TESTAMENTARY MARITAL EXCLUSION CLAUSES

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A common clause in wills is one where the testator declares that any bequest to a beneficiary is to be free of any community of property or profit and loss. In other words, the beneficiary's spouse is not entitled to share in the inheritance. The rationale behind this marital exclusion clause is to ensure that only the beneficiary receives the benefit of the inheritance. Does this clause adequately protect the inheritance of a beneficiary married in community of property against any claim to such inheritance from the beneficiary's spouse and the spouse's creditors?

Protection from a Spouse

If two people get married in community of property, the legal effect is that the spouses' separate estates are joined to form one joint estate. All assets which were owned separately by each spouse prior to the marriage become part of the joint estate. The same applies to liabilities. All assets acquired and liabilities incurred after the date of the marriage would therefore belong to the joint estate.

The Matrimonial Property Act (Act 88 of 1984) provides for certain exceptions to this rule by stating that the following assets and liabilities do not form part of a joint estate:

- Property donated or bequeathed to a beneficiary subject to the condition that it shall be excluded from the marriage in community of property
- Certain life insurance policies
- Delictual damages for non-patrimonial loss
- Delictual liabilities

Bequests in a will which are subject to a marital exclusion clause are therefore excluded from a joint estate and protected from a claim by the beneficiary's spouse. If the marital exclusion clause is not inserted in a will, any bequest to a person married in community of property will form part of the joint estate and be shared with the beneficiary's spouse.

Protection from Creditors

While the marital exclusion clause is effective against the spouse of the beneficiary married in community of property, is it effective against creditors of the beneficiary's spouse? This question was considered in 2003 by the Supreme Court of Appeal ("SCA") in the case of **Du Plessis v Pienaar NO and Others**. In that case the SCA held that when a joint estate is sequestrated, both spouses become insolvent debtors for the purposes of the Insolvency Act 24 of 1936. The spouses' undivided interest in the joint estate as well as any separately owned property will be used to meet the claims of the creditors regardless of what the testator's intentions may have been. It is submitted the same would apply even if there were no insolvency – creditors can claim any property belonging to either spouse.

In short, a marital exclusion clause in a testator's will can protect an inheritance from a claim by the beneficiary's spouse but not from a claim by any creditor of the joint estate.

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