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PROPOSED ALTERNATIVES TO THE USUFRUCT



Fiduciary Institute of South Africa member, High Court Advocate and Fiduciary Advisor at PSG Trust, Dr Eben Nel, proposes that a discretionary living trust should be considered as an alternative to estate planning structures such as the usufruct, which can often unearth numerous challenges.



The usufruct became a popular mechanism for transferring assets, especially fixed property, to an heir, but at the same time creating a right on the use, or produce of the property in favour of another person, known as the usufructuary. The usufructuary can be regarded as a legatee rather than an heir.

There is a distinction between a fiduciary interest, which represents a vested right in the body of the *fideicommissary* property, and a usufructuary interest. As the usufructuary is entitled to both the use and enjoyment of the property, as well as the fruits thereof, they may let the asset to a third party.

A variety of practical and tax-related problems relating to the usufruct have, however, developed over time. A favourite application is where the testator determines in his will that his farm will be inherited by his son, who will continue with the farming operations, with a usufructuary right in favour of the testator's wife, to ensure that she will have a roof over her head and will benefit from the profits of the farm as an income. However, at the death of his mother, the son will be liable for estate duty on the value of the usufruct, which is added to his bare dominium. In practice, the son may not have the taxable amount available or may not be in a position to raise the funds. This may result in his selling the farm or other assets to facilitate the taxes payable, which was never the intention of the testator.