ACCRUAL CAN IMPERIL INHERITANCE

John and Jane marry out of community of property by Antenuptial Contract which automatically includes the accrual system introduced by the Matrimonial Property Act No. 88 of 1984. Section 2 of the Act states that "*every marriage out of community of property in terms of an Antenuptial Contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is subject to the accrual system specified in this Chapter, except insofar as that system is expressly excluded by the Antenuptial Contract.*"

Neither John nor Jane bring any assets into the marriage and the commencement value of the estate of each is nil. John embarks on a successful business career. After ten years he has an estate of R12 million. The family home is registered in Jane's name. The couple have two children. Tragedy strikes and the widowed husband is left to bring up the two children. Some years prior to the death of Jane the couple had updated their Wills. It was decided that because John was amassing an estate and in order to limit the growth in John's estate, Jane would bequeath her assets (which in their view was the home only) to a Trust to be administered for the children during their minority. John would be entitled to occupy the home during his lifetime. On Jane's death the home was worth R2 million.

The executor of Jane's estate informed John that because his assets were valued at R10 million more than his wife's assets, the accrual system obliged him, at the dissolution of the marriage, to transfer assets worth R5 million to his wife's estate. Those assets would be dealt with in accordance with Jane's Will and would vest in the Trust created for the children. In one stroke John's estate was halved. The income he previously had earned from his investments was halved. John's only consolation was that his children were the beneficiaries of the Trust and that he would have a right of occupation to the home.

Assume John and Jane had not had children and John's estate had grown to R16 million. When drawing their Wills both agreed that if Jane were the first to

die that John would have sufficient assets and income for the remainder of his lifetime and that Jane could leave her home to a charity about which Jane was passionate, namely the SPCA. John would not want to live in the home anymore so he did not want a right of occupation. He was glad Jane would be able to endow a worthy organisation. Unfortunately Jane's Will did not bequeath only her home to the SPCA but bequeathed her entire estate to the SPCA. Jane incorrectly thought that her Will would apply only to her home.

To his horror John discovered that the accrual system obliged him to pay his wife's estate the sum of R7 million and therefore indirectly to endow the SPCA in the sum of R7 million. He was an unwitting and unwilling donor.

In the first example given, assume John had been the first dying. Assume further that John had been concerned during his lifetime that if he left his estate to his wife that she might lack the financial acumen to preserve the assets for the benefit of his children. With her agreement, John provided in his Will for the creation of a testamentary trust so that his assets would be administered by selected trustees. The income would accrue for the benefit of Jane and the children. John did not realise that at the dissolution of the marriage through death, one-half of the difference in the value of the two estates namely R5 million would devolve upon Jane directly because of the accrual. Only the balance of R5 million would devolve upon the Trust. In addition to her home, Jane now had R5 million to do with as she pleased. John's careful plans had in part been thwarted.

Peter and Susan had substantial estates. After marriage their assets grew further because of astute investments. When Peter learned that he had terminal cancer his estate was worth R20 million and Susan's R10 million. Peter was told that, after allowing for the rebate of R3 500 000,00 and expenses of R500 000,00, the remainder of his estate of R16 million would attract estate duty of 20% or R3 200 000,00. Peter's estate had been valued at R12 million in 2001 when Capital Gains Tax ("CGT") had been introduced so his estate would be liable for CGT on the gain of R8 million in the sum of R800 000,00.

His total contribution to the fiscus would therefore be R4 million. Susan owned the primary residence so Peter could not claim the rebate of R1 500 000,00.

Peter was told that if he were to bequeath all his assets to Susan, his estate would be exempt from estate duty and CGT because of the roll-over provisions in the tax legislation. However on Susan's subsequent death her estate would be liable for those amounts plus additional tax on the further growth in her estate. In addition she would be taxed on the assets she owned in her own right. It made sense therefore for Peter to leave R10 million to a Trust for his children, to pay the estate duty and CGT on that legacy and to bequeath the residue of his estate to his wife.

In their Antenuptial Contract, Peter and Susan had not stipulated any commencement values. Accordingly the accrual system would apply to the whole of their estates, regardless of what they had brought into the marriage. In deciding to leave R10 million to a Trust, Peter and his advisor overlooked the impact the accrual system would have on his estate. One half of the difference in value in their estates automatically would vest in Susan. Accordingly Susan was entitled to R5 million by virtue of the accrual system before any consideration was given to Peter's Will. The Act stipulates that "*The accrual of the estate of a deceased spouse is determined before effect is given to any testamentary disposition or donation.*"

The accrual had the effect of reducing the value of Peter's estate to be distributed in terms of the Will from R20 million to R15 million. Although Peter intended to bequeath R10 million to the Trust for his children, because of fluctuations in the value of his assets, he did not stipulate a figure in the Will but simply left one-half of the residue of his estate to the Trust. His oversight concerning the effect of the accrual resulted in a substantial reduction in the amount of the bequest to the Trust created for his children.

Other examples could be given. The accrual system is intended primarily to protect and provide for wives who spend much of their working lives looking

after their children and managing the home. Freed of domestic responsibilities, the husband is able to amass wealth. The experience of the Courts before the accrual system was introduced was that in many divorce cases the wife who had given the best years of her life to the marriage was left with very little. The noble goals of the accrual system presumably are achieved in most instances. However couples whose marriages are subject to the accrual system need to give careful consideration to the impact the accrual will have before the terms of their Wills are given effect to.

The accrual system has probably contributed to a fair and equitable division of and distribution of assets upon divorce. However the effect of the system on the interpretation of Wills which were drawn without regard to the accrual system will, as the years go by, become more and more evident. It is twenty years since the Act was promulgated. The full impact of the system may take years to be felt. The same may be said about CGT although the impact of CGT is already felt because of the significant growth in value which has occurred in assets such as equities and property since the introduction of CGT in 2001. Apart from the primary residence rebate, the current exemption from CGT in the year of death is only R120 000,00.

Over time, CGT coupled with estate duty can result in taxes payable on death being close to 30% of the value of the estate (after allowance of the primary rebate). One way of limiting these death duties is to transfer assets to or to acquire assets in an *inter vivos* trust. While the trust will limit liability for additional estate duty, it will not avoid CGT. CGT is payable by a beneficiary when assets held by a Trust vest in that beneficiary. If a trust disposes of assets and pays the proceeds to the beneficiary, the trust would be liable for CGT of 20%. It is therefore preferable for a capital gain to be awarded to or to vest in an individual beneficiary who will pay tax up to a maximum of 10% of the gain. Payment of CGT can be postponed by roll-over provisions or by the retention of assets. However, apart from exemptions such as R1 500 000,00 of the gain arising from the disposal of a primary residence, CGT cannot be avoided on eventual disposal.

JC Sonnekus in his commentary on matrimonial property law (Family Law Service by Butterworths, Division B) makes the point that "*although the Act provides for equal sharing in the defined accrual of both estates, parties can expressly alter their particular shares of the accrual in their Antenuptial Contract.*" This is not often done.

The conclusion to be drawn is that it is essential that a person drafting a Will for a married person be given full particulars of the assets and liabilities of both spouses and that the consequences of the matrimonial regime be carefully investigated. Because marriages in community of property without an Antenuptial Contract have existed for much longer than marriages governed by the accrual system, there are many examples of testators who drew Wills which took no account of the marriage in community of property. Classic examples are a bequest by a spouse of the matrimonial home to a Trust or to a third party. Because one-half of the assets in a joint estate vest in each spouse, the effect of the Will is to transfer only a one-half undivided share in the home to the Trust or third party. The other one-half vests in the surviving spouse by operation of law. Accordingly caution should also be exercised when drawing a Will for a person who is married in community of property.

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