# Estate planning around divorce

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FISA

Experiencing the emotional turmoil of a divorce is bad enough but going through a divorce when you are financially dependent could make your problems even worse. Angelique Visser, Chairperson of the Fiduciary Institute of Southern Africa and Director, Baraza Wealth, gives a few guidelines for women to consider to help them make informed decisions to protect themselves and make the process a little easier.

**Maintenance**

Ensure that your divorce agreement makes provision for maintenance for both you and your children in the event of your former spouse's death. If there is no provision, you may find it very difficult to prove your maintenance claim to the executor of the deceased estate. It is also important to make sure that it is clear in the Settlement Agreement what expenses will be paid by whom as this could result in additional costs if you have to approach the Court in this regard after the date of divorce.

**Protecting your assets**

Remember to finalise the registration or transfer of assets between you and your former spouse at the time of your divorce. Postponing this will only complicate matters when either of you die. Worse even, if you do not take transfer of fixed properties into your name and your former spouse's estate is sequestrated, you will only have a claim against his insolvent estate.

**Pension fund**

There was an amendment to the Pensions Funds Act which came into effect on 13 September 2007 which now allows for any amount granted to a non-member spouse to be deducted from the member's pension benefit in terms of the Divorce Act. This means that the non-member spouse does not have to wait until the member's retirement or death to receive the amount awarded to her in terms of the Divorce Order, but will receive the benefit immediately after the date of divorce. Since 1 November 2008 a non-member can within a specified period after date of the divorce elect whether she wishes for the amount to be paid directly to her or whether she wants to transfer it to a pension fund in her favour.

Statistics show that most women elect to take cash payments. The pros and cons of taking cash or having funds transferred to a pension fund need to be considered carefully, including the tax implications on your estate. If the money is not transferred to another fund and is withdrawn as cash, tax becomes payable on all but R25 000 of the amount withdrawn. Withdrawals of retirement fund benefits before retirement count against you because they reduce the tax-free lump sum you are entitled to when you retire. Currently 51% of South Africa's pensioners cannot make ends meet and as women have a much longer life expectancy than men and the early withdrawal of pension funds will make the position for them even worse after retirement.

**Update your Will immediately after your divorce**

You need to update your Will within three months of your divorce being granted. The importance of this timing is that after this three month period, should your former spouse still be named as a beneficiary in your Will, he will inherit from your estate regardless of your present circumstances. You could even have remarried and have children born from the second marriage. This happens!

**Guardianship and custody of children**

If you are divorced, it is important to ascertain whether the court has granted you sole or joint guardianship of your children. If you have joint guardianship and you do not believe that your divorced spouse is fit to act in that capacity, you should deal with the issue while you are alive. You may nominate an alternate guardian in your own Will, but make sure that this is someone suitable. In the event of joint guardianship, the divorced spouse will automatically be the sole guardian of the children and the nominated guardian will only become the guardian should the former spouse not wish or is unable to be the guardian.

**Who will look after my children after I die?**

You must ensure that you have enough cash in your estate to cover any outstanding debts, tax, funeral expenses and administration fees; otherwise your executor could be forced to sell assets to cover any shortfall. One way to guard against this would be to ensure that there is sufficient liquidity provided by life insurance to cover all these expenses. You should further provide for sufficient cash to provide for your children's daily maintenance needs; especially if you have nominated a third party as a guardian to raise your children.

**Testamentary trust**

To avoid minor children's inheritance being paid to the national Guardian's Fund, you can choose to set up a testamentary trust. This means that you state in your Will that a trust will be set up on your death; you also need to nominate the future trustees of this trust. The trustees will invest the funds in favour of the minor children and pay the children's guardian an amount every month for their living costs as well as school and medical fees. There are severe limitations to the flexible use of money left in the Guardian's Fund for the benefit of a minor beneficiary.