

LIMITED INTERESTS

A person can possess a right to enjoy a benefit of some kind in an estate without full ownership. Enjoyment is limited. The following are different types of limited interests:

1. USUFRUCT

This form of limited interest is created when a testator wishes to bequeath something to one person but allows another to enjoy the of the asset for a specific period, for example when a married couple wish the survivor of them to remain in possession and control of the estate and enjoy the fruits thereof with ownership going elsewhere.

A usufruct does not confer any rights of ownership and the legal presumption is, that the assets are intended to vest in the ultimate heirs to the capital from the date of death of the first dying. Some testators might tend to favour delayed vesting but from a practical point of view, it is preferable to confer vested rights upon the ultimate heirs where the intervening "life interest" is usufructuary.

The following is a typical illustration for the form in which a usufructuary interest may be created:

"We bequeath the residue of our massed estates to our children subject to the following conditions:

- a) The survivor of us shall remain in possession and control of the residue and enjoy the usufruct thereof until his or her death. The survivor of us is hereby specially exempted from the obligation to furnish security for the proper care and preservation of the assets.
- b) Should any of our children predecease the first dying of us, his or her share shall devolve upon his or her lawful issue by representation and failing such issue, shall accrue to our other children or their lawful issue per stirpes"

Bearing in mind the above illustration, the following points are worthy of note:

- a) The usufructuary has been exempted from furnishing security. If this is not done, the usufructuary may have no alternative but to repudiate (reject) the Will. He or she will almost certainly not be in a position to furnish acceptable security in respect of the full value of the assets. Furthermore, it will be noted that the usufructuary has been exempted from furnishing security generally, not specifically to the Master of the High Court or the executors or the ultimate heirs.
- b) Provision has been made to cover the contingency of the death of a child before the first dying of the testators.

In some joint Wills, the draftsmen concerned use expressions such as: "In the event of the predecease of a child", "Should a child die" etc. These draftsmen do not apparently appreciate that the expressions quoted may, in point of time, relate to events other than death of the first dying of the testators, for example, the death of the surviving spouse.

Needless to say, it is essential to be able to ascertain at the time the Will becomes operative, that is, on the death of the first dying, whether the ultimate heirs are to acquire vested rights or whether vesting in them is contingent upon their surviving the usufructuary. In example, vesting is immediate but with complete outright ownership postponed. The ultimate heirs are known as the "Bare Dominium" holders. A usufruct need not, of course, be created only in a joint Will. Any testator can incorporate a usufructuary interest into his or her Will.

2. **FIDUCIARY (FIDEI COMMISUM)**

This type of "life interest" is associated with legal ownership, although from a practical point of view it may confer no greater rights than a usufruct. In certain circumstances the distinction may, however, be of importance from the estate duty angle. The parties here are the fiduciary and fidei commissary heir.

If the surviving spouse, as fiduciary, is not specially authorised to mortgage or sell fixed property etc., then during the subsistence of the fiduciary interest, his or her rights are virtually the same as those of a usufructuary. From the point of vesting, however, the position is entirely different and therefore the Will which creates a fiduciary interest should not be in the same form as that which creates a usufruct. The following example of a joint Will which creates a fiduciary interest will illustrate this:

"We bequeath the whole of our massed estates to the survivor of us (the fiduciary) subject to the following conditions:

- a) On the death of the survivor of us, our estates shall devolve upon our children (the fidei commissary heirs) who may then be living and the lawful issue by representation of any child who may have predeceased the survivor of us.
- b) The survivor of us is hereby specially exempted from all obligation to furnish security for the preservation and ultimate restoration of the assets.
- c) The survivor of us shall be entitled to continue any bond liabilities which may be in existence at the date of the death of the first dying of us. He or she is hereby authorised to pass any bond in replacement of an existing bond but shall not be entitled to bond any property for an amount exceeding the sum outstanding at the death of the first dying of us. At the death of the survivor of us, any bond debt then outstanding shall be assumed by the ultimate heirs".

Bearing in mind this illustration, the following comments apply:

- a) The estate is bequeathed in the first instance to the surviving spouse, not the children, in order that the dominium (ownership) may vest in him or her.
- b) In the light of the preceding comment, it will be clear firstly, that vesting the ultimate heirs cannot possibly take place until the death of the survivor and, secondly, that the survivor will have the required locus standi to register transaction in respect of the fixed property (for example the continuation of bond debts), provided of course that the necessary authority for the transaction is conferred under the Will.
- c) The surviving spouse has been exempted from furnishing security. Under the common law a fiduciary parent is not required to security for the restoration of the assets to his or her children but, in the example given, grandchildren and remoter issue are also contingently interested in the preservation of the estate. It is a wise precaution to exempt a fiduciary for having to furnish security regardless of who may be the ultimate heirs.
- d) As the children acquire vested rights until the death of the fiduciary, it would be wrong to relate the substitution to the death of the first dying; accordingly, provision has been made for the substitution of issue in respect of any child who predeceased the survivor.

3. **FIDEI COMMISSUM RESIDUI**

This type of "life interest" confers upon the surviving spouse the right to use both income and capital for his or her personal requirements. What remain of the capital of the estate as at the death of the surviving spouse will, however, devolve in terms of the joint Will and not in terms of any later Will the surviving spouse may have executed. The form which the Will should take is illustrated below:

"We bequeath the whole of our massed estates to the survivor of us, who shall be entitled to enjoy during his or her lifetime the absolute ownership thereof, with full powers of alienation but subject only to the condition that what remains of our estates at the date of the death of the survivor of us, shall devolve upon our children then alive and the lawful issue by representation of a child who may have predeceased the survivor. We specially exempt the survivor of us from all obligation to furnish security for the preservation and ultimate restoration of any portion of our massed estate."

4. **USUS**

Usus is the right to use the property of another. The holder of a right of usus is under all the obligations of a usufructuary but his rights are more limited. The right of the usuary is strictly personal, and he or she is entitled to use the usus of the land, he may occupy it and take vegetables, fruits, wood, water etc., sufficient for his daily needs but no more.

The usus of animals give the usuary the right to work them and to take their milk, but their wool or offspring; the usuary of a house may occupy it with his family but he may not let it. A usuary may not cede or transfer his rights to another person.

5. HABITATIO

Habitatio is the right of living in the house of another but unlike a usuary the holder or a right of habitatio may let the house. His right is limited to residence and he has no right, for example, to depasture stock on adjoining land. Unless otherwise provided in the Will, the holder of a right of habitatio is liable for such charges as are levied on the occupier of premises e.g. water and electricity but not for charges which fall upon the owner.

6.

USUFRUCT

1. Owner – the Bare Dominium holder
2. The usufructuary:
 - Possession
 - The fruits
 - No ownership
 - Can let but not beyond the period of the usufruct or his lifetime whichever is shorter
 - No power to sell/bond
 - Can sell usufruct, meaning that the right of use and enjoyment can be sold. The new owner does not become the usufructuary
 - Must maintain property and pay rates and taxes. This does not extend to insurance cover for the property although it would be in his/her interests to do so
 - Not part of community estate
 - Successive usufructs possible
 - Can mine but only entitled to the income on the mineral proceeds
 - The right is an asset for CGT purposes

FIDUCIARY

1. Owner – the Fiduciary
2. The Fiduciary:
 - Possession
 - Fruits
 - Ownership during fideicommissum
 - Can let
 - Can sell/bond if authorised thereto
 - Can sell the fideicommissum
 - Must maintain property and pay rates and taxes
 - Not part of community estate
 - Successive fideicommissum possible but remember restrictions on fixed property
 - Can mine but only entitled to the income on the mineral proceeds
 - The right is an asset for CGT purposes