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Legal update 9 of 2020: Case law on divorce in respect of living annuities

Introduction

The Supreme Court of Appeal recently handed down judgment in a case relating to the division of the accrual of the estates of the parties married out of community of property with the accrual system involved in divorce proceedings. The case concerns whether or not a party's living annuity forms part of his/her estate and is therefore subject to be included in the calculation of the accrual of his/her estate, even though the annuitant does not own the capital value of the policy but is entitled to the annuity payments as and when they become due to him. The summary of the case appears below. It does not affect how we handle divorce matters should they come across in claims on the Momentum Living Annuity, Momentum Retirement Annuity Fund, the Momentum Pension Preservation Fund and the Momentum Provident Preservation Fund. We also included more detail on the case in the document.

Summary

Case: Montanari vs Montanari [2020] ZASCA 48 (5 May 2020)

Inclusion of living annuities in the calculation of accrual of an annuitant's estate

- The finding: The annuity payments from a living annuity of an annuitant involved in divorce proceedings may be taken into account when calculating the annuitant's accrual even though the capital value of the living annuity cannot be divided between the parties to the divorce.
- How we deal with this: When an annuitant (or the non-member spouse's attorney, by way of subpoena) requests a policy summary indicating an annuitant's living annuity values (capital and annuity payments), we furnish the authorised party requesting the information with the policy summary, as those values may be used in court to determine the accrual of the annuitant's estate.

The important thing is that we do not allow the parties to share the capital amount of the living annuity as if it were pension interest held in a retirement fund where a lump sum can be paid to the non-member spouse.

More detail of the case

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The parties were married out of community of property with the accrual system. Upon the divorce of parties married in terms of that marital regime, they need to treat their separate estates as if they were completely separate up until the date of marriage from which they need to start looking at the growth of each party's estate ('the accrual') and then divide the growth into equal shares. During their divorce proceedings, the parties had a dispute about whether the living annuity policies of the husband held with an insurer should be included in the calculation of his accrual. The High Court found that the annuitant's living annuity policies could not be considered when calculating his accrual, as the underlying assets of the living annuity policies (the capital) belong to the insurer and do not form part of his estate.

The non-member spouse was not satisfied with the High Court's decision and took the matter to the Supreme Court of Appeal (SCA).

The SCA set aside the decision of the High Court for the following reasons:

- The parties agreed at the outset that the relevant legislation (i.e. section 37A of the Pension Funds Act read with the Income Tax Act and the South African Revenue Service (Sars) General Note 18) did not allow for the annuitant's living annuities to be divided among them in the same manner that pension interest held in a retirement fund was divided.
- Therefore, the SCA was not asked to decide on whether the non-member spouse could receive a portion of the capital in the annuitant's living annuities.
- The ownership of the capital value of the living annuities vests in the insurer and the annuitant is only entitled to the annuity income/payments.
- The annuitant has a clear right to the investment returns yielded by his capital reinvestment with the insurer in the form of future annuity income.
- The annuity income is an asset that can be valued. Therefore, it forms part of the estate of the annuitant and subject to the accrual.

The SCA held that the value of the annuitant's right to future annuity payments in his living annuity policies was an asset in his estate for purposes of calculating the accrual in his estate.

It is not clear how the value of the annuitant's right to future payments should be determined. An annuitant in a living annuity has the right to choose a drawdown rate within the parameters set by the Minister of Finance by Notice in a Government Gazette. This level can be changed once a year. What drawdown rate should be used in calculating the future right? In addition, the annuitant can choose the investment portfolio/s in which the living annuity must be invested. What investment return (interest) should be taken into account for the calculation of the annuitant's future right?

An alternative would be to simply calculate the capital element of the living annuity by using the formula

$$Y = \frac{A}{B} \times C$$

where

A = purchase price of annuity

B = expected return provided for in the policy [annual annuity times life expectancy as per 'The a(55) Tables for Annuitants']

C = amount of annual annuity

and then provide for the split of that amount as per the agreement between the parties.

It would be interesting to see how this judgment is implemented.

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