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Estate planning: The inclusion of the proceeds of a life policy when the accrual is calculated

Summary

Life policies play an important role in estate planning, and the correct application of the proceeds is necessary to determine the effect on the accrual calculations at the dissolution of a marriage (upon the death of the first-dying spouse) in order to determine the correct insured amount required. The accrual of either spouse is calculated at the dissolution of the marriage, which is at the moment of death. If the proceeds of a life policy form part of the net estate at the moment of death, then the proceeds are included in the net estate of the spouse when the accrual is calculated. Consequently, the right to payment should vest at the moment of death for the proceeds to be included. Taking into account the different ways of structuring a life policy (policyholder, insured and nominated beneficiary), the moment that the right to payment vests will depend on who is entitled to the proceeds: the policyholder or a nominated beneficiary.

Boedelbeplanning: Die insluiting van die opbrengs van 'n lewenspolis wanneer die aanwas bereken word

Lewenspolisse speel 'n belangrike rol in boedelbeplanning en die korrekte toepassing van die opbrengs is noodsaaklik om die effek op die aanwasberekening te bepaal by die beëindiging van 'n huwelik (by die dood van die eerssterwende gade) om die korrekte versekerde bedrag te bepaal. Die aanwas van beide gades word bereken by die beëindiging van die huwelik wat die oomblik van dood is. Indien die opbrengs van 'n lewenspolis deel vorm van die netto boedel by die oomblik van dood, dan sal die opbrengs ingesluit word by die netto boedel van die gade wanneer die aanwas bereken word. Gevolglik moet die reg tot betaling vestig by die oomblik van dood vir die opbrengs om ingesluit te word. Met inagneming van die verskillende maniere wat die lewenspolis gestruktureer kan word (polishouer, versekerde en genomineerde begunstigde), sal die oomblik wat die reg tot betaling vestig, bepaal word deur wie geregtig is tot die opbrengs: die polishouer of 'n genomineerde begunstigde.

1. Introduction

The accrual system¹ is a very attractive matrimonial property regime for couples who would like to share in the growth of each other's estate during the marriage, but still keep their estates separate without the interference or consent of the other to transact during the marriage. The accrual has been described as a partnership with deferred sharing of profits² and as deferred community of gains.³

The accrual of either spouse is calculated at the dissolution of the marriage and the spouse with the smallest accrual has a claim to an amount of half of the difference of the accrual of the respective spouses.⁴ To avoid unnecessary surprises upon the death of a spouse, the possible accrual claim should be taken into consideration during the estate planning process of the couple. It is important for proper and effective estate planning to determine the possible accrual claim, in whose favour it is payable, and to identify assets to settle the accrual claim. Without the necessary planning, the accrual claim against a spouse's deceased estate can negatively influence the liquidity of the estate and complicate the liquidation and distribution process and the execution of the last will and testament.

When the accrual is calculated, the application of the proceeds of life policies has, in the past, caused inconsistency, uncertainty and interpretation problems for financial advisors during the estate planning process. Consequently, it is imperative to have certainty regarding the implications of life policies during the estate planning process by addressing the following question: Do the proceeds of a life policy form part of the net estate of a spouse at the dissolution of the marriage (at death) when calculating the accrual?

Life policies play an integral part in holistic estate planning to provide for the unexpected death of a person. A life policy is considered and used for a number of reasons, including the following:

- to fund a buy-and-sell agreement;
- to provide for the maintenance and education of dependants;
- to make provision for a liquidity shortfall in an estate;
- to pay debt or claims against an estate;
- to make provision for financial assistance upon the death of a key person;
- to make provision for the cash legatees in a last will and testament;

1 Incorporated in chapter I of the *Matrimonial Property Act 88/1984*.

2 Sinclair 1984:14, 33.

3 Hahlo 1985:304.

4 *Matrimonial Property Act*:section 3(1).

- to make provision for equal inheritance; and
- to make provision for the payment of an accrual claim against a deceased estate.

Given the above scenarios, the monetary value of the insured amount and the structuring of the life policy are two of the core elements when someone considers or takes out a life policy. The correct application of the proceeds may influence both the insured amount required and the structuring of the policy.

The purpose of this article is twofold: it aims, first, to determine whether the proceeds of a life policy are included in the net estate of a spouse when the accrual upon the death of either spouse is calculated and, secondly, to determine the estate planning consequences.

The purpose of this article can be addressed by considering and focusing on the following:

- Do the proceeds of a life policy, which are payable to the deceased estate, form part of the net estate of the deceased when the accrual is calculated? In this scenario, the deceased is the policyholder⁵ and insured and there is not a nominated beneficiary.
- Do the proceeds of a life policy, payable to the nominated beneficiary, form part of the net estate of the deceased when the accrual is calculated? In this scenario, the deceased is the policyholder and insured and the nominated beneficiary duly accepts the nomination.
- Do the proceeds of a life policy, payable to the nominated beneficiary as the surviving spouse, form part of the net estate of the surviving spouse when the accrual is calculated? In this scenario, the deceased is the policyholder and insured and the surviving spouse, as the nominated beneficiary duly accepts the nomination.
- Do the proceeds of a life policy, payable to the surviving spouse as the policyholder, form part of the net estate of the surviving spouse when the accrual is calculated? In this scenario, the surviving spouse is the policyholder and the deceased (first-dying spouse) is the insured.
- Estate planning techniques for accrual calculation problems.

2. Practical consequences

To illustrate the effect of the different outcomes when determining the insured amount required, in the scenario where the proceeds are payable to the deceased estate (the deceased was the policyholder and insured), the following example will be used.

⁵ Policyholder is referred to as the policy owner and the person who is entitled to the policy benefits under a life policy. See *Long-Term Insurance Act 52/1998*.

Example A

Mr and Mrs X are married out of community of property, subject to the accrual system. Mr X's net asset value is R3 000 000 and Mrs X's net asset value is R1 000 000. None of the assets are excluded from the accrual. The financial advisor has calculated the possible accrual claim of R1 000 000 in favour of Mrs X at the immediate death of either spouse. Mr and Mrs X do not have any life policies.

Mr X has identified assets to settle the R1 000 000 accrual claim and bequeathed the entire estate to the family trust. Mr X has valuable assets in his estate and it is his wish that the assets remain in the family for generations to come. The total amount required to pay all the outstanding liabilities and claims against the deceased estate is R2 000 000. In order to prevent the liquidation of any assets, Mr X took out a R2 000 000 life policy on his life, payable to the deceased estate.

Upon the death of Mr X (a few months later), the application of the proceeds of the life policy will determine Mr X's accrual. Mrs X's accrual remains R1 000 000.

Application 1

The proceeds of the life policy of R2 000 000, are not included in Mr X's net estate when his accrual is calculated. His accrual is R3 000 000 and Mrs X's accrual is R1 000 000.

Result 1

Mrs X has an accrual claim of R1 000 000⁶ against the deceased estate.

Application 2

The proceeds of the life policy of R2 000 000 are included in Mr X's net estate when his accrual is calculated. His accrual is R5 000 000 and Mrs X's accrual is R1 000 000.

Result 2

Mrs X has an accrual claim of R2 000 000⁷ against the deceased estate.

Should the result in the second application be correct, Mrs X will receive an additional R1 000 000 from the accrual claim, payable in assets or in cash. If payable in cash (from the life policy proceeds), there will be a liquidity shortfall and, if payable in assets, Mr X's wish to preserve the assets in the trust will not be fulfilled. Careful consideration is necessary to correctly determine the application of the proceeds and simultaneously ensure that the client's wishes are fulfilled.

6 $R3\ 000\ 000$ (Mr X's accrual) – $R1\ 000\ 000$ (Mrs X's accrual) = $R2\ 000\ 000 / 2 = R1\ 000\ 000$.

7 $R5\ 000\ 000$ (Mr X's accrual: net asset value of $R3\ 000\ 000$ and the $R2\ 000\ 000$ proceeds from the life policy) – $R1\ 000\ 000$ (Mrs X's accrual) = $R4\ 000\ 000 / 2 = R2\ 000\ 000$.

During the estate planning process of the spouses, there should be no doubt about the insured amount required at the conclusion of a life policy. Uncertainty about the application of the proceeds of the life policy when the accrual is calculated can erroneously inflate or deflate the amount required and lead to an inaccurate insured amount.

It is evident that there should be certainty about the application of the proceeds of life policies at the dissolution of a marriage by death, when a person is married subject to the accrual system, in order to determine the insured amount required and the possible accrual of a spouse.

3. Net value of the estate

The accrual of a spouse is the amount by which the net value of the estate at the dissolution of the marriage exceeds the net value of the estate at the commencement of that marriage.⁸ The *Matrimonial Property Act*⁹ does not define the “net value of the estate”; however, certain amounts/assets are expressly excluded from the accrual:¹⁰

- damages, other than damages for patrimonial loss;
- assets which have been excluded from the accrual system in terms of the antenuptial contract;
- inheritances, legacies or donations which accrued during the subsistence of the marriage; and
- donations between spouses.

In addition, the accrual is determined before effect is given to any testamentary disposition, donation *mortis causa* or succession in terms of the law of intestate succession.¹¹

Bester¹² argues that, based on the above exclusions and the principles of interpretation of statutes, anything else that is not explicitly excluded will be included in the net estate when the accrual is calculated.¹³

Proceeds of life policies are not specifically excluded from the accrual. The determining factor is if the proceeds of a life policy form part of the net estate at the moment that the accrual is calculated. The accrual is calculated at the dissolution of the marriage and the dissolution of the

8 *Matrimonial Property Act*:section 4(1)(a).

9 *Matrimonial Property Act* 88/1984.

10 *Matrimonial Property Act*:sections 4(1)(b) and 5.

11 *Matrimonial Property Act*:section 4(2).

12 Bester 2001:7.

13 Botha 2002:126 – “Where a statute provides for a specific situation, it is assumed *ex contrariis* (from the opposite or on the contrary) that the opposite arrangement will apply to the opposite situation”.

marriage is at the moment of death of one or both of the spouses.¹⁴ The accrual is thus calculated at the *moment of death*. Hence, the proceeds of life policies that form part of the net estate at the *moment of death* will be included when the accrual is calculated. Alternatively, the proceeds of the life policies that form part of the net estate *after the moment of death* will not be included when the accrual is calculated.

Consequently, the pending question could be rephrased as: Do the proceeds of a life policy form part of the net value of the estate, at the exact moment of death of a spouse, when the accrual is calculated at the dissolution of the marriage?

4. Legal nature and structure of a life policy

According to the definition of a life policy,¹⁵ a contract exists between the insurer and the policyholder, where the policyholder pays a premium in return for the policy benefits (proceeds) upon the death of the insured (life event).¹⁶ The policyholder and the insured do not necessarily have to be the same person. The policyholder also has the option of nominating a third party to receive the benefits. There are different scenarios when more than one party is involved. The following scenarios are possible:

- the proceeds are payable to the deceased estate (the deceased is the policyholder and insured);
- the proceeds are payable to the surviving spouse as the nominated beneficiary (the deceased is the policyholder and insured); or
- the proceeds are payable to the surviving spouse as the policyholder and the deceased (the first-dying spouse) is the insured.

Each of these scenarios will be discussed separately in paragraphs 5 to 7.

5. Proceeds payable to the deceased estate

For the discussion of this scenario, it is assumed that the policyholder and the insured are one and the same person, unless otherwise stated.

The factor which determines whether the proceeds should be included in the net estate of the deceased when the accrual is calculated is the *moment of death*. Upon the conclusion of the policy contract, the insurer undertakes to pay the policy benefit (proceeds) to the policyholder upon

14 *Matrimonial Property Act*:section 3(1). The dissolution of a marriage is by death or divorce. For the purpose of this article, only the implications upon the death of the spouse will be discussed.

15 *Long-term Insurance Act 52/1998*:section 1.

16 All references to life policies include whole life policies only, unless otherwise indicated.

the insured event (death).¹⁷ The payment of the proceeds of a life policy vests at the conclusion of the life policy; however, it becomes payable only upon the death of the insured.¹⁸ The nature of the payment constitutes a time clause:¹⁹

However, as has been pointed out by the authors of *The Law of South Africa* (*ibid* in a footnote in paragraph 425), the insured's right to payment of the sum insured in a life insurance contract – which is exactly what the parties contracted for – vests on conclusion thereof though it only becomes payable on death, which is nothing more than a time clause – *a dies certus an incertus quando*.

Before the death of the insured, the policyholder has the option of surrendering the policy or awaiting the fulfilment of the time clause.²⁰ The policyholder has no right to the proceeds of a life policy before the fulfilment of the time clause. Determining the exact moment when the right to payment vests will determine if the proceeds vest at the moment of death or after the death of the deceased.

There are some contradictory practices and opinions on the matter, and these can be grouped into those who argue that the proceeds do not vest at the exact moment of death and those who do.

The first group²¹ argues that the right to the proceeds does not vest at the moment of death. The reasoning includes the fact that the insurer will first determine the validity of the claim and determine if it complies with all the terms and conditions of the policy contract after the death of the insured. The proceeds will become payable only once this validity has been confirmed.²²

The latter group²³ argues that the exact moment of death is also the exact moment that the proceeds vest in the deceased estate and that the proceeds should be included in the net estate when the accrual is calculated. It is clear from the discussion that follows that the latter group's argument holds and that, although the validity of the claim will be

17 Nienaber & Reinecke 2009:6.

18 *Warricker and another NNO v Liberty Life Association of Africa Ltd* 2003 (6) SA 272 (W):279.

19 *Warricker and another NNO v Liberty Life Association of Africa Ltd*:279.

20 *Warricker and another NNO v Liberty Life Association of Africa Ltd*:279.

21 Herbst 2004:28. In *Danielz NO v De Wet & another; De Wet v Danielz NO and another* (2008) JOL 22151 (C):23, the court held that the proceeds from the life policy vest only after the death of the deceased. The court did not deliberate on this matter.

22 Herbst 2004:28.

23 Muller 2006:270 – “Death is the moment at which the policy benefits must be valued and at that moment in time the policy proceeds (death value) become enforceable against the insurer”. Botha & Oosthuizen 2009:20 – “... the moment at which the value of the estate must be determined for accrual purposes, and the moment that the policy proceeds vest unconditionally in the person entitled thereto is not separated in time”.

determined and payment will occur only after the death of the insured, the right in terms of the contract to claim the proceeds vests at the moment of death.

Muller²⁴ (who supports the latter group) confirms that death is a time clause and not a condition²⁵ of the policy:²⁶

A time clause is a contractual term that qualifies an obligation with reference to a certain future event and should be distinguished from a condition that relates to an uncertain moment in the future. A time clause may either be resolute or suspensive. Where a suspensive time clause is incorporated into a contract (such as a life insurance policy) the obligations come into existence on the conclusion of the contract, but the full operation of the obligations is postponed until the future moment or event.

The full operation of the obligation by the insurer to pay the proceeds is postponed until death. The moment of death fulfils the time clause, where the payment of the proceeds becomes enforceable against the insurer.²⁷ The moment of death is also the moment that the accrual is calculated at the dissolution of the marriage.

Consequently, the moment of the dissolution of the marriage and the moment that the right to payment vests occur simultaneously at the moment of death. The proceeds will be included in the net estate when the accrual is calculated. Based on the legal nature of a life policy and the fulfilment of the time clause at death, the argument from the latter group is correct and should be applied.

From the above discussion, it is clear that application 2 from example A²⁸ is the correct application and that the proceeds payable to the deceased estate will be included in the accrual calculations. However, careful consideration is required to determine the effect on the estate plan and the wishes of the client, and this scenario will be discussed in more detail in paragraph 8 below.

6. Proceeds payable to the nominated beneficiary

For the discussion of this scenario, it is assumed that the policyholder and the insured are one and the same person, unless otherwise stated.

The question is twofold if the policyholder nominates a beneficiary, to determine whether the proceeds form part of the deceased estate when the accrual is calculated, and whether the proceeds form part of the surviving spouse's estate (as the beneficiary) when the accrual is calculated.

24 Muller 2006:270.

25 See also Botha & Oosthuizen 2009:22.

26 Muller 2006:263.

27 Muller 2006:270.

28 See paragraph 2 above.

The nomination of a beneficiary on a life policy is a *stipulatio alteri*, a contract for the benefit of a third person.²⁹ The policyholder (the stipulator) agrees with the insurer (the promisor) that the insurer will render performance to the beneficiary. The contract constitutes an offer of donation by the policyholder to the beneficiary through acceptance.³⁰ It is a contract that enables a third party to come in as a party with one of the original two parties (insurer) and eliminate the other original party (policyholder).³¹ The beneficiary has to accept the benefit to enforce payment against the insurer. The beneficiary does not merely receive a benefit from the contract, but becomes a party on the same terms, advantages and disadvantages to which the policyholder and insurer agreed.³²

It is important to differentiate between a revocable³³ and an irrevocable³⁴ beneficiary nomination. The difference is important, since the application of each and the rights of the parties differ.³⁵ An irrevocable beneficiary nomination is rarely used or accepted by the insurers in South Africa, and will be excluded in the discussion of this article.

All references to a beneficiary nomination in this article are assumed to be a revocable beneficiary nomination, where the policyholder can unilaterally revoke the nomination at any time prior to the death of the insured, unless otherwise indicated. Consequently, after the nomination of a beneficiary and prior to the death of the insured, the policyholder retains the right to surrender the policy and amend/revoke the beneficiary nomination.

Before accepting the benefit, the beneficiary has no right to enforce payment against the insurer.³⁶ Thus the beneficiary's right to the proceeds will vest only upon acceptance. Whether the beneficiary can accept the benefit prior to the death of the insured is uncertain, and this has caused interpretational problems and inconsistent arguments. Some authors³⁷

29 *Hees NO v Southern Life Association Ltd* 2000 (1) SA 943 (W):951; *Warricker and another NNO v Liberty Life Association of Africa Ltd*:273. *Botes NO v Afrikaanse Lewensversekeringsmaatskappy Bpk en 'n ander* 1967 (3) SA 19 (W):23.

30 *Crookes, NO and Another v Watson and Others* 1956 (1) SA 277 (A):286.

31 Muller 2006:261. *Pieterse v Shrosbree NO and Others, Shrosbree NO v Love and Others* 2005 (1) SA 309 (SCA):313.

32 Henckert 1995:184. Muller 2006:261. Henckert 1993:514.

33 Nienaber & Reinecke 2009:222 – The policyholder can unilaterally revoke the nomination, at any time before the death of the insured, when communicated to the insurer.

34 Nienaber & Reinecke 2009:222 – The policyholder can revoke the nomination only with the consent of the insurer. Henckert 1995:186.

35 Henckert 1995:182.

36 Reinecke & Nienaber 2009:4-5; Scott 2012:805.

37 Henckert 1994:515 – “Acceptance at this stage has the effect that the *spes* is converted into a right, albeit conditional”. Botha & Oosthuizen 2009:24 – The beneficiary will acquire a right subject to a negative suspensive condition at acceptance. The beneficiary does not have to accept the benefit again (after the death of the insured) and the proceeds will unconditionally vest in the beneficiary upon the moment of death.

have argued that the beneficiary can accept the benefit prior to the death of the insured, provided the policy does not contain a “no-right”³⁸ clause. Other authors³⁹ have argued that a beneficiary cannot accept the benefit prior to the death of the insured. Acceptance prior to the death of the insured is premature and the beneficiary will obtain no right to the proceeds even if the life policy does not contain a “no-right” clause.⁴⁰ The beneficiary has a *spes* only and cannot accept the benefit prior to the death of the insured.⁴¹

In *PPS Insurance Company Ltd & others v Mkhabela*,⁴² the court held that a beneficiary cannot accept a benefit prior to the death of the insured.⁴³ Once the policyholder has nominated the beneficiary; the beneficiary has no right to the policy benefits and only an expectation to claim the benefits:⁴⁴

It is well established that a nominated beneficiary does not acquire any right to the proceeds of a policy during the lifetime of the policy owner. It is only on the policy owner's death that the nominated beneficiary is entitled to accept the benefit and the insurer is obligated to pay the proceeds of the policy to the beneficiary. Until the death of the policy owner, the nominated beneficiary only has a *spes* (an expectation) of claiming the benefit of the policy – the nominated beneficiary has no vested right to the benefit.

Although the beneficiary might have the intention of accepting the policy benefit during the lifetime of the insured, the beneficiary does not have any right to accept.⁴⁵ An acceptance by the beneficiary during the lifetime of the insured is regarded as premature and irrelevant.⁴⁶ Thus a beneficiary who was nominated in terms of a revocable nomination cannot accept the benefit prior to the death of the insured.

38 Henckert 1994:514 – A provision in a life policy contract that stipulates that the beneficiary has no right in terms of the contract before the death of the insured. The beneficiary cannot accept the benefit prior to the death of the insured.

39 Reinecke & Nienaber 2009:22-23; Muller 2006:262; Scott 2012:805.

40 Reinecke & Nienaber 2009:22-23; Scott 2012:805 – The beneficiary has no right to accept prior to the death of the insured.

41 Muller 2006:262; Scott 2012:805. Also see *Moonsamy and another v Nedcor Bank Ltd and Others* 2004 (3) SA 513 (D):518 – “A nominated beneficiary does not acquire any rights to the policy during the lifetime of the policyholder”.

42 *PPS Insurance Company Ltd & others v Mkhabela* 2011 JOL 28083 (SCA).

43 Reinecke 2012:357 – Although the court does not address the distinction between an irrevocable and a revocable nomination, the policy nomination *in casu* was a revocable nomination.

44 *PPS Insurance Company Ltd V Mkhabela*:4.

45 Muller 2006:262; Scott 2012:805.

46 Reinecke 2012:357.

Upon the death of the insured, the proceeds of a life policy are offered⁴⁷ to the beneficiary by the insurer and the beneficiary is entitled to accept.⁴⁸ Once the beneficiary accepts the benefits, the beneficiary becomes a party to the contract, the policyholder falls away and thereafter the contract is between the insurer and the beneficiary.⁴⁹ The right to payment of the benefit will vest only upon the acceptance of the beneficiary.

6.1 Do the proceeds form part of the deceased estate upon acceptance by a nominated beneficiary?

In *Hees No v Southern Life Association Ltd*,⁵⁰ Claasen J held that the proceeds do not form part of the deceased estate where the proceeds are payable to a beneficiary, as the monetary proceeds did not vest in the policyholder's estate prior to the maturity date. In *Warricker and another NNO v Liberty Life Association of Africa Ltd*, Van Oosten J held that the proceeds do not form part of the deceased estate:⁵¹ "Upon the insured's death, and leaving aside the effects of sequestration, the policies themselves would not have formed part of the deceased estate and the proceeds thereof would, upon acceptance of the benefits, have been payable to the designated beneficiary".

In *Pieterse v Shrobbree NO and Others, Shrobbree NO v Love and Others*, Ponnau AJA held that the proceeds are payable to the beneficiary and not to the deceased estate. Upon acceptance by the beneficiary, a contract will be established between the insurer and the beneficiary that would confer rights that are enforceable by the beneficiary.⁵² "... because the beneficiary appointment, until revoked, has the effect that payment of the proceeds will be made to the beneficiary and not the estate of the deceased".⁵³

Upon the death of the policyholder, the policy proceeds are offered to the nominated beneficiary. After acceptance by the beneficiary, the policyholder is eliminated from the agreement and loses all rights in terms of the contract.⁵⁴ The beneficiary replaces the policyholder in the original

47 *Crookes NO and Another v Watson and Others*: 286 – "The agreement constitutes an offer". Henckert 1994:515 – "The contract between the assurer and the policyholder functions as an offer to the beneficiary." *Pieterse v Shrobbree NO and Others, Shrobbree NO v Love and Others*: 2005 1 SA 209 (HHA):313 – "an agreed offer would be made by the insurer to a third".

48 *Warricker v Liberty Life Association of Africa Ltd*:273.

49 *Crookes NO and Another v Watson and Others*:291.

50 *Hees No v Southern Life Association Ltd* 2000 (1) SA 943 (W):948.

51 *Warricker and another NNO v Liberty Life Association of Africa Ltd*:278.

52 *Pieterse v Shrobbree NO and Others, Shrobbree NO v Love and Others*:313-314.

53 *Pieterse v Shrobbree NO and Others, Shrobbree NO v Love and Others*:313-314.

54 Reinecke & Nienaber 2009:5-6 – The authors differentiate between three models when considering the legal construction of the *stipulatio alteri*; however, the legal consequences of each of the three models differ only prior to acceptance. After acceptance, the legal consequences are similar.

insurance contract and acquires an enforceable right against the insurer.⁵⁵ Consequently, the proceeds will not form part of the deceased estate when the accrual is calculated, if a beneficiary was nominated and the nomination was duly accepted.

6.2 Do the proceeds form part of the surviving spouse's estate upon acceptance by the surviving spouse as the nominated beneficiary?

If the surviving spouse is the designated beneficiary, the proceeds upon acceptance will be payable to the surviving spouse. The accrual of either spouse is calculated upon the death of the first-dying spouse.

The proceeds will form part of the estate of the surviving spouse upon acceptance. However, it is important to determine whether the proceeds form part of the surviving spouse's estate at the moment of death when the accrual is calculated. Death is a time clause and the time clause must first be fulfilled before the beneficiary can accept. Considering the timeline, the beneficiary can accept the benefit only after the death of the insured; hence, the proceeds of the life policy will vest after the moment of death and not form part of the net estate of the surviving spouse (beneficiary) when the accrual is calculated.

7. Proceeds payable to the surviving spouse as the policyholder

Will the proceeds be included in the surviving spouse's estate, when the accrual is calculated, if the surviving spouse was the policyholder and the first-dying spouse the insured?

To answer the above question, it is important to review what we have confirmed thus far.

- It is submitted that the proceeds payable to the deceased estate of the insured as the policyholder where no beneficiary is nominated are included in the net estate of the deceased when the accrual is calculated.
- It is submitted that the proceeds payable to the surviving spouse, as the nominated beneficiary, are excluded from the net estate of the deceased (who was the policyholder and insured) and the net estate of the surviving spouse, when the accrual is calculated.

The determining factors are the moment of death, acceptance by the beneficiary and the moment that the proceeds become payable to the estate of the policyholder or beneficiary.

⁵⁵ *Pieterse v Shrobsree NO and Others, Shrobsree NO v Love and Others*:313; Scott 2012:805.

In the event where the surviving spouse insured the life of the first-dying spouse, the contract is between the surviving spouse and the insurer. Upon concluding the policy contract, the insurer undertakes to pay the proceeds to the surviving spouse upon the death of the first-dying spouse. Similar to the scenario where the proceeds are payable to the deceased estate of the insured as the policyholder, the payment constitutes a time clause, which is fulfilled upon the death of the insured. The payment of the proceeds of a life policy vests at the conclusion of the life policy. However, it becomes payable to the policyholder only upon the death of the insured. The death of the first-dying spouse as the insured is the moment of the dissolution of the marriage and the moment that fulfils the time clause.

Consequently, and to answer the pending question above, the proceeds become payable to the surviving spouse at the moment of death (the dissolution of the marriage). The proceeds will then be included in the estate of the surviving spouse when the accrual is calculated.

8. Estate planning consequences and techniques

The correct application of the proceeds of life policies has been identified. However, the implications should be discussed in order to truly comprehend the significance thereof.

8.1 A life policy to make provision for a liquidity shortfall

From the illustration in example A above, it is evident that when a person, married out of community of property subject to the accrual system, is considering a life policy to provide for additional cash in the deceased estate,⁵⁶ the insured amount should be adjusted to make provision for the possible accrual claim.

Reviewing the facts above, Mr X took out a life policy of R2 000 000 to make provision for the liquidity shortfall in his deceased estate. However, after evaluating the application of the proceeds, it is clear that the proceeds payable to the deceased estate will increase Mr X's net estate when the accrual is calculated. Mrs X will have an accrual claim of R2 000 000 versus the R1 000 000 before the life policy was considered. Taking into account Mr X's wishes, there is not enough cash or assets to accommodate the additional R1 000 000 accrual claim.

If the insured amount is adjusted to R4 000 000 to accommodate the enlarged accrual claim, Mr X's accrual will be R7 000 000 and Mrs X will

⁵⁶ There are a number of scenarios where a person might ask to secure additional cash in the deceased estate by way of a life policy, including a cash shortfall, a cash legacy, payment of debt and claims against the estate and payment of the accrual claim.

have an accrual claim of R3 000 000.⁵⁷ R1 000 000 from the accrual claim will be settled with the assets as identified by Mr X, R2 000 000 will be settled with cash from the proceeds of the life policy, and the balance of the proceeds will secure the payment of all outstanding liabilities and claims against the estate. This application has an enormous effect on the estate planning process. Although Mr X considered the initial R2 000 000 to inject cash into the deceased estate, he was forced to increase the insured amount solely because he was married subject to the accrual system.

If the accrual claim is in favour of the surviving spouse, the insured amount to make provision for a liquidity shortfall should effectively be twice as much as what is required. This can be described as exorbitant, as the cost might not be feasible.

8.2 A life policy to make provision for the accrual claim

The position where a spouse would like to make provision for the accrual claim against the deceased estate in favour of the surviving spouse with the use of the proceeds of a life policy is similar. If one takes out a life policy to settle the accrual claim, the proceeds will indirectly increase the accrual claim and make it almost impossible to match the accrual claim.

Example B

Mr K and Mrs K are married out of community of property subject to the accrual system. Both were previously married. Mr K has children from his previous marriage and would like to bequeath his assets to his children. With the help of a financial advisor, the possible accrual claim in the event of the first-dying spouse's death has been calculated as R1 000 000 in favour of Mrs K (Mr K's accrual is R3 000 000 and Mrs K's accrual is R1 000 000). Mr K would like to make provision for the claim with the proceeds of a life policy.

If Mr K (as the policyholder and insured) takes out a R1 000 000 life policy payable to the deceased estate, it will automatically increase the accrual claim in favour of Mrs K to R1 500 000.⁵⁸ If Mr K takes out a life policy of R1 500 000, it will automatically increase the accrual claim in favour of Mrs K to R1 750 000. Consequently, it is impossible to make provision for the entire accrual claim with the use of the proceeds of a life policy payable to the deceased estate.

If Mr K nominates Mrs K as the beneficiary on the policy to avoid the increase in the accrual claim, she will receive the R1 000 000 proceeds and will still have an accrual claim of R1 000 000. The proceeds will not

57 $R7\ 000\ 000$ (Mr X's accrual: net asset value of R3 000 000 and the R4 000 000 proceeds from the life policy) – R1 000 000 (Mrs X's accrual) = R6 000 000 / 2 = R3 000 000.

58 The proceeds of the policy will be included in his estate when the accrual is calculated. The proceeds will increase Mr K's accrual by R1 000 000, and consequently increase the accrual claim by R500 000.

be included in Mrs K's net estate when the accrual is calculated, as acceptance is after the dissolution of the marriage (moment of death).

Mr K and Mrs K could consider a life policy in the name of Mrs K (as the policyholder on the life of Mr K (as the insured)). The proceeds of the life policy on the life of Mr K and payable to Mrs K as the policyholder will be included in her estate when her accrual is calculated. A life policy with an insured amount of R1 000 000 will increase Mrs K's accrual and reduce her accrual claim to R500 000.⁵⁹ Alternatively, an insured amount of R2 000 000 will increase Mrs K's accrual and eliminate the entire accrual claim.⁶⁰ Although this scenario might not be ideal, at least the additional life insurance can eliminate the accrual claim and simultaneously benefit the surviving spouse. The surviving spouse is still in a better position, as she will receive R2 000 000 versus the initial R1 000 000 accrual claim.

8.3 A life policy payable to a third party to ensure equal inheritance

The focus of this article is the application and structuring of the proceeds of life policies between spouses. Yet it is also necessary to discuss the implications where the proceeds of a life policy are considered, during the estate planning process, for the benefit of a third party who is married out of community of property subject to the accrual system.

Life insurance is often used to compensate an heir where the equal inheritance of assets is not possible.

Example C

A farmer who has a son and daughter would like his son to succeed him in the farming operations in which his daughter has no interest. He decides to bequeath his farming assets to his son and compensate his daughter with the proceeds of a life policy. He takes out a life policy with an insured amount equal to the value of the farming assets. Both the son and the daughter are married out of community of property subject to the accrual system.

Upon the death of the farmer, the son inherits the farm and the daughter accepts the beneficiary nomination and receives the proceeds from the life policy. Upon the dissolution of the son's marriage, his entire inheritance will be excluded from his accrual. However, will the proceeds of the life policy be included in the daughter's accrual at the dissolution of her marriage?

The rationale of the accrual system is for spouses to share in the growth of each other's contributions during the existence of the marriage, hence

59 Mr K's accrual of R3 000 000 – Mrs K's accrual of R2 000 000 (R1 000 000 + R1 000 000 from the proceeds) = R1 000 000 / 2 = R500 000.

60 Mr K's accrual of R3 000 000 – Mrs K's accrual of R3 000 000 (R1 000 000 + R3 000 000 from the proceeds) = R0.

the exclusion of inheritances, legacies and donations.⁶¹ At first glance, it appears that the rationale of the accrual system is not to share in the proceeds of life policies, but the specific exclusion of inheritances, legacies and donations means that the opposite applies to the proceeds of life insurance.⁶² Consequently, the proceeds of the life policy will be included in the estate of the daughter when the accrual upon the dissolution of her marriage is calculated, unless the proceeds are excluded as an inheritance or donation in terms of the Act.⁶³

In *Botes NO v Afrikaanse Lewensversekeringsmaatskappy BPK en 'n ander*,⁶⁴ the plaintiff argued that the policyholder nominated his fiancée as the beneficiary of a policy as a donation subject to the condition that the parties entered into a marriage. The court held that there was no agreement between the policyholder and the beneficiary and that the beneficiary's right to the proceeds was not based on a donation but on the right acquired only if she had accepted the nomination.⁶⁵ Thus, the legal nature of a *stipulatio alteri* does not constitute a donation by the policyholder, since there is no contract between the policyholder and the beneficiary.⁶⁶

The payment of the proceeds to the beneficiary also does not have the effect of an inheritance. The proceeds are payable in terms of a contract and not from the deceased estate of the policyholder.⁶⁷ The proceeds payable to the beneficiary are also not in terms of a *pactum successorium*⁶⁸ (a succession agreement).⁶⁹ The proceeds payable to the beneficiary do not qualify as an inheritance when the accrual is calculated.

The implication of the above scenario is that the proceeds will be included in the daughter's estate when the accrual upon the dissolution of her marriage is calculated.

61 Herbst 2004:28-29.

62 Botha 2002:126; Devenish 1992:88.

63 *Matrimonial Property Act*:sections 4 and 5(1).

64 *Botes NO v Afrikaanse Lewensversekeringsmaatskappy BPK en 'n ander* 1967 (3) SA 19 (W).

65 *Botes NO v Afrikaanse Lewensversekeringsmaatskappy Bpk en 'n Ander*:23.

66 Reinecke & Nienaber 2009:9; *Botes NO v Afrikaanse Lewensversekeringsmaatskappy Bpk en 'n Ander*:23.

67 Reinecke & Nienaber 2009:10.

68 Hutchison 1983:231 – “To sum up thus far: a *pactum successorium* is an agreement which purports to limit a contracting party's freedom of testation by irrevocably binding him to a post-mortem devolution of the right(s) to an asset in his estate”.

69 Reinecke & Nienaber 2009:10; *McAlpine v McAlpine & Another* 1997 (1) SA 736 (A):756 – the court held that, although a life policy may involve a contractual post-mortem disposition of property, it is not a *pactum successorium*. Hutchison 1983:235.

If one of the objectives of the farmer is to protect his children's inheritance from any matrimonial property regime, alternative options should be considered and could include the following:

- The proceeds are payable to the farmer's deceased estate (policyholder) and he bequeaths an amount equal to the value of the proceeds to his daughter. The bequest is a legacy and excluded from the net estate when the accrual is calculated for the daughter upon the dissolution of her marriage.⁷⁰
- The liquidity of the deceased estate should be considered carefully, as the cash bequest will realise only if there is sufficient cash in the estate to pay all the liabilities and claims against the estate. The insured amount should be adjusted to include the executor's fee. If the farmer is married in community of property or subject to the accrual system, the insured amount should be twice as much to make provision for the surviving spouse's share.⁷¹ This option might be costly⁷² if the farmer is married in community of property or subject to the accrual system.
- The farmer can create⁷³ a discretionary testamentary trust⁷⁴ or an *inter vivos* trust⁷⁵ where his daughter is the capital and income beneficiary (together with her descendants and excluding her husband) and nominate the trust as the beneficiary.
- The insured amount will determine whether it is feasible to create a trust and the provisions of the trust deed require careful consideration to include the founder's (policyholder) objectives.
- The farmer bequeaths his estate to the son and daughter in equal shares and the son takes out a life insurance policy on the life of the farmer to purchase the daughter's share of the farming assets.

70 Lombard 2006:106.

71 The surviving spouse will be entitled to half of the joint estate if they are married in community of property or the surviving spouse will be entitled to half the proceeds if she has an accrual claim against the deceased estate if they are married subject to the accrual system and the accrual claim is in favour of the surviving spouse's estate.

72 The premium will be more, since the insured amount is twice as much. See example A above.

73 The farmer could nominate an existing *inter vivos* trust; however, the trust deed should be carefully studied to ensure that it meets the objective of the farmer, for instance to confirm the beneficiaries of the trust.

74 Reinecke & Nienaber 2009:11 – To qualify as a beneficiary, the beneficiary must be identifiable and alive at the death of the policyholder. A testamentary trust is created in terms of the will of the policyholder and comes into existence at the death of the policyholder. Cameron *et al.* 2007:6 – “The trust exists from the moment of death, though it takes effect later”.

75 Choosing between the two trusts will be based on the circumstances. If the trust will essentially be used to receive the proceeds, the creating of an *inter vivos* trust might be costly and premature. The testamentary trust might be more cost effective.

A buy-and-sell contract is required to secure the purchase, and the insured amount should be reviewed to ensure a market-related value. This option might be costly, taking into account additional transfer duty and possible value-added tax payable, capital gains tax or donations tax if the proceeds do not correlate with the market value.

A financial advisor should pay meticulous attention to all the above options and discuss each in detail with the client to select the best option where it is the express wish of a person to protect the benefit from the matrimonial property regime of the beneficiary.

9. Summary of practical implications

It is submitted that the application of the proceeds from a life policy payable to the estate of a spouse married out of community of property subject to the accrual system is as follows:

- The proceeds payable to the deceased estate of the policyholder, who is also the insured, are included in the net estate of the deceased when the accrual is calculated.
- The proceeds payable to a nominated beneficiary, who duly accepted the nomination, are excluded from the policyholder's net estate when the accrual is calculated.
- The proceeds payable to the surviving spouse, as the nominated beneficiary, who duly accepted the nomination, are excluded from the surviving spouse's net estate when the accrual is calculated.
- The proceeds payable to the surviving spouse as the policyholder on the life of the first-dying spouse are included in the surviving spouse's estate when the accrual is calculated.

The matrimonial regime of a client (and applicable third parties) should always be discussed and considered during the estate planning process. Although the correct application of the proceeds has been confirmed, careful consideration is required to correctly structure the life policies and determine the insured amount.

10. Conclusion

The accrual system is a fair matrimonial regime for couples who would like to keep their separate estates, but share in each other's growth during the subsistence of the marriage. However, taking into account the above examples, the possible accrual claim for or against the estate of a spouse can become complicated, costly and problematic during the administration of the deceased estate if not discussed in detail and provided for during the lifetime of the spouses.

It is recommended that the possible accrual claim be calculated on a regular basis; that it be determined in whose favour it is payable, and that assets or solutions be identified to settle the claim. Life insurance plays an important role in estate planning, and the correct application of the proceeds will ensure that spouses can effectively plan and provide for the accrual claim upon the death of the first-dying spouse in order to avoid complications during the administration of the deceased estate.

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