



MAINTENANCE CLAIMS and DECEASED ESTATES

Even after death you have an obligation to support dependent children. By **Debi Godwin**, Director - Independent Executor & Trust.

A testator may for the flimsiest of reasons, or for no reason at all, disinherit his spouse or children in favour of a third party. But even in death he cannot escape his obligation to support his dependent children. His children will have a claim for maintenance against his estate, whatever he may or may not say in his will.

If you are the financially dependent spouse in a marriage, it is essential to ensure that the will of your spouse makes adequate provision for your maintenance. This is a delicate matter, and many people feel uncomfortable in asking to see their spouse's will. Even having read the will, you have no guarantee that they won't later change the will that they have shown you.

Consider this unpleasant scenario: you are financially dependent on your spouse, and when he or she dies, you discover that the will makes no provision, or inadequate provision, for your on-going maintenance. Perhaps it was an oversight, or perhaps your spouse had a long-standing grudge against you, and now it's pay-back time. In any event, the will now leaves you financially high and dry.

What are your legal rights?

The law provides that, if a person, whether in error or with intent, fails to make provision in their will for the maintenance of a person to whom they owe a legal duty of support (for example, a minor child) the latter can lodge a claim against the deceased estate for maintenance.

The Maintenance of Surviving Spouses Act

gives a surviving spouse the right to claim maintenance from the deceased estate of the first-dying spouse, if the surviving spouse cannot maintain themselves from their own resources. The Act provides that the claim must be calculated for the provision of their **reasonable** maintenance needs until their death or remarriage, in so far as they are not able to provide for these needs from their own means and earnings. This also applies to same-sex partners in a permanent life relationship. The Act also allows the executor of an estate to satisfy any such claim for maintenance by a surviving spouse by any appropriate agreement with that surviving spouse and the heirs or by the creation of a trust. Any award of maintenance made by the court in terms of this Act has to be in the form of periodic payments, and cannot take the form of a lump-sum payment.

As a beneficiary of a discretionary trust, the surviving spouse has no absolute right to any income or capital of the trust. They receive trust income and capital only if the trustees, in their discretion, decide to make a distribution to them. The surviving spouse may, therefore, be left in uncertainty as to whether the trustees will distribute trust income to them, and whether they will continue to do so on a regular basis. It is advisable to seek advice as to whether the spouse should require the trustees to pass a resolution binding themselves to pay trust income to him/her, or whether they should lodge a claim against the deceased estate for maintenance in terms of the Maintenance of Surviving Spouses Act. ⊕



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