



The testator may bequest a unit in a sectional title scheme to his daughter, subject to a lifelong usufruct to his girlfriend, who has no income and, after two years of non-payment of any levies, disappeared. In terms of the Sectional Titles Act 95 of 1986, the owner of the unit is liable for all levies. Section 1(a) defines the owner as “the person registered as owner or holder thereof”. It can be argued that a usufructuary who holds the property and enjoys the fruits thereof for the rest of her life, is a holder for these purposes.

Alternatively the owner of the bare dominium, the daughter, may be forced by the body corporate to pay the levies although she had no enjoyment of the property and, as long as the usufructuary resides there, she cannot rent it out to defray the levies. If she refuses or is unable to pay the levies, she may ultimately lose the property and the usufructuary may even end up on the street.

In terms of the Deeds Registries Act 47 of 1937, the duration of a usufruct is limited to the lifetime of the person in whose favour it was created. In practice, however, a contingent usufructary right may be registered, which means that the right is dependent on a future event, like a remarriage or emigration.

A usufruct may be created in favour of more than one person at the same time, but more than one usufruct cannot exist concurrently over the same property. Although a second usufruct can therefore not be registered over property, a contingent usufruct may indeed be registered.

The potential challenges relating to the usufruct include estate duty and transfer duty realities, the limitations created by the Subdivision of Agricultural Land Act 70 of 1970, capital gains tax and the limitations regarding the use of property with a usufruct as security for a bond to be registered.

We submit that a discretionary living trust should often be considered as an alternative to estate planning structures such as the usufruct, the *fideicommissum*, *usus*, *habitatio*, *modus* and the testamentary trust.

The trust as an alternative can be structured to provide for a number of beneficiaries and even to separate income and capital beneficiaries. For example, if the testator bequeathed an asset to a discretionary trust with one party as the capital beneficiary and another party as the income beneficiary, a similar result can be achieved as with the usufruct. When the income beneficiary dies, the result will be that the capital beneficiary will remain as the only beneficiary, both income and capital. As no vesting of capital has taken place in case of a discretionary trust, no transfer of ownership is realised and no tax or other considerations are relevant.