Why you should think twice before giving your kid a brand new Merc...

By David Thomson

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There are a few things to consider before giving your 21-year-old any luxury assets. Sars might ask whether you're being generous because you can afford it... or if you're being 'shady' and dodging creditors and donations tax. It could go either way, depending on your income and credit status. On the other side of the proverbial coin, should someone kindly donate you a house, you might want to double check that they've paid the 20% donation fee they owe Sars... otherwise that's going to come out of your pocket if your benefactor hasn't settled it up within six months.

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Gifting is a beautiful thing, but – like a present – it can come with layers. Plus, hidden costs. Here we 'unpack' gifting from a legal point of view:

First up, the difference between gifts and donations

They're largely interchangeable terms but the context is different. Gifting means the giving of a genuine gift (for example a 'present') that fits within your means and lifestyle and usually marks a celebration. If you owe your creditors or are in arrears with Sars, then obviously the 'gift' – especially if it's an expensive car, house or Rolex, for example – will be investigated. A donation differs a bit in that it comes with tax and isn't linked to an occasion. You can make a donation or donations up to R100,000 in value, tax-free, annually. More expensive donations are subject to a 20% donations tax.

If a parent gifts a child a flat, for example, the question will be whether this is normal maintenance in line with the parent's wealth and desire to furnish his or her child with somewhere to live whilst at university, or an extravagant purchase that doesn't fit with the parent's financial profile.

People need to be careful that gifts are appropriate and aligned with an occasion. Donations are commonly perceived as giving to a worthy cause or part of estate planning and setting beneficiaries up for life. For example, you could take out an endowment policy for your child and ‘donate the premiums’ tax-free, providing these are under the allotted R100,000 pa.

Some donations are tax-deductible

Charitable donations can be tax-deductible up to a prescribed limit, providing the recipients are listed as Sars approved section 18A public benefit organisations (PBOs). If you make a donation to such an entity, you should be issued with a section 18A certificate, which must be submitted to Sars with your annual tax return.

Trusts can help with estate planning

Many people set up trusts as part of their estate planning. If you lend money to a discretionary trust that you are either ‘connected to’ as trustee or benefits you or your family, then you will have to charge the trustees market-related interest on the loan. If you don’t charge interest, Sars will levy donations tax on you. If you’re making a loan to a charitable trust – or any trust to which you are not ‘connected’ – that’s different and you don’t have to charge any interest on this. (The concept of ‘connected to’ and the types of trusts affected are covered in the Income Tax Act and you should seek tax advice to see if you fall within that definition).

Here’s a note of caution: If you’re married in community of property, be wary if your partner starts making donations to a trust you are not a beneficiary (or merely a discretionary beneficiary) of, without consulting you. Seek independent advice if you are unsure.

Unfortunately, South Africa has a high divorce rate and I've seen cases where a spouse has cheated his or her partner out of assets in this way. The tricky thing is that once the donation is done, it’s done. There’s no way for the aggrieved partner to retrieve the money from the trust, unless a lawyer can find a way to contest it in court on a technicality – like whether the transactions have been legitimate and proving that the trust is a ‘sham’ or simply the ‘alter ego’ of your spouse or partner.

No regrets

That rule goes for donations and gifting – once the gift/donation is given, there’s no opportunity to ‘take it back’ – unless it’s a donation *mortis causa*, “If you make a donation in anticipation of your death, you may revoke it.”

Gifts don’t always come free

Property transfer fees, conveyancing fees, deeds office fees (for property), securities transfer fees (for shares) etc. all still apply to gifts and donations, and are usually for the recipient’s pocket. It depends on what is being given and how it’s given. For example, there’s no cost for transferring an endowment from one person to another. But, when a property is given, even though its purchase price is R0, its transfer duties and conveyancing fees are based on the market value of the property, according to a professional valuation.

If you receive a donation that’s over R100,000 in value, you also need to be a bit cautious. Make sure the giver pays the

20% donation fee within the stipulated six months, otherwise Sars will expect you, as the recipient, to pay this. Your annual tax return form from Sars requires you to declare all donations given and received.

The final advice for the gift giver?

Just make sure the gift is appropriate to your lifestyle and means and recognises a special event in some way – that all helps to prove it's genuine, should Sars audit you. If you're making a donation over R100,000, always consider the tax side of things and take advice from a financial professional.

ABOUT THE AUTHOR

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