

## **ESTATE PLANNING**

There are various definitions and descriptions for the process known as “estate planning”. According to Meyerowitz, (an authority in this field) estate planning is the arrangement, management, securement and disposition of a person’s estate so that he, his family and other beneficiaries may enjoy and continue to enjoy the maximum from his estate and his assets during his lifetime and after his death, no matter when death may occur.

Three clear processes can be distinguished, namely accumulation of one's estate, the utilisation (controlling) thereof and eventually, the distribution thereof. These three processes can be distinguished from one another, but are also linked. In view of the fact that the science of estate planning is in the final instance practice-orientated, it involves a continuous interaction between theory and practice on the one hand, and, a wide variation between a number of subject disciplines that are relevant to the planning of estates on the other hand.

Estate planning is not primarily aimed at tax savings. In fact, it should never be considered as such. The evident reason for that is that tax legislation may change overnight. The fundamental reason is that, with the excessive emphasis on tax savings, the wide field of the science and profession of estate planning is narrowed to a series of tricks and acrobatic stunts! Although the protection of an estate against the erosion of unnecessary tax is legally part and parcel of the planning of an estate, it remains of secondary importance in the broader framework of the accumulation, utilisation and distribution of an estate.

Care should always be taken that the success of an estate plan is not measured against the tax savings that may flow from such a plan. In practice it unfortunately often happens that even doubtful tricks and stunts are used to save taxes, pretending that such activities are proper estate planning.

Not only are such actions detrimental to the general science of estate planning but they also cause damage to the trustworthiness of this very important subject discipline.

Estate planning involves the application of a wide range of divergent subject disciplines such as accounting, psychology (the knowledge of human nature), economics, finance and investment strategy. It is again important to emphasise that estate planning is not only estate duty planning and it is also not only insurance planning and definitely not only the drafting of wills. Although this subject discipline might include all of the above, it extends much further and wider than only that.

In order to practise estate planning properly, as a profession, it must be scientifically justifiable and not practised in a haphazard fashion. The process of the planning of an estate should have a logical sequence from the very first interview with the estate owner until the final implementation thereof. It is important to note that the process can actually never begin too early but that it most often begins too late.

The process normally starts with the collection of information with regard to the estate owner, his family and estate, his psychological and social environment, including cultural, political, religious, legal and economical/financial information. At this stage it should already be decided how comprehensive the planning must be.

Depending on, amongst other factors, the economical realities, it might only be necessary at this stage to execute an antenuptial contract or will and to do more thorough planning at a later stage. A questionnaire is normally used to obtain the required preliminary information.

After collection of the information, it is necessary to establish what the estate owner wants to do with his assets and liabilities, whether *inter vivos* or *mortis causa* (again this implies the establishment of the situation regarding the assets and liabilities of the estate owner). Goals have to be set, dealing with caring for the surviving spouse and other dependants, provision of income not only in the short term but also in the long term, the avoidance of disputes amongst family members, the creation of continuity with regard to, for instance, a farming operation, business enterprise and investments, the just and proper division of

estates and the securing of assets (under this will also fall possible savings in respect to VAT, Income Tax, Capital Gains Tax, Estate Duty, etc.)

From the description of estate planning, as set out above, it is also important to remember that estate planning must be done in such a manner that the estate owner, during his lifetime, can still enjoy and utilise his assets. Estate planners should be watchful not to lose sight of this aspect in their attempts to plan an estate, irrespective of the consequences.

The “what” question should, as set out above, eventually result in the setting of goals for the estate owner.

Thereafter attention should be drawn to the question of how these goals should be reached (in other words which techniques and instruments should be utilised for this purpose). With instruments and techniques are meant aspects such as antenuptial contracts, trusts, donations, loans, suspensive sales and options, companies and close corporations, partnerships, usufructs and other limited rights, insurance products, purchase and sale agreements, wills, etc. Also bear in mind that an estate plan can only be effective if it is legally binding. For this reason it is important that the estate planner acquaint himself with all the subject disciplines, acts and case law as already mentioned above.

It must then be decided when portions of the plan be implemented. For instance during marriage – the choice of matrimonial property, or *inter vivos* by way of a trust, insurance products, etc., after death by way of testamentary dispositions (which might also include limited rights). It must also be decided who will be responsible for the implementation of which portion of the estate plan. (For instance the attorney to draw up the contracts, the auditor to do the recording of the transactions in the books, the broker to attend to the insurance.)

From the above it should be clear that estate planning will never be a once off attempt. It should be an ongoing process beginning preferably at birth and continuing even after death.

For an estate plan to be successfully implemented, it must also be cost effective. The estate owner will always weigh the costs of the process against the advantages thereof. Costs are often one of the reasons for non-implementation of an estate plan. Other reasons might be the fact that the estate planner is so busy planning that he or she does not take proper notice of the specific requirements of the estate owner. It might also be due to the fact that the plan is only partial in the sense that it only covers insurance or tax or the transfer of certain properties. Fear of death, which is most often associated with estate planning, might also be a reason for non-discussion and non-implementation of an estate plan.

The feasibility and consequences of eventual recommendations, as well as the adaptability to conform to any unforeseen future circumstances, are essential prerequisites for a good estate plan.