

A decorative graphic in the top left corner consisting of several overlapping, stylized arrow shapes pointing to the right. The arrows are in shades of grey and red.

Legal update

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Claims for maintenance against the estate of a deceased

Introduction

South African law recognises the principle of freedom of testation. This means that a person (the testator) can record in his will how he wants his estate to be dealt with after his death. A testator is free to leave his assets to whom he wishes and strictly speaking no person can benefit from the deceased estate unless that person is included as a beneficiary in the will. However, there are certain instances where people who have not been provided for in a will can still have a claim against the estate of a deceased. The right to claim maintenance from the estate of a deceased, subject to certain conditions, has been established in our law. This legal update will discuss the rights of the surviving spouse and child of the deceased to claim maintenance from his estate, where the deceased has failed to make provision for their maintenance needs in his will.

The right of a child to claim maintenance from the estate of a deceased parent

The duty on a parent to support a child arises automatically on the birth of a child and continues until the child becomes self-supporting. Both parents owe a duty of support to a child according to their respective means. This duty continues after the death of the parent. This means that a child can lodge a claim for maintenance against his deceased parent's estate. A child who is over the age of 18 can also claim maintenance from the estate of his deceased parent. However, in cases where the child is no longer a minor, he will have to prove that he is in need of support. In addition to this, a major child must prove the extent or amount of maintenance that he requires.

With the exception of debts owed by the estate to creditors, a child's claim for maintenance ranks above all other claims against the estate of his deceased parent, including claims of heirs and legatees.

Any maintenance orders already in place at the time of a parent's death, will be binding on his estate after his death.

The right of a surviving spouse to claim maintenance for the deceased spouse's estate

Prior to 1990, the right of a surviving spouse to claim maintenance from the estate of a deceased spouse was not established in South African law, because it contradicted the principle of freedom of testation. In 1990, the Maintenance of Surviving Spouses Act ("the Act") came into effect. This Act provides the surviving spouse with a claim for maintenance against the estate of the deceased spouse.

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In terms of the Act, a surviving spouse has a claim against the estate of the deceased spouse in respect of her reasonable maintenance needs, in for far as she is unable to meet those needs with her own means and earnings.

The provisions of the Act apply only to marriages that are dissolved by the death of a spouse. Our courts have held that an ex-spouse cannot claim maintenance from the estate of her former husband after his death. The claim that a surviving spouse has against the estate of her deceased spouse arises from the reciprocal duty of support that spouses owe each other. Once the bonds of marriage are severed, this duty of support ceases to exist.

Where the divorce order makes provision for spousal maintenance, the settlement agreement will usually provide that the agreement is binding on the estates of the respective parties. If the divorce order or settlement agreement makes provision for spousal maintenance, this order can be enforced against the estate of the deceased.

The surviving spouse's right to maintenance from the estate of the deceased continues until the surviving spouse's death or remarriage.

The surviving spouse's claim for maintenance ranks in the same order of preference as a child's claim for maintenance. If the surviving spouse and child lodge competing claims for maintenance, both claims may be reduced proportionately, if necessary.

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