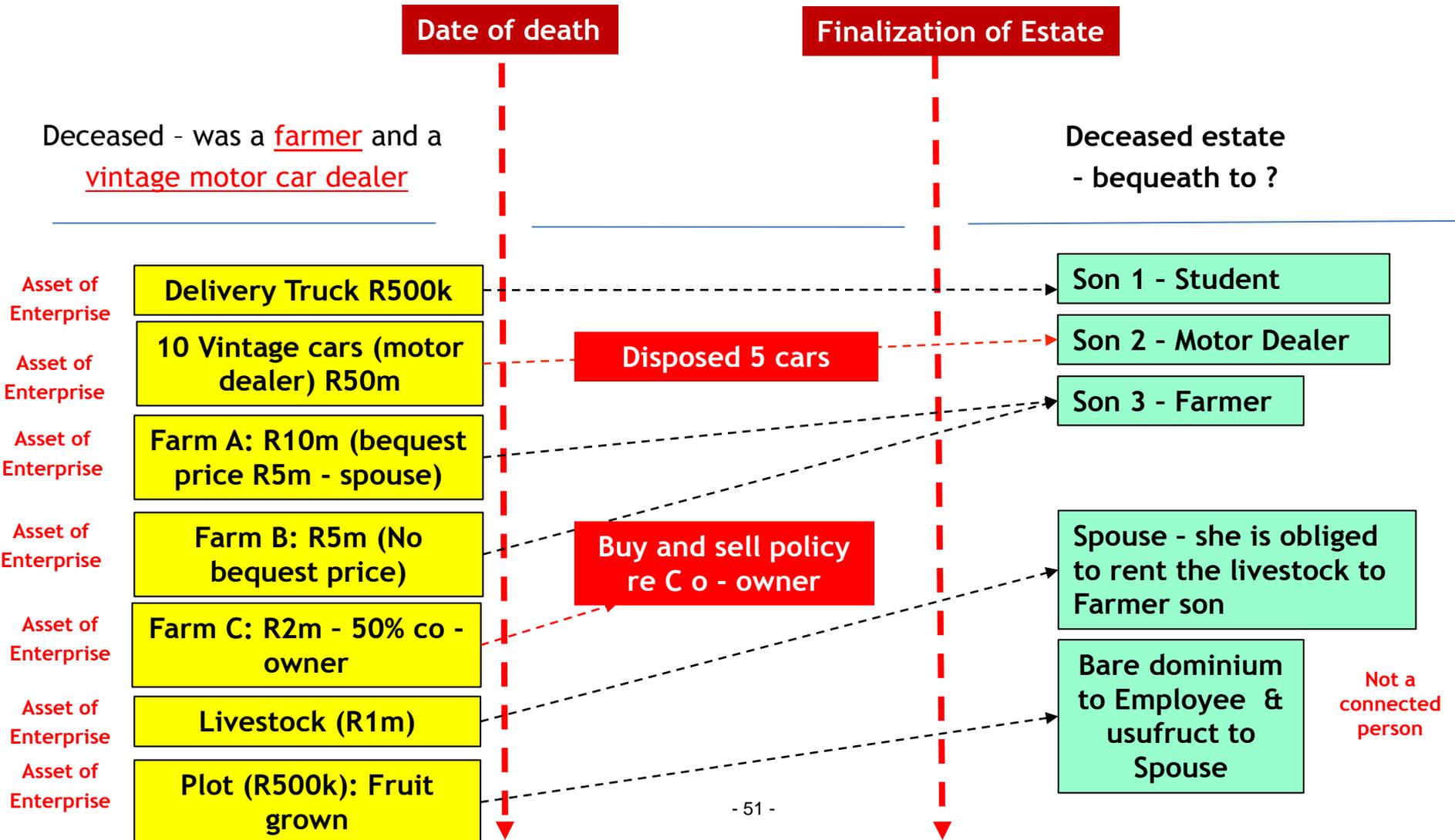
The estate is liable to account for VAT on the distribution of goods and services that formed part of the deceased's enterprise. Output tax is calculated by applying the relevant tax fraction to the consideration charged, which, in most cases, **will be nil** where assets are bequeathed to a legatee or heir without a bequest price.

However, if the special value of supply rule for “**connected persons**” in section 10(4) applies, VAT must be accounted for on the **open market value** of the goods, notwithstanding the fact that no consideration was payable.

**When a supply is made between connected persons for no consideration, or for a consideration which is below the open market value, the consideration for the supply is deemed to be equal to the open market value if the recipient would not have been entitled to a full input tax deduction on the goods or services acquired, had the open market value been charged on the supply.**

## 2. ESTATE ADMINISTRATION (d) VAT

Section 53(1)(b) of the VAT Act - the deceased person and the deceased estate are deemed to be one and the same person.



## 2. ESTATE ADMINISTRATION (d) VAT

### Scenario

The deceased (G), a VAT vendor, was a farmer and a vintage motor car dealer.

### **Brilliant Vintage Cars (sole proprietor):**

**He was the owner of Brilliant Vintage Cars.**

G bequeathed a delivery truck which was used in his business to his son 1 (a student).

50% of his vintage cars were disposed during the process of winding up the estate.

The rest of his fleet vintage cars were bequeathed to son 2.

The open market values of the assets were as follows:

- Delivery truck - R500 000
- 50% vintage cars sold - R25 000 000
- 50% vintage cars sold bequeathed - R25 000 000

### Question

What is the VAT effect on G's estate?

## 2. ESTATE ADMINISTRATION (d) VAT

### Solution

All the said assets were used by G in his enterprise of making taxable supplies

G's sons are connected persons to him.

Son 1 will not be using the delivery truck to make taxable supplies, therefore section 10(4) applies and the estate is liable to account for VAT on the open market value of the vehicle.  $R500\ 000 \times 14 / 114 = R61,404$

Son 2 will be using all the vintage cars bequeathed to him to make taxable supplies, therefore section 10(4) will not apply and the estate will not be liable to account for VAT on the open market value of the vehicle. The consideration is zero.

Output tax due in respect of the vehicle sold during the process of administering the estate.  $R25\ 000\ 000 \times 14 / 114 = R3\ 070,175$

## 2. ESTATE ADMINISTRATION (d) VAT

### Scenario

The deceased (G), a VAT vendor, was a farmer and a vintage motor car dealer.

### Express Farm Stock (sole proprietor):

G was the owner of Express Farm Stock.

He owned three farms, Plattekloof (R10m), Perdekraal (R5m) and 50% of Trippoli (R2m)

He used these farms in his farming enterprise.

He owned 50% of Trippoli as co owner with his friend John (not connected but a VAT vendor in his own name). They have concluded a buy and sell policy on G's life (R1m) whereby John had become entitled to buy out the 50% of G.

Plattekloof was bequeathed to Son 3 (also a VAT vendor as sole proprietor) but subject to a bequest price of R5m payable to his spouse.

Perdekloof was bequeathed to Son 3 with encumbrance

### Question

What is the VAT effect on G's estate?

## 2. ESTATE ADMINISTRATION (d) VAT

### Solution

All the said assets were used by G in his enterprise of making taxable supplies

G's son 3 is a connected person to him.

### Plattekloof (subject to a bequest price)

Son 3 will be using this farm in the making of taxable supplies. Therefore, had a bequest price not been requested, section 10(4) would not have applied and the estate would not have been liable to account for VAT on the open market value of the farm (then zero consideration).

But, the bequest price represents consideration for a supply of goods irrespective of whether it is paid to the estate or directly to the other beneficiaries. Consequently, the executor will have to apply the tax fraction to the bequest price to calculate the VAT due by the estate.

Output tax due = R5 000 000 (bequest price)  $\times$  14 / 114 = R614, 035

### Perdekraal (not subject to a bequest price)

Section 10(4) does not apply, hence zero consideration, hence no output VAT

## 2. ESTATE ADMINISTRATION (d) VAT

### Trippoli (subject to a buy and sell agreement)

The farm were used by G in his enterprise of making taxable supplies.

John is not a connected person to him.

The buy and sell policy will result in the executor having to dispose of the 50% of the farm to John for an amount of R1m.

As it is an asset of the enterprise, the executor will have to apply the tax fraction to the disposal price to calculate the VAT due by the estate.

Output tax due = R1 000 000 (price)  $\times$  14 / 114 = R122, 807

## 2. ESTATE ADMINISTRATION (d) VAT

### Scenario

The deceased (G), a VAT vendor, was a farmer and a vintage motor car dealer.

### Express Farm Stock (sole proprietor):

G was the owner of Express Farm Stock.

He farmed with livestock. The value thereof at his demise was R1m.

He bequeathed all the livestock to his spouse, but, in terms of his last will she is obliged to rent the livestock to son 3, the farmer. He needs to pay her R20,000 per month. Spouse does not intend to apply for voluntary VAT registration.

### Question

What is the VAT effect on G's estate?

## 2. ESTATE ADMINISTRATION (d) VAT

### Livestock

The livestock formed part of G's enterprise and the distribution thereof is a taxable supply. As G and his Spouse are connected persons the applicability of section 10(4) needs to be considered. Spouse is not a vendor and she does not wish to voluntarily register for VAT, therefore G's estate is liable to account for output tax based on the open market value of the livestock.

Output tax:  $(R1\ 000\ 000) \times 14 / 114 = R122\ 807$

## 2. ESTATE ADMINISTRATION (d) VAT

### Scenario

The deceased (G), a VAT vendor, was a farmer and a vintage motor car dealer.

### Express Farm Stock (sole proprietor):

G was the owner of a plot on which on which fruit was grown to F (a trusted employee) whilst bequeathing the usufruct to his wife (S). F is not a connected person in relation to the deceased.

Assume:

Value of Bare dominium: R50,000

Value of Usufruct: R450,000

### Question

What is the VAT effect on G's estate?

## 2. ESTATE ADMINISTRATION (d) VAT

### Plot on which on which fruit was grown

Output tax due by the estate if S is not a vendor or does not use the plot in the course of furtherance of her enterprise:  $R450\ 000 \times 14\% = R55\ 263$

F is not connected to G and no consideration was charged for the bare dominium, therefore no output tax is due.

Ps:

The bare dominium holder will generally not be entitled to deduct input tax in respect of the acquisition of the bare dominium as the bare dominium can usually not be used to make taxable supplies.

Output tax must be paid on the open market value of the bare dominium of the property distributed to the beneficiary if that person and the deceased were connected persons in relation to each other.

## 2. ESTATE ADMINISTRATION (e) ROLL OVER RELIEF PROVISIONS

Can a sole proprietor's business be transferred to a company?

<u>SOLE PROPRIETOR</u>				
ASSET	MARKET VALUE	TAX VALUE	CGT / INCOME TAX	TAX
CATTLE	R10m	R100,000	R9,900k x 41%	R4,059k
TRACTORS	R20m	R5m	R15m x 41%	R6,150k
STANDING CROPS	R1m		(R16m - R5m) x 16,4%	R1,804k
FARM	R15m	R5m		
BOND ON FARM	(R10m)	<b>Liabilities?</b>		
OPERATIONAL LIABILITIES	(R5m)			
	R31m		Income tax and CGT	R12,013k

Estate duty (R31m less R3,5m less Income tax & CGT x 20%)

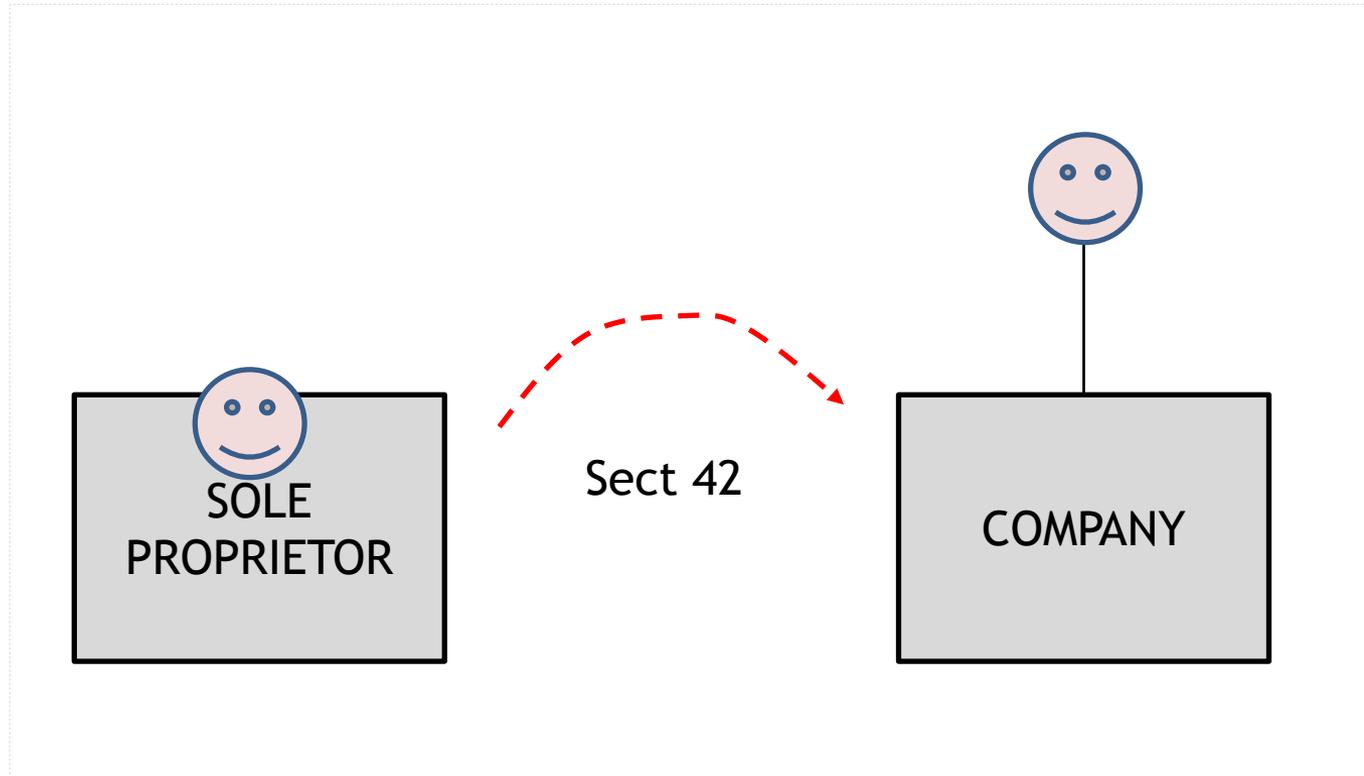
R3,097k

What about the tax position of the heir?

Total

R15m

## 2. ESTATE ADMINISTRATION (e) ROLL OVER RELIEF PROVISIONS



7. Can the value of the estate be pegged?

6. Can the share be disposed?

1. Asset per Asset basis

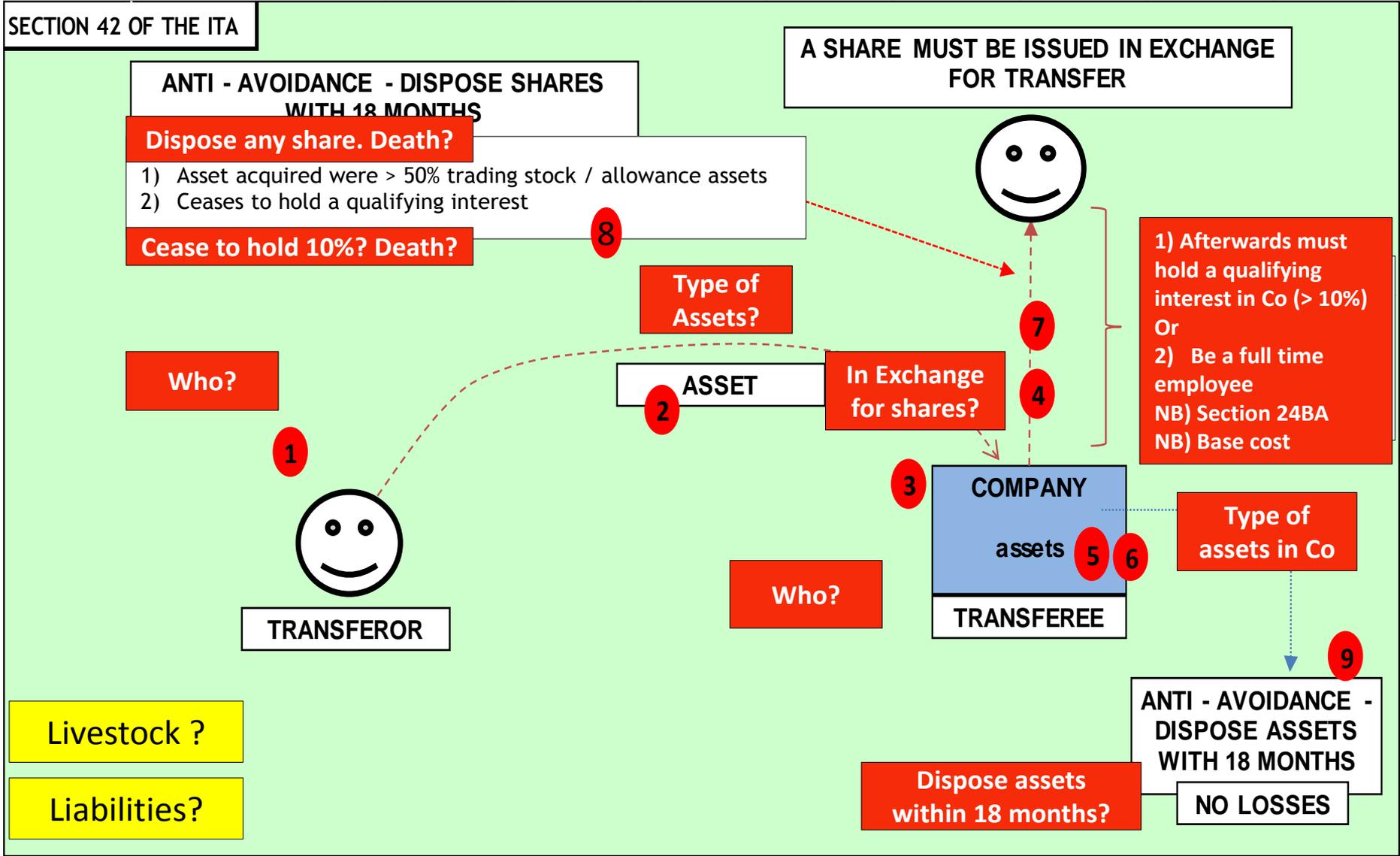
2. What would be the benefit?

3. Would the Co share be a capital asset?

4. What about the liabilities - can it be transferred?

5. Is there a restriction on when the acquired assets can be disposed (think livestock)?

## 2. ESTATE ADMINISTRATION (e) ROLL OVER RELIEF PROVISIONS



## 2. ESTATE ADMINISTRATION (e) ROLL OVER RELIEF PROVISIONS

S42 (8) - Where a person disposes of—

- (a) any **ASSET WHICH SECURES ANY DEBT** to a company in terms of an asset-for-share transaction and that debt was incurred by that person—
- i. more than 18 months before that disposal; or
  - ii. within a period of 18 months before that disposal—
    - aa) and that debt was incurred at the same time as that asset was acquired by that person; or
    - bb) to the extent that debt constitutes the refinancing of any debt in respect of that asset incurred as contemplated in subparagraph (i) or item (aa) of subparagraph (ii), and that company assumes that debt or an equivalent amount of debt that is secured by that asset; or
- (b) **ANY BUSINESS UNDERTAKING AS A GOING CONCERN** to a company in terms of an asset-for-share transaction and that disposal includes any amount of debt that is **attributable to**, and arose in the **normal course of that business undertaking**,
- that person must, upon the **disposal of any equity share acquired** in terms of that asset-for-share transaction... treat so much of **the face value of that debt** as relates to that equity share—

(A) where that equity share is held as a capital asset, **as an amount received or accrued in respect of that equity share** that accrues to that person in respect of the disposal by that person of that equity share; or

## 2. ESTATE ADMINISTRATION (e) BUY AND SELL INSURANCE POLICIES

Peter concluded a buy and sell agreement with his co - 50% shareholder in the private company, Arthur. The first to pass' share will be bought out for an agreed amount of R10m. Underlying life policies have been taken out for that amount on each other's lives. Peter passes away. A valuation of the company at time of death reflected its value to be R26m.

Value of share = higher than Policy proceeds

### ESTATE DUTY:

- Value of share (*mv*):  
R13m
- Policy proceeds: exempt
- (*buy and sell policy - individuals*)

### CGT:

M value date of death: **R13m**  
(*deemed disposal*)  
(*R13m less acquisition cost = capital profit*)

Disposal of share: **(R10m)**  
(*R10m less R13m = CGT loss in estate*)

### L & D ACCOUNT:

Liquidation account:

Assets:

Shares disposed R10m

## 2. ESTATE ADMINISTRATION (e) BUY AND SELL INSURANCE POLICIES

The first to pass' share will be bought out for an agreed amount of R10m. Peter passes away. A valuation of the company at time of death reflected its value to be R16m.

Value of share = lower than Policy proceeds

### ESTATE DUTY:

- Value of share (*mv*):  
R8m
- Policy proceeds: exempt

*(buy and sell policy - individuals)*  
*Would the full amount be exempt?*

### CGT:

M value date of death: **R8m**  
*(deemed disposal)*  
*(R8m less acquisition cost =*  
*capital profit)*

Disposal of share: **(R10m)**  
*(R10m less R8m = CGT gain in*  
*estate)*

### L & D ACCOUNT:

Liquidation account:

Assets:

Shares disposed R10m

# Undeductible contributions to RA's

- Since 1 March 2016, deductible contributions to all retirement funds are limited to the lesser of: ([sec 11\(k\)](#))
  - R350,000; or
  - 27.5% of the higher of:
    - Remuneration (as defined); or
    - Taxable income (before this deduction or a deduction under sec 18A, and before the inclusion of a taxable capital gain)
- What you cannot deduct this year, is deemed to be a contribution next year
- Accumulated undeductible contributions are added to tax free lump sum at retirement ([par 5 & 6 of 2<sup>nd</sup> Schedule](#))
- Accumulated contributions after retirement not deductible under previous point are set off against post-retirement income as an exemption ([sec 10C](#))

# Undeductible contributions to RA's

- However, any undeductible contribution made after 1 March 2015 is included as **property** in the estate of any person who died after 1 January 2016 ([sec 3\(2\)\(bA\) of the EDA](#))
- So, the implication is that anyone who has undeductible contributions and who dies before retirement could have an estate duty problem
- Not a problem if you are receiving remuneration, because then you know what to contribute
- What if you don't receive remuneration and has to fall back on the taxable income leg of sec 11(k)?

# Undeductible contributions to RA's

## Practical implications

Koos (38) is the sole proprietor of a farming business. As a result of good financial advice by a CFP<sup>®</sup> professional, he currently contributes R165,000 per annum on the last day of the year of assessment to a retirement annuity fund (RA) to provide for his retirement at age 60, when he hopes his son will take over the farm.

He started this contribution ten years ago and has increased it with inflation regularly. In the 2017 year of assessment he has an estimated taxable income prior to this deduction of only R97,000 due to the drought.

Koos has some cash reserves and would like to keep providing for retirement, as he realises that he will need a substantial amount of capital upon retirement.

# Undeductible contributions to RA's

## Practical implications

If Koos contributes the R165,000 to the RA on 28/02/2017, he will be able to contribute only:

$$97,000 \times 27.5\% = R26,675$$

$165,000 - 26,675 = R138,325$  will be undeductible

If his taxable income recovers to R600,000 next year, he will not be able to deduct the R138,325 plus the R165,00 for next year and an amount will be carried over again. What happens if he dies in the next year?

# Undeductible contributions to RA's

## Practical implications

- The R138,325 will be property in his estate under sec 3(2)(bA) of the EDA.
- The trustees of the fund may allocate the fund benefits to persons other than a surviving spouse (child, other dependant)
- If the CFP<sup>®</sup> professional did estate planning and the will contains bequests amounting to R3.5m to other parties, the R138,325 may be dutiable if the fund benefits do not go to a surviving spouse.
- If everything goes to a surviving spouse, the R138,325 will probably (we think) qualify for the sec 4(q) deduction.
- If benefits go to others, [sec 11](#) does not make provision for apportionment of estate duty caused under sec 3(2)(bA)

# Apportionment of estate duty

- Under sec 13 of the EDA, the executor in a deceased estate can recover any estate duty payable as a result of a usufruct, annuity, or domestic policy from the person who received the benefit upon death of the deceased.
- The estate duty payable in the estate on a policy is apportioned according to this formula:

$$\frac{\text{Death claim value of the policy}}{\text{Net value of estate}} \times \text{Duty payable}$$

**NB. The more well-known two step formula will yield exactly the same answer in all cases**

- There is an inherent flaw. The heir(s) of the residue could end up carrying the cost!
- Although theoretically sound, the apportionment could cause a practical problem.

# Apportionment of estate duty- example

Peter has property of R12m.

Deemed property consists of two policies. Policy A (R3m cover) pays to his estate and Policy B (R1.5m cover) is owned by PC (Pty) Ltd in which Peter and Charl each holds 50%.

Policy B is a contingent liability cover policy to cover a R1.2m loan that PC has with Big Blue Bank.

Peter's liabilities, administration costs, taxes, and other deductions except the sec 4(q) deduction amounts to R2.5m.

His will bequeaths assets to the value of R3.5m to a discretionary testamentary trust for the benefit of his two minor children, and the residue to his spouse, Mary. The will was drafted based on an estate plan crafted by his financial planner, Paul, a CFP<sup>®</sup> professional.

# Apportionment of estate duty- example

Description	Liabilities / deductions	Assets
Property		12,000,000
Deemed property		
Policy A		3,000,000
Policy B		1,500,000
<b>Gross estate</b>		<b>16,500,000</b>
Other deductions	2,500,000	
Amount to be taken into 4(q) calculation		14,000,000
Sec 4(q) deduction	9,000,000	
<b>Net estate</b>		<b>5,000,000</b>
Standard abatement (sec 4A)	3,500,000	
<b>Dutiable estate</b>		<b>1,500,000</b>
<b>Estate duty @ 20%</b>	<b>300,000</b>	

# Apportionment of estate duty- example

## Calculation of residue going to surviving spouse

<b>Carried over (Gross estate minus all other deductions)</b>		<b>14,000,000</b>
<b>Bequests and accruals to parties other than the surviving spouse</b>		
Bequest to discretionary trust for benefit of children	3,500,000	
Policy B	1,500,000	
	<b>5,000,000</b>	
<b>Residue to spouse</b>		<b>9,000,000</b>

## Apportionment of duty to PC (Pty) Ltd

$$\frac{1,500,000 \text{ (Policy B)}}{5,000,000 \text{ (Net estate)}} \times 300,000 \text{ (Estate Duty)} = 90,000$$

# Apportionment of estate duty- example (2)

Description	Liabilities / deductions	Assets
Property		12,000,000
Deemed property		
Policy A		3,000,000
Policy B		1,500,000
<b>Gross estate</b>		<b>16,500,000</b>
Other deductions	2,500,000	
Amount to be taken into 4(q) calculation		14,000,000
Sec 4(q) deduction	9,750,000	
<b>Net estate</b>		<b>4,250,000</b>
Standard abatement (sec 4A)	3,500,000	
<b>Dutiable estate</b>		<b>750,000</b>
<b>Estate duty @ 20%</b>	<b>150,000</b>	

# Apportionment of estate duty- example (2)

## Calculation of residue going to surviving spouse

<b>Carried over (Gross estate minus all other deductions)</b>		<b>14,000,000</b>
<b>Bequests and accruals to parties other than the surviving spouse</b>		
Bequest to discretionary trust for benefit of children	3,500,000	
Policy B	750,000	
	<b>4,250,000</b>	
<b>Residue to spouse</b>		<b>9,750,000</b>

## Apportionment of duty to PC (Pty) Ltd

$$\frac{750,000 \text{ (Policy B)}}{5,000,000 \text{ (Net estate)}} \times 150,000 \text{ (Estate Duty)} = 45,000$$

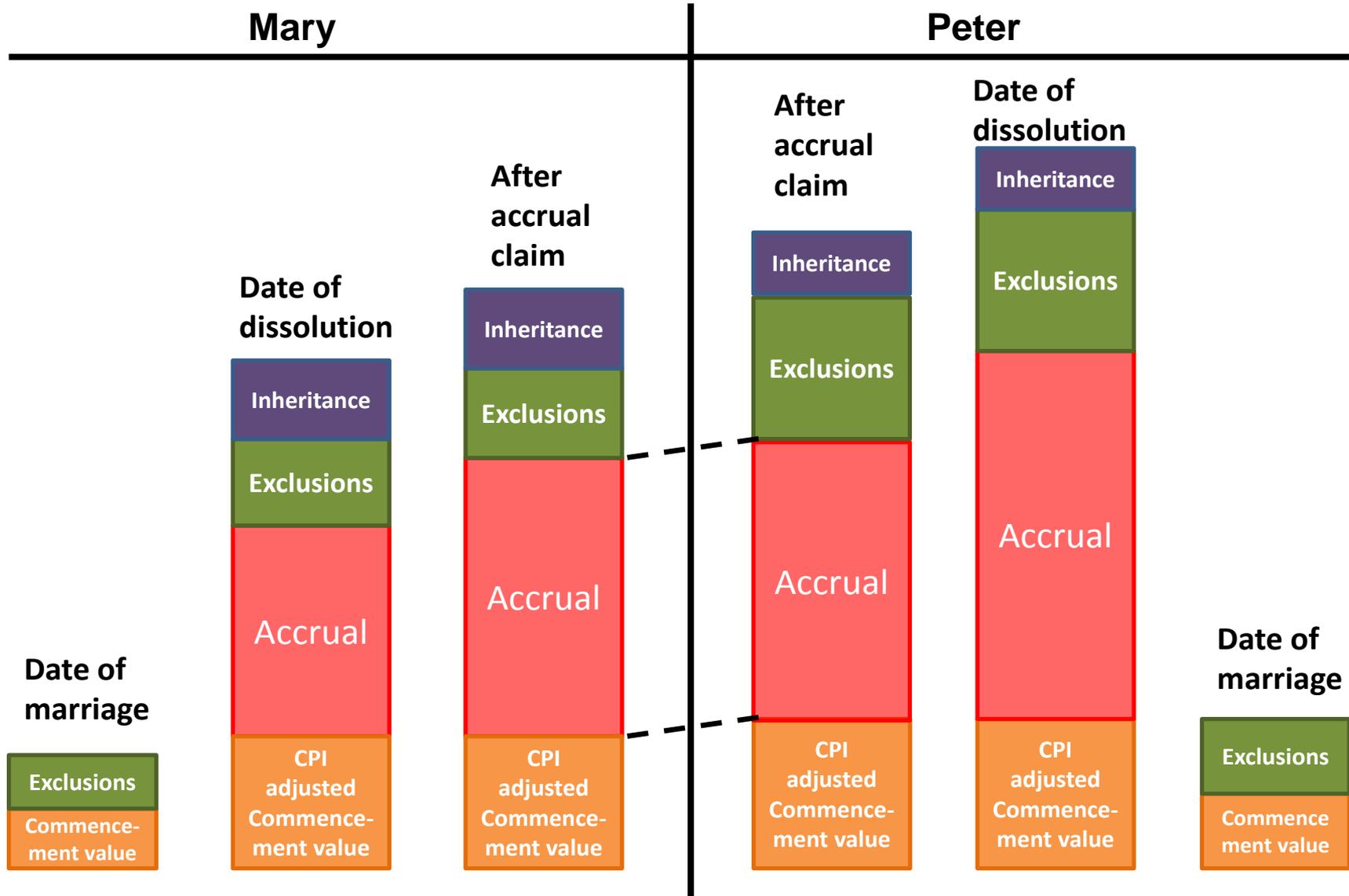
# Apportionment of estate duty- Consequences

- So, the policy is causing all the estate duty, but only contributes 30% of the duty payable.
- Keep this in mind when planning, especially when company-owned policies are taken out.
- Ensure that there is enough liquidity in the estate to pay the estate duty caused by the policy.
- Crucially important that there is an effective and properly funded buy-and-sell agreement in place to convert the deceased's stake in the company to cash.
- If a company-owned policy is taken out that will be deemed property in the client's estate, ensure that the buy-and-sell insurance is reviewed.

# Accrual system - General

- Accrual is an equalisation of the increase in wealth of the spouses during the subsistence of the marriage
- Therefore, once complete, the accrual calculation and claim will theoretically ensure that each spouse's estate will end up with one half of the aggregate net increase in wealth of both spouses during the subsistence of the marriage

# Accrual system



# Accrual system - pitfalls

- A commencement value and an exclusion is not the same thing!
- When planning, don't take the clients' word about their marital regime. Ask for a copy of the ANC.
- There are weird and wonderful ANC's out there:
  - Same assets taken as commencement values and excluded in ANC.
  - Creating community of property "... only insofar as general household assets, liabilities and expenses are concerned."
- A post-nuptial contract can change the marital regime to or from accrual, but will only be enforceable between the parties to the marriage.
- Neither spouse has a claim while the marriage lasts.
- Accrual is a marriage OUT of community of property – no claim against spouse B by spouse A's creditors.

# Claims against deceased estates

- Sec 29 to 33 of the Administration of Estates Act, 66 of 1965, (AEA) provides for the process to inform creditors of the deceased's death and invite claims from them.
- This process entails:
  - The executor must advertise for debtors and creditors to pay and lodge claims within a period of between thirty days and 3 months.
  - No property may be sold in execution before the expiry of this period, or after that without the consent of the Court.
  - The executor must accept or reject all claims.
  - There is an objection process w.r.t. the executor's decision
- In *Nedbank Ltd v Steyn & Others*<sup>1</sup> the SCA was faced with the question whether this procedure takes away a creditor's common law right to sue the executor for payment of the claim.

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1. [2015] ZASCA 30; [2015] 2 All SA 671 (SCA)

# Claims against deceased estates (2)

- Rule when interpreting any legislation is that if the intention is to amend the common law, the act must do so explicitly. If not, the common law stands.
- Steyn's husband died. At death, he was in arrears with the bond payments on their home.
- Thirteen months later Nedbank instituted their court action for payment of the outstanding bond payments, which were by then 27 months in arrears.
- The SCA ruled that the AEA does not explicitly take away the common law right to sue the estate of the deceased for payment.
- What does this mean?

# Claims against deceased estates (3)

- Creditors can institute action proceedings in court for payment of debts due by the deceased at date of death.
- Creditors are therefore not bound by the procedure in the AEA.
- However, this is unlikely to cause widespread use of this right provided the creditor is satisfied that the admin process is running smoothly.
- Planning:
  - Ensure that there is sufficient cash in the estate of your client to cover debts;
  - Ensure that a competent executor is nominated in your client's will.

# 3. TRUSTS

# The new sec 7C of the ITA

- Budget review 2016 contained the following sentence:
  - “To limit taxpayers’ ability to transfer wealth without being taxed, government proposes to ensure that the assets transferred through a loan to a trust are included in the estate of the founder at death, and to categorise interest free loans to trusts as donations.”
- It was not clear at the time how this was to be done.
- It appeared as if Treasury itself did not quite know how effect was going to be given to this statement.
- What was clear was that both threats could not materialise – to do so would be double tax. Or could they?

# The new sec 7C of the ITA

- The first draft Taxation Laws Amendment Bill, 2016, was published for comment on 8 July 2016.
- Proposal then was:
  - Difference between interest charged by a “connected person” on a loan to a trust, and the “official rate of interest” (currently 8% p.a.) will be added to the income of the lender;
  - The extra income tax caused by this provision may be recovered from the trust by the lender;
  - If the lender does not recover the tax from the trust, the tax amount will be a deemed donation to the trust;
  - The R100,000 p.a. donations tax exemption will not be available for this donation.

# The new sec 7C of the ITA

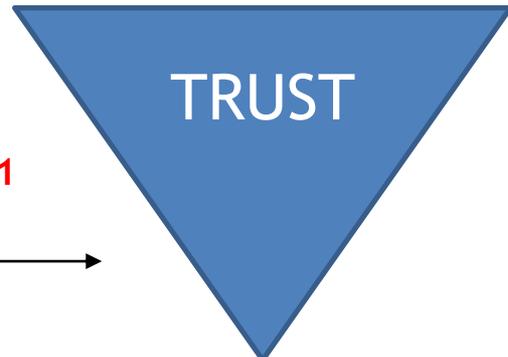
- Substantial input from the industry during the comment period (FISA also submitted comment):
  - It is undesirable to use one tax (income tax) to prevent avoidance of another tax (estate duty).
  - Amending the common law position w.r.t. interest on loans will create absurd situations and unfair results.
  - Using the official rate of interest for this purpose is inappropriate – short term interest rate preferable.
  - It is undesirable to approach a complex situation with a blunt instrument such as this.
  - Many trusts where loans exist are not in situations where the lender would be liable for estate duty. These will be unfairly treated as if they are estate duty avoidance schemes.
- There were also some technical problems with the wording of the section.
- This led to the [second draft](#) which became law in January w.e.f. 1/3/2017.

# The new sec 7C of the ITA

- The section as promulgated provides as follows:
  - If a natural person P (or a company at P's instance) extends a loan to a trust to which P is a connected person, then:
    - The difference between the interest the trust incurs during the year of assessment (YoA) and the official rate (8%) is deemed a donation by P to the trust on the last day of the YoA;
    - P may not claim a loss or deduction for a waiver of the loan or failure to claim payment of the loan;
    - The donation will qualify for the R100,000 p.a. exemption.
  - Exclusions are certain vested trusts, primary residence in trust, PBO trusts, special trusts for mentally or physically handicapped beneficiaries, Sharia financing arrangements (sec 24JA), loans by companies to trusts where the provisions of sec 64E(4) will apply, and international arms length transactions under sec 31(1).

### 3. TRUSTS - (a) Section 7C

**Loans between trusts?**



Transfer assets to trust against interest free loan account **1**

Provide funds to the trust to finance trust asset - no interest on loan **2**

**3**  
Distribute profits without payment - no interest

**Beneficiaries**

**Distributions example**

Natural person



Connected party to the Natural person



Company at the instance of the natural person

**Company / CC**

**R100k donation?  
R1,250k loan?  
Spouses – R2,5m loan?**

1. Loan, advance or credit
2. Provided by a Natural Person, or at the instance of that person, a company to whom Natural Person is related,
3. To a trust, in relation to which that natural person or company, or any person that is a connected person in relation to that person or company, is a connected person.
4. Low or No Interest
5. Timing (donation as at year end)
6. Penalty -  $8\% \times 20\% = 1,6\%$
7. Certain trusts excluded

**Only payable at year end?**

### 3. TRUSTS - (a) Section 7C

#### BENEFICIARY DISTRIBUTIONS

#### SARS EXPLANATORY MEMORANDUM (16 DECEMBER 2017)

An amount that is **vested irrevocably** by a trustee in a trust beneficiary and that is used or administered for the benefit of that beneficiary **without distributing or paying it** to that beneficiary **will not qualify as a loan or credit provided by that beneficiary** to that trust if -

a) the vested amount may in terms of the trust deed governing that trust not be distributed to that beneficiary, e.g. before that beneficiary **reaches a specific age;**

or

b) **that trustee has the sole discretion** in terms of that trust deed regarding the timing of and the extent of any distribution to that beneficiary of such vested amount.

### 3. TRUSTS - (a) Section 7C

#### BENEFICIARY DISTRIBUTIONS

#### SARS EXPLANATORY MEMORANDUM (16 DECEMBER 2017)

An amount vested by a trust in a trust beneficiary that is not distributed to that beneficiary **will, however, qualify as a loan or credit** provided by that beneficiary to that trust if that non-distribution results from an **election** exercised by that beneficiary or a request by that beneficiary that the amount not be distributed or paid over, e.g. if the beneficiary has reached the age at which a vested amount must be paid over or distributed to him or her and

#### CHOICE

- the trustee accedes to a request by that beneficiary that this not be done; or
- the beneficiary enters into an agreement with the trustee in terms of which the amount may be retained in the trust.

## ADDITIONAL SLIDE - 3. TRUSTS - (b) Possible Solutions - SUMMARY

### 1. Choose to pay the INTEREST (8%)

- Ensure that the interest would be deductible in the hands of the trust
- Create Taxable income in trust - trust assets rent out
- Create counter loan - levy interest

### 2. Choose NOT to pay the INTEREST (8%)

- Consider exceptions - primary residence / S 64(E4) - Dividend tax- 15% / R100 k donations per spouse
- Section 42(8) - consider

### 3. Consider to KILL the loan

- Donate the loan
- Waive the loan

### 4. Choose to REPAY the Loan

- Consider existing assets of the trust - tax values vs market values

## ADDITIONAL SLIDE - 3. TRUSTS - BUDGET FEBR 2017

### Annexure C: Additional Tax Policy and Administrative Adjustments

#### Refining measures to prevent tax avoidance through the use of trusts

1. In 2016, an anti-avoidance measure aimed at curbing the tax-free transfer of wealth to trusts through the use of low-interest or interest-free loans was introduced in the Income Tax Act (1962).
2. This anti-avoidance measure deems any interest foregone in respect of low-interest or interest-free loans to a trust to be donations that are subject to donations tax at a rate of 20 per cent.
3. **However, some taxpayers have already attempted to circumvent the anti-avoidance measure by making low-interest or interest-free loans to companies owned by a trust.**
4. To counter abuse, it is proposed that the **scope of this anti-avoidance measure be extended to cover these avoidance schemes.** In addition, it is proposed that the anti-avoidance rule should not apply to trusts that are not used for estate planning, for example, employee share scheme trusts and certain trading trusts.

### 3. TRUSTS - (b) Possible Solutions

1. Identify **Beneficiary distributions** and Amend Trust Deed and Amend Format of Financial Statements
2. Consider the **exclusions to section 7C (eg Special Testamentary Trust? (eg testamentary trust?), trust holding primary residence)**
3. Consider the asset classes of the Trust & consider the deductibility of interest in the trust when chose to pay (**example 1**)
4. Trust loan assets to individual (**example 2**)
5. Divide the loan **between Husband and Wife** (utilise R100k donation with each spouse) (R2,5m loan & R100k + R100k donation)

### 3. TRUSTS - (b) Possible Solutions

6. If Company & shareholder advanced the loan, consider -

- Dividend tax on the interest (15%) per annum (eff: 1,2%) - S 64E(4)
- Distribute the loan as a dividend in specie (15% x R) / compare donation (20% x R)

(Budget Speech 2017 - dividend withholding rate = now 20%)

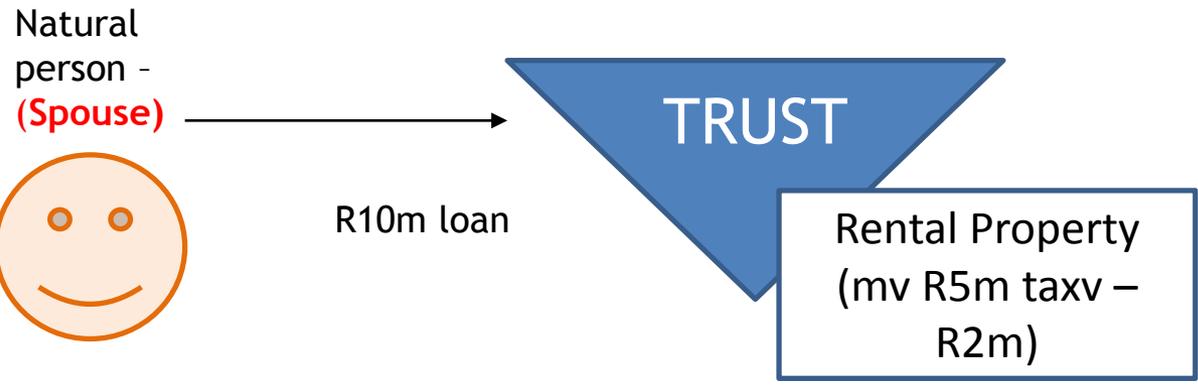
7. Consider **repayment** of the loan with assets / cash funds - watch out for CGT - and then onloan to a company which shares are held by trust  
(**example 3**)

8. Waiver of the loan / Donation of loan -  
= 20% donations tax x R

9. Section 42 transfer to a company (section 42(8))

### 3. TRUSTS - (b) Possible Solutions (example 1)

**Consider the asset classes of the Trust - Rental Property disposed**



**If interest will be levied:**

R10m x 8% = R800k  
Can the interest be deducted in trust?

**If interest is not levied:**

R10m x 8% x 20% = R160k donations tax

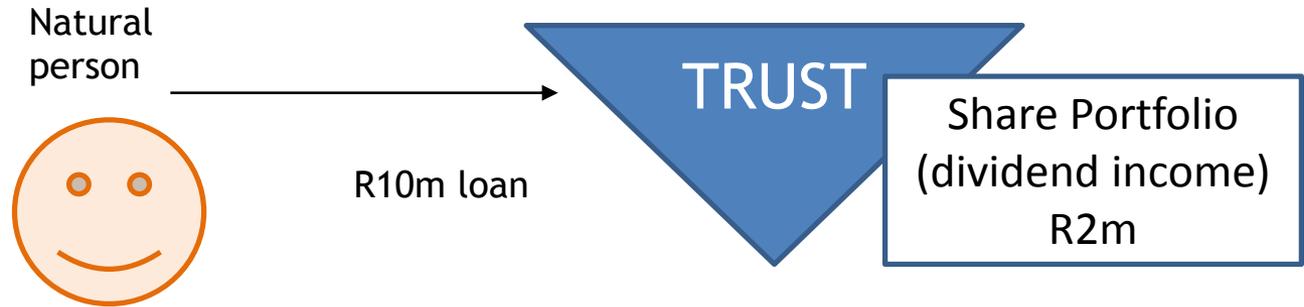
- Assume the Rental property is disposed**
- Distribute only the taxable capital gain to spouse **1**
  - Rest (after tax cash) advance as a loan to spouse **2**
  - Trust levy interest on the loan (10%) **3**

**Result**

- Interest receive in trust (R3m(eg) x 10% = R300k)
- Interest payable by trust R800k (see opposite)

### 3. TRUSTS - (b) Possible Solutions (example 2)

**Loan assets to individual**



**If interest will be levied:**

$R10m \times 8\% = R800k$   
Can the interest be deducted in trust?

**If interest is not levied:**

$R10m \times 8\% \times 20\% = R160k$  donations tax

Loan all dividend income to Natural Person (not distribute) **1**

Estate duty: Natural Person onloan to Company with Shares in trust **2**  
*(watch our for new remarks in Budget speech)*

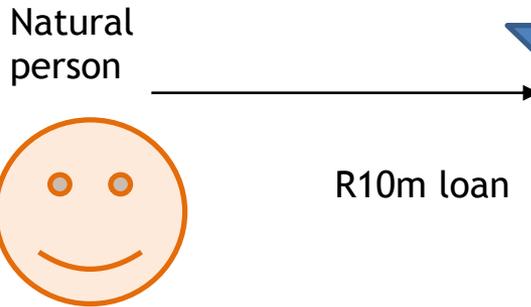
Trust then levies interest (10%) & Natural person levies interest from Co (10%) **3**

**Result**

- Interest receive in trust ( $R2m \times 10\% = R200k$ )
- Interest payable by trust R800k (see opposite)

### 3. TRUSTS - (b) Possible Solutions (example 3)

**Consider repayment of loan**



Share Portfolio	mv R5m	taxv R4,5
Loan receivable	mv R3m	taxv R3m
Property	mv R2m	taxv R1m

**If interest will be levied:**  
 $R10m \times 8\% = R800k$   
 Can the interest be deducted in trust?

**If interest is not levied:**  
 $R10m \times 8\% \times 20\% = R160k$  donations tax

Repay the loan with the assets and distribute the capital gains tax:

Capital gains:  
 Attorney's cost:  
 Transfer Duty:  
 STT:

**Result** 1. All assets disposed

- CGT -  $R500 + R1m = R1,5m \times 16,4\% = R246,000$
- Conveyancer's cost =  $2\% \times R2m = R40,000$
- Transfer Duty - R167,501
- STT -  $0,25\% \times R5m = R12,500$

**Result**

- Total = R466,00

= 5% van R10m

### 3. TRUSTS - (c) Chief Master Directive 1 of 2017

- Followed a workshop conducted from 22 to 24 February 2016.
- Section 3 of the Judicial Matters Amendment Act, 2005 which requires the Chief Master to “exercise control, direction and supervision over all the Masters”.
- Purpose: ... *to implement the following recommendations to ensure uniformity in all Master’s Offices.*
- Aspects mentioned in the Directive:
  - 1) Replacement of trustees appointed as nominee of a corporation
  - 2) Resignation of trustee (see discussion hereafter)
  - 3) Prior Letters of authority with removal of trustees
  - 4) The need to request an identity document from an existing trustee
  - 5) The Master’s power to refuse an appointment
  - 6) Appointment of trustees in the alternative

### 3. TRUSTS - (c) Chief Master Directive 1 of 2017

- Aspects mentioned in the Directive (cont):

7) Special Trusts and trusts created to receive compensation from the RAF

8) Amendment of trust deeds (see discussion hereafter)

9) Deregistration of trusts (see discussion hereafter)

10) Trustee's duty to obtain the master's written authority to deal with trust assets

**- Can not be an absolute prohibition**

11) Trust and communal property associations

**- The Master may not refuse to register a trust**

12) Implementing the decision in *Land and Agricultural Bank Of South Africa v Parker And Others* 2005(2) SA 77 (SCA) (see discussion hereafter)

13) The use of electronic signatures in trust transactions

14) PEAST SYSTEM

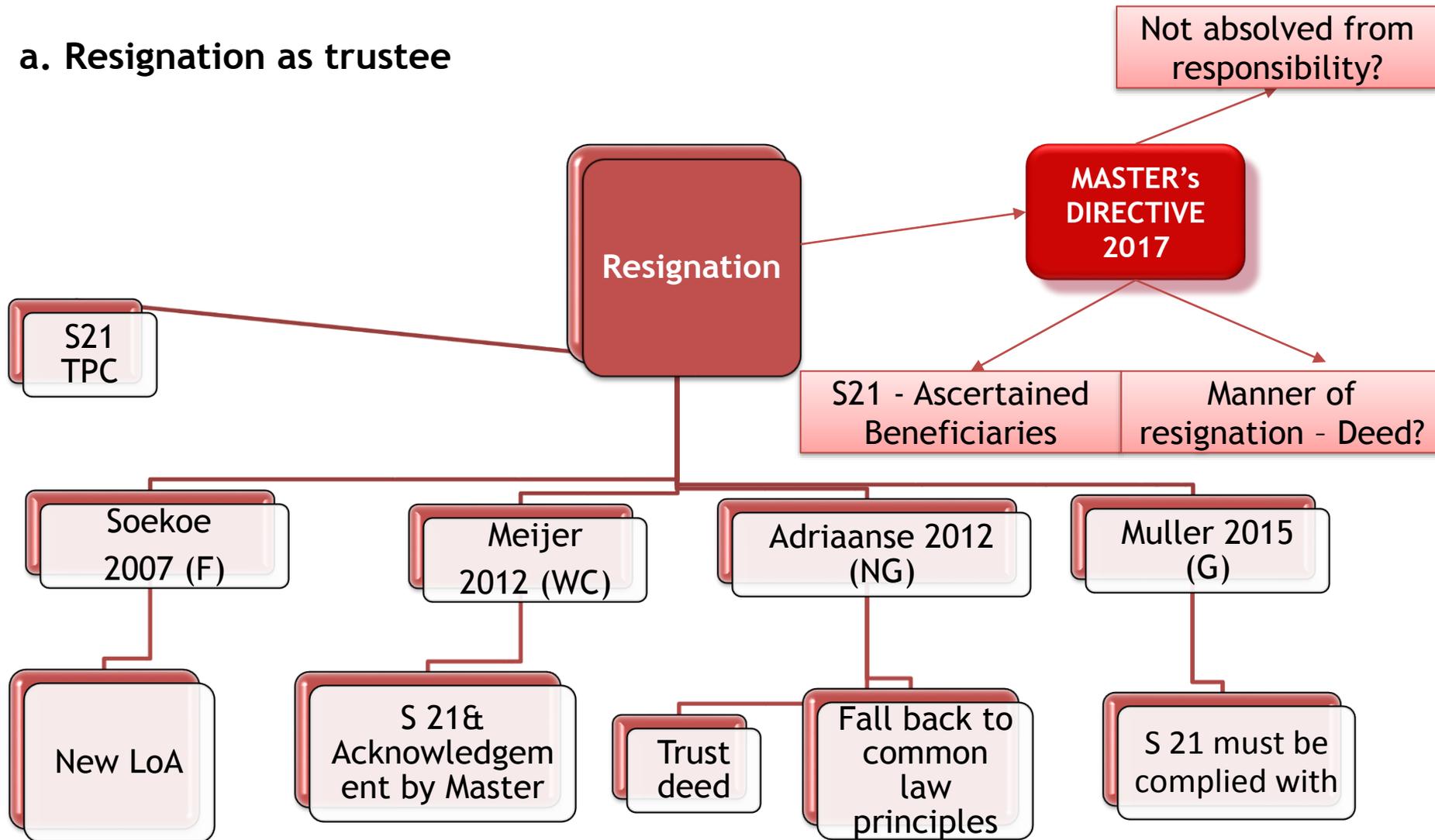
**There is no need to use pre-printed letters of authority, prepared by applicants, as PEAST generates its own letters of authority.**

15) The master's role in regulating trusts

**- Hanekom v Voigt – choice between 2 trusts**

### 3. TRUSTS - (c) Chief Master Directive 1 of 2017

#### a. Resignation as trustee



### 3. TRUSTS - (c) Chief Master Directive 1 of 2017

#### a. Resignation as trustee

##### Resign and replace:

When a trustee resigns, and:

- a) The trust deed prescribes a procedure to be followed to select a replacement trustee; or
- b) the trust deed contains a list of people or a class of people from which a new trustee should be selected,

the **Master must request assurance that the procedure was complied with** or that the nominee forms part of the designated group or class.

### 3. TRUSTS - (c) Chief Master Directive 1 of 2017

#### a. Resignation as trustee

##### Ascertained Beneficiaries:

In terms of section 21 of the Trust Property Control Act, 1988 a trustee must give notice of his or her resignation in writing to the Master and to the ascertained beneficiaries. The courts have not, on the date of this directive, had the opportunity to decide what **ascertained beneficiaries** in the context of section 21 of the Act means. Masters must therefore give the words their normal meaning, **namely beneficiaries with vested rights that are known to the trustees.**

##### Trustees not absolved:

The Trust Property Control Act, 1988 does **NOT** contain any provision **authorising the Master to refuse to accept the resignation of the trustee.** Masters must note that upon his or her resignation a trustee is not absolved from any liability incurred while he or she was a trustee.

### 3. TRUSTS - (c) Chief Master Directive 1 of 2017

#### b. Amendment of trust

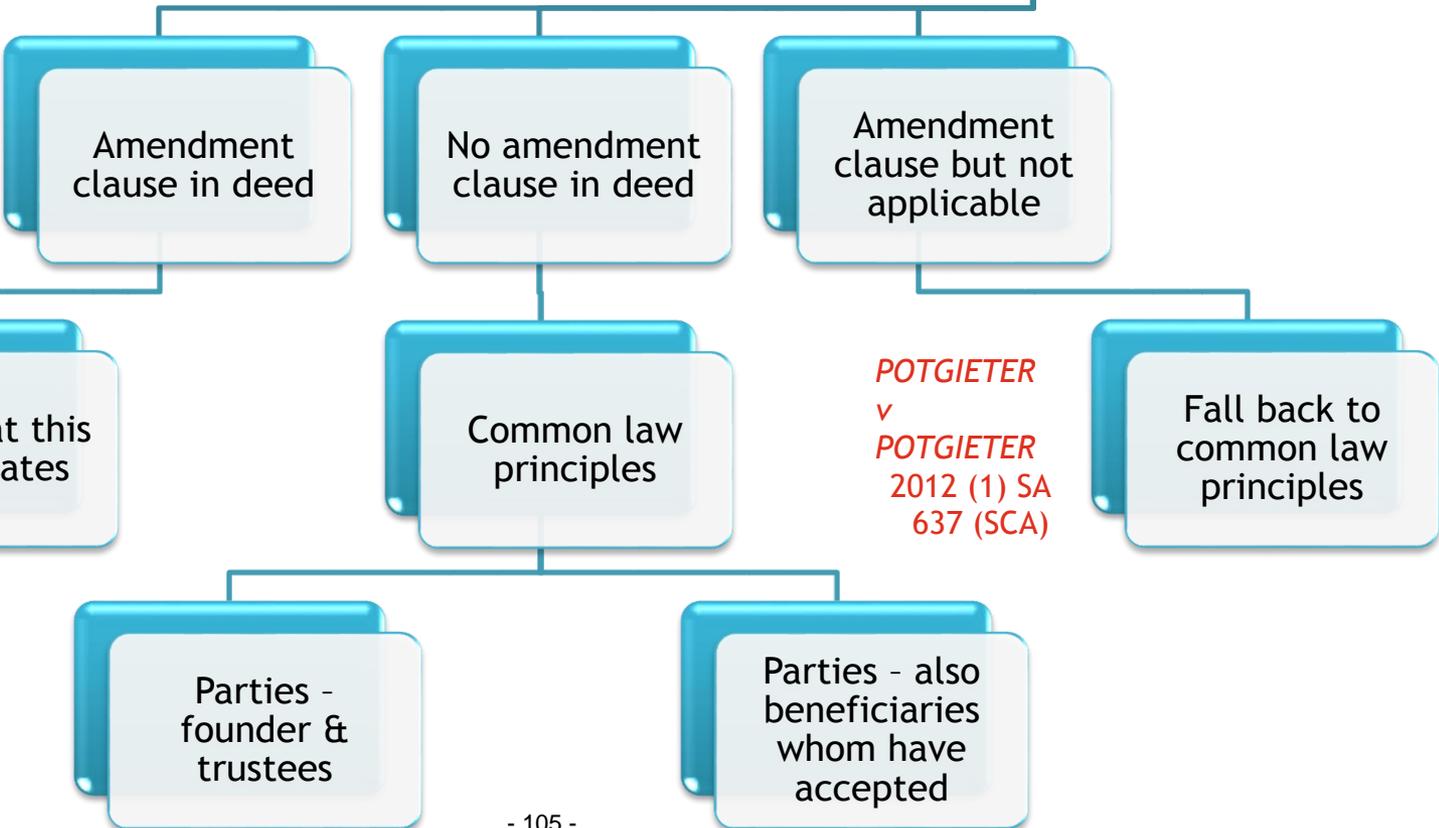
I acknowledge receipt of your letter dated 09 June 2016. I refer you to clause 19 of the Trust Deed. The Founder must sign all amendments during his lifetime if he is dead. Kindly furnish me a certified copy thereof.

Fiduciary duty towards all beneficiaries

*CROOKEES v WATSON (SCA)*

*HOFER v KEVITT (SCA)*

Law of Contract



*LEON LUKE ZAZERAJ NO v J H JORDAAN AND OTHERS - CASE NO 22526 / 2011*

*POTGIETER v POTGIETER 2012 (1) SA 637 (SCA)*

### 3. TRUSTS - (c) Chief Master Directive 1 of 2017

#### b. Amendment of trust deeds

The rule regarding the amendment of contracts (including inter vivos trust deeds) in common law is as follows (Christie Law of Contract 2006; 447):

- a. Parties to a contract are free to vary (or amend) their agreement. This means that **all the parties to the original contract may amend the original agreement as they please**, provided that, if a statute prescribes formalities for the amendment of a contract, those formalities must be complied with.
- b. Where the original agreement **contains a clause prohibiting the amendment of the contract**, the parties may still amend the contract, but it must now take place in two stages: first the prohibition clause needs to be amended, after which the contract may be amended.
- c. Section 13 of the *Trust Property Control Act, 1988* governs the situation where the **founder is no longer available** to agree to the amendment of the trust deed. In such a case the court has the power to amend the trust deed. The application to court is only necessary if the **trust deed does not contain an amendment clause**.

### 3. TRUSTS - (c) Chief Master Directive 1 of 2017

#### b. Amendment of trust deeds

d. There is, however, **no need for the Master to question** applications lodged with him or her without any reasonable ground to believe that amendment procedures were not adhered to.

e. Should:

- the trust instrument contains **provisions protected from amendment**; and
- the founder, trustees and beneficiaries entitled to the benefit cannot agree on the amendment,

the application for amendment must be made to the court in terms of section 13 of the *Trust Property Control Act, 1988*.

f. Amendments, where all the trustees and all the beneficiaries are replaced simultaneously or shortly after one another, **amounts to the creation of a new trust** and this practice should not be permitted or encouraged.

### 3. TRUSTS - (c) Chief Master Directive 1 of 2017

#### c. Deregistration of trust

There is no provision in the *Trust Property Control Act, 1988* that requires the deregistration of trusts.

However, there may be circumstances that may require confirmation from the Master that a trust has been terminated.

If a trust has been terminated the **Master will close his or her file** and may **then confirm** that the trust has been terminated and that the file is closed

### 3. TRUSTS - (c) Chief Master Directive 1 of 2017

#### c. Deregistration of trust

In order to close the file, the Master must request the following documents from the trustees:

- a) Reasons for termination of the trust or, where applicable, a copy of the **resolution terminating the trust**;
- b) The **original** letter of authority;
- c) **Bank statements** reflecting a nil balance on the final statement;
- d) **Proof that the beneficiaries** have received their benefits; and
- e) An **affidavit from the trustees** confirming that the trust has been divested of all assets.

When confirming the termination of the trust and informing the trustees that the trust file is closed, the Master must direct the attention of the trustees to the provisions of section 17 of the *Trust Property Control Act, 1988*.

### 3. TRUSTS - (c) Chief Master Directive 1 of 2017

#### d. Implementing Parker - decision (independent trustee)

The Master must consider appointing an independent trustee where the trust is registered for **the first time** with the Master and it emerges from the trust deed that the trust is a **“family business trust”** or has the potential of becoming such a trust.

**For the purpose of this directive a family business trust is a trust with the following characteristics:**

- a) The trustees have the power to **contract with independent** third parties, thereby creating trust creditors;
- b) The **trustees are all beneficiaries**; and
- c) The **beneficiaries are all related** to one another.

### 3. TRUSTS - (c) Chief Master Directive 1 of 2017

#### d. Implementing Parker - decision (independent trustee)

##### An independent trustee:

- Is a professional accountant, admitted attorney, an advocate who is affiliated to the relevant professional body or association, trust companies, boards of executors or fiduciary practitioners who are members of FISA;
- Has **no relation or connection, blood or other, to any of the existing or proposed trustees, beneficiaries or founder** of the trust;
- Has no reason for concluding or approving transactions that may prove to be invalid, because he or she would be knowledgeable about the law of trusts;
- Would not have any interest in the trust property **as a beneficiary**;
- Is not disqualified by the *Trust Property Control Act, 1988* from acting as a trustee; and
- Has knowledge and experience of the **business field in which the trust operates.**

### 3. TRUSTS - (c) Chief Master Directive 1 of 2017

#### d. Implementing Parker - decision (independent trustee)

The Master may in certain circumstances **dispense** with the appointment of an independent trustee and make use of one of the following alternatives:

- a) Decide to forego the appointment of the independent trustee after **receiving representations from the founder** showing good cause to dispense with the appointment of an independent trustee;
- b) Request that the trust deed **be amended** to exclude the powers of the trustee to run a business;
- c) Request **security**; or
- d) Request that financial statements **be audited annually** and that the auditor be instructed to inform the Master when potential harm to creditors is likely.

### 3. TRUSTS - (c) Chief Master Directive 1 of 2017

#### d. Implementing Parker - decision (independent trustee)

The following persons must be consulted to obtain nominations for an independent trustee:

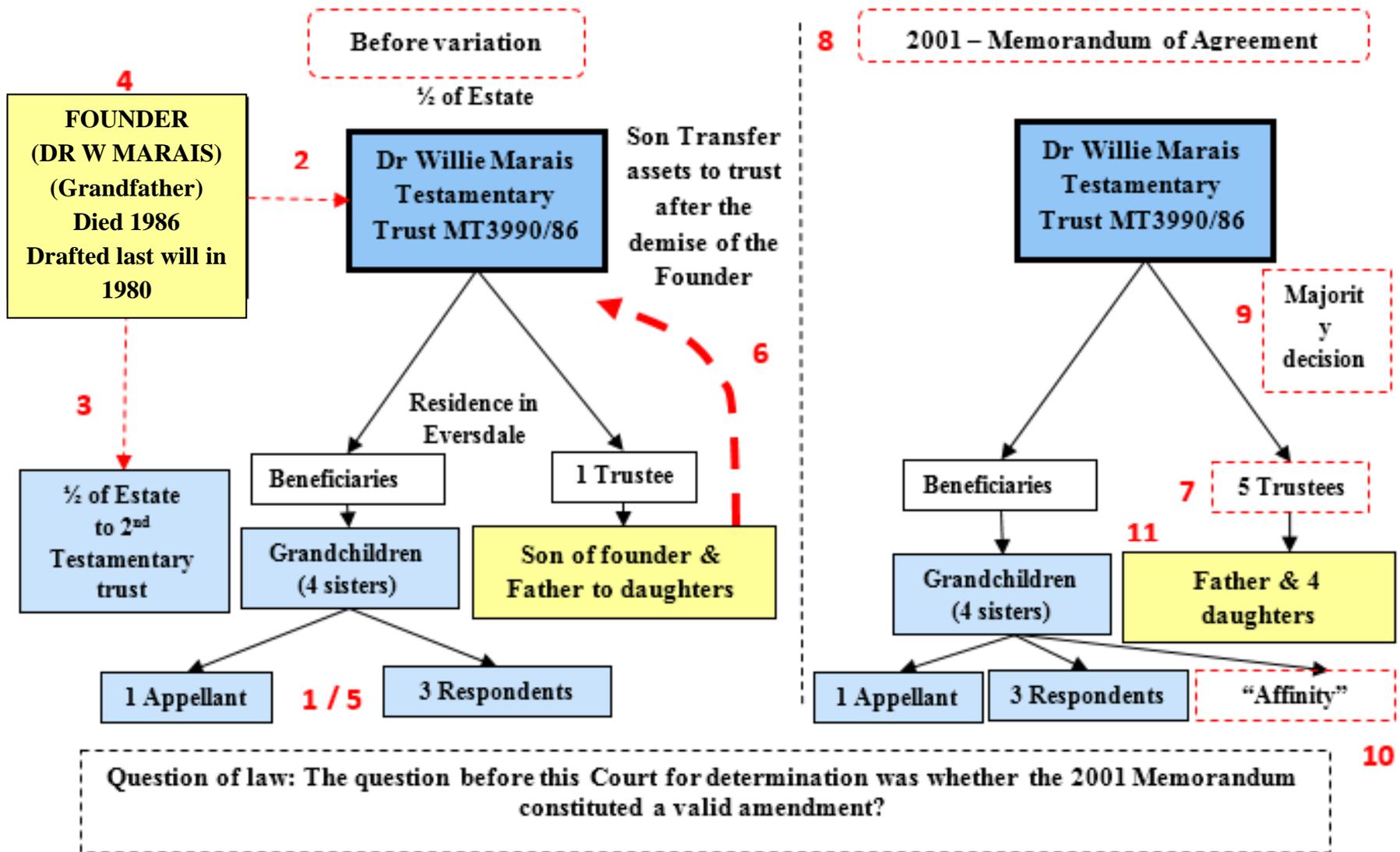
- a) The founder;
- b) The existing trustees;
- c) Beneficiaries with a vested right in the trust assets.

The Master is not bound by the nomination and may appoint a suitable person other than those nominated. This should however be done only in exceptional circumstances.

If the independent trustee resigns, the Master may, if he or she considers it desirable, replace the independent trustee in terms of section 7(2) of the Trust Property Control Act, 1988 notwithstanding the provisions of the trust deed.

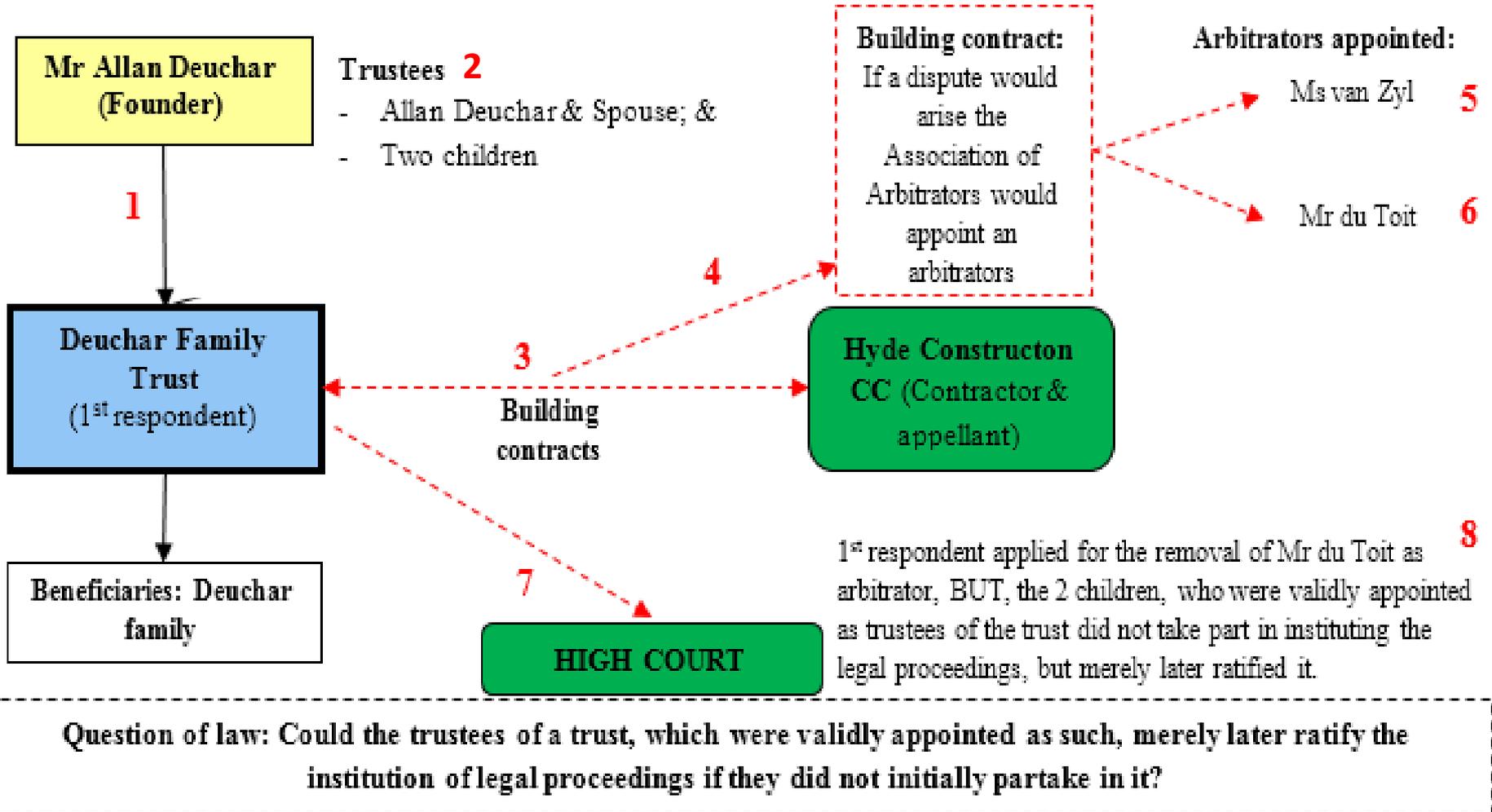
### 3. TRUSTS - (d) Court Case

HANEKOM v VOIGT N.O AND OTHERS (15493/2014) [2014] ZAWCHC 194 (10 12 2014)



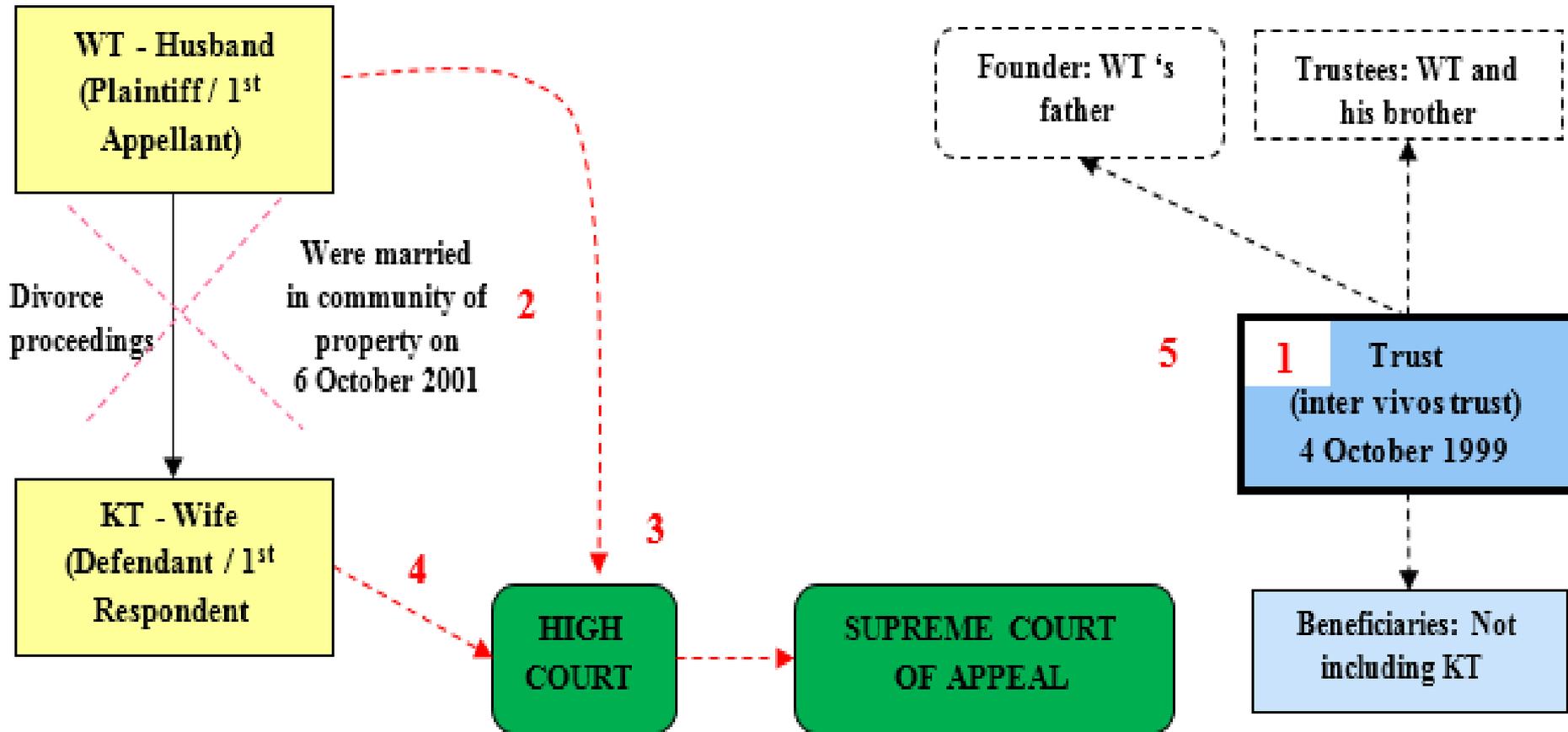
### 3. TRUSTS - (d) Court Case

#### HYDE CONSTRUCTION CC v DEUCHAR FAMILY TRUST AND ANOTHER 2015 (5) SA 388 (WCC)



### 3. TRUSTS - (d) Court Case

WT AND OTHERS v KT 2015 (3) SA 574 (SCA) (13 MARCH 2015)



Question of law: Whether or not assets of a discretionary family trust could be regarded as part of the assets of the joint estate of parties married in community of property.

## 2. TRUSTS - (f) Court Case - summary

- Penwill NO and Another v Penwill and Others (61782/2012) [2016] ZAGPPHC 473 (20 June 2016)
- Senwes Limited v Kruger N.O. and Others (Afrikaanse Protestantse Kerk (Hoopstad) Intervening) (3688/2015) [2016] ZAFSHC 63 (11 February 2016)
- Marshall N.O. and Others v CSARS (39219/2014) [2015] ZAGPPHC 304 (6 May 2015) (RED CROSS TRUST)
- Weiss N.O. and Others v Standard Bank of South Africa Ltd, In Re; Standard Bank of South Africa Limited v Fourie N.O. and Another (945/2010) [2013] ZANWHC 92 (16 May 2013)

## 2. TRUSTS - (f) Court Case - summary

- Du Toit v Du Toit and Others (2792/2015) [2016] ZAFSHC 7 (22 January 2016)
- Collet N.O and Others v and Another (618/2016) [2016] ZAECGHC 70
- Gowar v Gowar (149/2015) [2016] ZASCA 101 (9 June 2016)



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*Thank you*

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*Your pathway to **professional** development*

# Section 11(k)(i)&(ii) of the Income Tax Act, 58 of 1962

- (k) any amount contributed during a year of assessment to any pension fund, provident fund or retirement annuity fund in terms of the rules of that fund by a person that is a member of that fund: Provided that—
- (i) the total deduction to be allowed in terms of this paragraph must not in the year of assessment exceed the lesser of—
    - (aa) R350 000; or
    - (bb) 27,5 per cent of the higher of the person's—
      - (A) remuneration (other than in respect of any retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit and severance benefit) as defined in paragraph 1 of the Fourth Schedule; or
      - (B) taxable income (other than in respect of any retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit and severance benefit) as determined before allowing any deduction under this paragraph and section 18A;
- [Item (B) substituted by s. 26 (1) (b) of Act No. 15 of 2016 deemed to have come into operation on 1 March, 2016.]
- (ii) any amount so contributed in any previous year of assessment which has been disallowed solely by reason of the fact that it exceeds the amount of the deduction allowable in respect of that year of assessment is deemed to be an amount so contributed in the current year of assessment, except to the extent that the amount so contributed has been—
    - (aa) allowed as a deduction against income in any year of assessment;
    - (bb) accounted for under paragraph 5 (1) (a) or 6 (1) (b) (i) of the Second Schedule; or
    - (cc) exempted under section 10C;



# Par 5(1)(a) and 6(1)(b)(i) of the 2<sup>nd</sup> Schedule to the ITA

5. (1) The deduction to be allowed for the purposes of paragraph 2 (1) (a) is an amount equal to so much of—
  - (a) the person's own contributions that did not rank for a deduction against the person's income in terms of section 11 (k) to any pension fund, pension preservation fund, provident fund, provident preservation fund and retirement annuity fund of which he or she is or previously was a member;
  
6. (1) The deduction to be allowed for the purposes of paragraph 2 (1) (a) (ii) or (b) is an amount equal to—
  - (b) in any other case, so much of the aggregate of—
    - (i) the person's own contributions that did not rank for a deduction against the person's income in terms of section 11 (k) to any pension funds, pension preservation funds, provident funds, provident preservation funds and retirement annuity funds of which he or she is or previously was a member;



# Section 10C of the ITA

**10C. Exemption of non-deductible element of compulsory annuities.—**(1) For the purposes of this section—

**“compulsory annuity”** means the amount of the remainder of the retirement interest of a person payable in the form of an annuity as contemplated in—

- (a) paragraph (ii) (dd) of the proviso to paragraph (c) of the definition of “pension fund”;
- (b) paragraph (e) of the proviso to the definition of “pension preservation fund”; or
- (c) paragraph (b) (ii) of the proviso to the definition of “retirement annuity fund”.

(2) There shall be exempt from normal tax in respect of the aggregate of compulsory annuities payable to a person an amount equal to so much of the person’s own contributions to any pension fund, provident fund and retirement annuity fund that did not rank for a deduction against the person’s income in terms of section 11 (k) as has not previously been—

- (a) allowed to the person as a deduction in terms of the Second Schedule; or
- (b) exempted from normal tax in terms of this section, in respect of any year of assessment.



# Section 3(2)(bA) of the Estate Duty Act, 45 of 1955

3. What constitutes an estate.—(1) For the purposes of this Act the estate of any person shall consist of all property of that person as at the date of his death and of all property which in accordance with this Act is deemed to be property of that person at that date.
- (2) “Property” means any right in or to property, movable or immovable, corporeal or incorporeal, and includes—
- (a) any fiduciary, usufructuary or other like interest in property (including a right to an annuity charged upon property) held by the deceased immediately prior to his death;
  - (b) any right to an annuity (other than a right to an annuity charged upon any property) enjoyed by the deceased immediately prior to his death which accrued to some other person on the death of the deceased,
  - (bA) so much of the amount of any contribution made by the deceased in consequence of membership or past membership of any pension fund, provident fund, or retirement annuity fund, as was not allowed as a deduction in terms of section 11 (k) or (n) of the Income Tax Act, 1962 (Act No. 58 of 1962), or paragraph 2 of the Second Schedule to that Act or, as was not exempt in terms of section 10C of that Act in determining the taxable income as defined in section 1 of that Act, of the deceased;
- [Para. (bA) inserted by s. 2 (1) of Act No. 25 of 2015 and comes into operation on 1 January 2016 and applicable in respect of the estate of a person who dies on or after that date in respect of contributions made on or after 1 March 2015.]



# Sec 11 of the EDA

- 11. Person liable for duty.**— The person liable for the duty shall be—
- (a) where duty is levied on property of the deceased which falls under subsection (2) of section three—
    - (i) as to any property referred to in paragraph (a) or (b) of that subsection, the person to whom any advantage accrues by the death of the deceased;
    - (ii) as to any other property, the executor;
  - (b) where duty is levied on property which, in accordance with subsection (3) of section three, is deemed to be property of the deceased—
    - (i) as to property referred to in paragraph (a) of that subsection, the executor: Provided that where the amount due under the policy is recoverable by any person other than the executor, the person liable for the duty shall be the person entitled to recover the amount due under the policy;
    - (ii) as to any property referred to in paragraph (b) of that subsection, the donee;
    - (iii) as to any property referred to in paragraph (cA) or (d) of that subsection, the executor.



# Sec 7C of the ITA

- 7C. Loan or credit advanced to a trust by a connected person.**—(1) This section applies in respect of any loan, advance or credit that—
- (a) a natural person; or
  - (b) at the instance of that person, a company in relation to which that person is a connected person in terms of paragraph (d) (iv) of the definition of connected person, directly or indirectly provides to a trust in relation to which that person or company, or any person that is a connected person in relation to that person or company, is a connected person.
- (2) No deduction, loss, allowance or capital loss may be claimed in respect of—
- (a) a disposal, including by way of a reduction or waiver; or
  - (b) the failure, wholly or partly, of a claim for the payment, of any amount owing in respect of a loan, advance or credit referred to in subsection (1).
- (3) If a trust incurs—
- (a) no interest in respect of a loan, advance or credit referred to in subsection (1); or
  - (b) interest at a rate lower than the official rate of interest as defined in paragraph 1 of the Seventh Schedule,
- an amount equal to the difference between the amount incurred by that trust, during a year of assessment as interest in respect of that loan, advance or credit and the amount that would have been incurred by that trust at the official rate of interest must, for purposes of Part V of Chapter II, be treated as a donation made to that trust by the person referred to in subsection (1) (a) on the last day of that year of assessment of that trust.



# Sec 7C of the ITA

- (4) If a loan, advance or credit was provided by a company to a trust at the instance of more than one person that is a connected person in relation to that company as referred to in paragraph (b) of subsection (1), each of those persons must be treated as having donated, to that trust, the part of that amount that bears to that amount the same ratio as the equity shares or voting rights in that company that were held by that person during that year of assessment bears to the equity shares or voting rights in that company held in aggregate by those persons during that year of assessment.
- (5) Subsections (2) and (3) do not apply in respect of any amount owing by a trust during a year of assessment in respect of a loan, advance or credit referred to in subsection (1) if—
  - (a) that trust is a public benefit organisation approved by the Commissioner in terms of section 30 (3) or a small business funding entity approved by the Commissioner in terms of section 30C;
  - (b) that loan, advance or credit was provided to that trust by a person by reason of or in return for a vested interest held by that person in the receipts and accruals and assets of that trust and—
    - (i) the beneficiaries of that trust hold, in aggregate, a vested interest in all the receipts and accruals and assets of that trust;
    - (ii) no beneficiary of that trust can, in terms of the trust deed governing that trust, hold or acquire an interest in that trust other than a vested interest in the receipts and accruals and assets of that trust;
    - (iii) the vested interest of each beneficiary of that trust is determined solely with reference and in proportion to the assets, services or funding contributed by that beneficiary to that trust; and
    - (iv) none of the vested interests held by the beneficiaries of that trust is subject to a discretionary power conferred on any person in terms of which that interest can be varied or revoked;



# Sec 7C of the ITA

- (c) that trust is a special trust as defined in paragraph (a) of the definition of a special trust;
- (d) that trust used that loan, advance or credit wholly or partly for purposes of funding the acquisition of an asset and—
  - (i) the person referred to in subsection (1) (a) or the spouse of that person used that asset as a primary residence as contemplated in paragraph (b) of the definition of “primary residence” in paragraph 44 of the Eighth Schedule throughout that year of assessment; and
  - (ii) the amount owed relates to the part of that loan, advance or credit that funded the acquisition of that asset;
- (e) that loan, advance or credit constitutes an affected transaction as defined in section 31 (1) that is subject to the provisions of that section;
- (f) that loan, advance or credit was provided to that trust in terms of an arrangement that would have qualified as a sharia compliant financing arrangement as contemplated in section 24JA, had that trust been a bank as defined in that section; or
- (g) that loan, advance or credit is subject to the provisions of section 64E (4).



## **25. Taxation of deceased estates.—(1) Any—**

- (a) income received by or accrued to or in favour of any person in his or her capacity as the executor of the estate of a deceased person; and
- (b) amount received or accrued as contemplated in paragraph (a) which would have been income in the hands of that deceased person had that amount been received by or accrued to or in favour of that deceased person during his or her lifetime,

must be treated as income of the deceased estate of that deceased person.

## **(2) Where the deceased estate of a person acquires an asset from that person, that deceased estate must, if that asset is an asset—**

- (a) other than an asset contemplated in section 9HA (2), be treated as having acquired that asset for an amount of expenditure incurred equal to the amount contemplated in section 9HA (1); and
- (b) contemplated in section 9HA (2), be treated as having acquired that asset for an amount of expenditure incurred equal to the amount contemplated in section 9HA (2) (b).

## **(3) Where the deceased estate of a person disposes of an asset to an heir or legatee of that person—**

- (a) that deceased estate must be treated as having disposed of that asset for an amount received or accrued equal to the amount of expenditure incurred by the deceased estate in respect of that asset; and
- (b) the heir or legatee must be treated as having acquired that asset for an amount of expenditure incurred equal to the expenditure incurred by the deceased estate in respect of that asset.

# Section 25 of the ITA (2)

- (4) (a) This subsection must be applied in respect of an asset acquired by a surviving spouse of a deceased person as contemplated in section 9HA (2) for purposes of determining the amount of any—
- (i) allowance or deduction to which that spouse may be entitled or that is to be recovered or recouped by or included in the income of that spouse in respect of that asset; or
  - (ii) the amount of any capital gain or capital loss in respect of a disposal of that asset by that spouse.
- (b) The surviving spouse contemplated in paragraph (a) must be treated as one and the same person as the deceased person and deceased estate with respect to—
- (i) the date of acquisition of that asset by that deceased person;
  - (ii) any valuation of that asset effected by that deceased person as contemplated in paragraph 29 (4) of the Eighth Schedule;
  - (iii) the amount of any expenditure and the date on which and the currency in which that expenditure was incurred in respect of that asset—
    - (aa) by that deceased person as contemplated in section 9HA (2) (b); and
    - (bb) by that deceased estate, other than the expenditure contemplated in section 9HA (2) (b);
  - (iv) the manner in which that asset had been used by the deceased person and the deceased estate; and
  - (v) any allowance or deduction allowable in respect of that asset to the deceased person and the deceased estate.



## Section 25 of the ITA (3)

- (5) A deceased estate must, other than for the purposes of section 6, section 6A and section 6B, be treated as if that estate were a natural person.
- (6) Where—
  - (a) the tax determined in terms of this Act, which relates to the taxable capital gain derived by a deceased person from assets disposed of by that person as contemplated in section 9HA, exceeds 50 per cent of the net value of the estate of that person, as determined in terms of section 4 of the Estate Duty Act for purposes of that Act, before taking into account the amount of that tax so determined; and
  - (b) the executor of the estate is required to dispose of any asset of the estate for purposes of paying the amount of the tax contemplated in paragraph (a), any heir or legatee of the estate who would have been entitled to that asset contemplated in paragraph (b) had there been no liability for tax, may elect that that asset be distributed to that heir or legatee if the amount of tax which exceeds 50 per cent of that net value be paid by that heir or legatee within a period of three years after the date that the estate has become distributable in terms of section 35 (12) of the Administration of Estates Act, 1965 (Act No. 66 of 1965).
- (7) Any amount of tax payable by an heir or legatee as contemplated in subsection (6), becomes a debt due to the state and must be treated as an amount of tax chargeable in terms of this Act which is due by that person.

[S. 25 substituted by s. 22 of Act No. 113 of 1993 and by s. 48 (1) of Act No. 25 of 2015 with effect from 1 March, 2016 and applicable in respect of persons who die on or after that date.]



## **9HA. Disposal by deceased person.**

- (1) A deceased person must be treated as having disposed of his or her assets, other than
- (a) assets disposed of to his or her surviving spouse as contemplated in subsection (2);
  - (b) a longterm insurance policy of the deceased, if any capital gain or capital loss that would have been determined in respect of a disposal that resulted in proceeds of that policy being received by or accruing to the deceased would have been disregarded in terms of paragraph 55 of the Eighth Schedule; or
  - (c) an interest of the deceased in
    - (i) a pension, pension preservation, provident, provident preservation or retirement annuity fund in the Republic; or
    - (ii) a fund, arrangement or instrument situated outside the Republic which provides benefits similar to a pension, pension preservation, provident, provident preservation or retirement annuity fund,  
if any capital gain or capital loss that would have been determined in respect of a disposal of that interest that resulted in a lump sum benefit being received by or accruing to the deceased would have been disregarded in terms of paragraph 54 of the Eighth Schedule,at the date of that person's death for an amount received or accrued equal to the market value as contemplated in paragraph 31 of the Eighth Schedule of those assets as at that date.



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- (2) A deceased person must, if his or her surviving spouse is a resident, be treated
- (a) as having disposed of an asset for the benefit of that surviving spouse if that asset is acquired by that surviving spouse
    - (i) by ab intestato or testamentary succession;
    - (ii) as a result of a redistribution agreement between the heirs and legatees of that person in the course of liquidation or distribution of the deceased estate of that person; or
    - (iii) in settlement of a claim arising under section 3 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984); and
  - (b) as having disposed of that asset for an amount received or accrued that is equal to, in the case of
    - (i) trading stock, or livestock or produce contemplated in the First Schedule, the amount that was allowed as a deduction in respect of that asset for purposes of determining that person's taxable income, before the inclusion of any taxable capital gain, for the year of assessment ending on the date of that person's death; or
    - (ii) any other asset, the base cost of that asset, as contemplated in the Eighth Schedule, as at the date of that person's death.
- (3) If any asset that is treated as having been disposed of by a deceased person as contemplated in subsection (1) is transferred directly to an heir or legatee of that person, that heir or legatee must be treated as having acquired that asset for an amount of expenditure incurred equal to the market value as contemplated in paragraph 31 of the Eighth Schedule of that asset as at the date of that deceased person's death.

[S. 9HA inserted by s. 15 (1) of Act No. 25 of 2015 with effect from 1 March, 2016 and applicable in respect of a person who dies on or after that date.]

