

The implications of the use of personal servitudes as estate planning instruments

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ABSTRACT

Estate planning is the process during which a plan is set up in order to regulate the use, conservation and transfer of the estate owner's assets. The division of ownership and use of property by means of personal servitudes is a useful estate-planning tool.

A distinction is made between two types of servitudes, namely: a praedial servitude and a personal servitude. The scope of this dissertation is focused on personal servitudes as estate-planning instruments. The study aims to discuss the financial implications of using personal servitudes as estate-planning instruments against a general back drop of the nature of estate planning, the nature of personal servitudes and the registration requirements of personal servitudes.

These financial implications are mainly in the form of taxes. The study discusses the following taxes with regard to personal servitudes: normal income tax, estate duty, donations tax, transfer duty and capital gains tax. Several other issues pertaining to the use of personal servitudes are discussed together with the use of one-year usufruct schemes in order to avoid taxes.

The study concludes that the use of personal servitudes as estate-planning instruments can be both beneficial as well as detrimental to the estate planning process. It is suggested that estate planners must consider all aspects of personal servitudes and all consequences that it may have on an estate before making use of these limited real rights.

Keywords: Estate planning, personal servitudes, registration, normal income tax, donations tax, estate duty, transfer duty, capital gains tax.

OPSOMMING

Boedelbeplanning is die proses waarin 'n plan opgestel word om die gebruik, beskerming en oordrag van die boedeleienaar se bates te reguleer. 'n Nuttige boedelbeplanninginstrument met betrekking tot onroerende eiendom is die verdeling van eienaarskap deur middel van persoonlike serwitute.

Daar word 'n onderskeid getref tussen twee tipes serwitute, naamlik: saaklike serwitute en persoonlike serwitute. Hierdie studie is gefokus op persoonlike serwitute as boedelbeplanninginstrumente. Die finansiële implikasies van die gebruik van persoonlike serwitute as boedelbeplanninginstrumente word bespreek teen 'n algemene agtergrond rakende die aard van die boedelbeplanningproses, die aard van persoonlike serwitute en die vereistes vir die registrasie van persoonlike serwitute.

Hierdie finansiële implikasies is meestal in die vorm van belasting. Die studie bespreek die volgende belasting van toepassing op persoonlike serwitute: inkomstebelasting, boedelbelasting, geskenkebelasting, oordragskoste en kapitaalwinstbelasting. Verskeie ander kwessies met betrekking tot persoonlike serwitute, sowel as die gebruik van een-jaar vruggebruik skemas word daaropvolgend bespreek.

Die studie kom tot die gevolgtrekking dat die gebruik van persoonlike serwitute as boedelbeplanninginstrumente voordelig kan wees in die boedelbeplanningproses maar dat dit ook nadelige gevolge kan meebring. Dit word voorgestel dat boedelbeplanners alle aspekte rakende persoonlike serwitute, sowel as die impak wat die gebruik daarvan op die boedel kan hê, moet oorweeg alvorens hul gebruik maak van persoonlike serwitute.

Sleutelwoorde: Boedelbeplanning, persoonlike serwitute, registrasie, inkomstebelasting, geskenkebelasting, oordragskoste, kapitaalwinstbelasting.

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LIST OF ABBREVIATIONS

THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir Suid Afrikaanse Reg
SARS	South African Revenue Service

1. Introduction

As Benjamin Franklin once said: 'In this world nothing can be said to be certain, except death and taxes'. Estate planning facilitates preparing for the event of death and the distribution of assets in the most cost-effective way.

Estate planning is the process during which a plan is set up in order to regulate the use, conservation and transfer of the estate owner's assets. When such a plan is well thought out it will ensure that the estate grows in value in order to provide for the needs of the estate owner and his or her family while protecting the estate from any avoidable costs and taxes.¹ Scholars have summarised the definition of what estate planning entails by stating that estate and/or financial planning is an ongoing process during which decisions on the best way to manage and accumulate assets must be made in advance.²

A useful estate planning tool in the case of immovable property is the division of ownership and use of property by means of personal servitudes. For example, it is possible for a testator to bequeath his farm to his son, while at the same time allocating his wife the right to live in the farmhouse or enjoy the profits of a certain part of the produce of the farm. In this way, the testator can ensure that his wife is taken care of by means of employing a personal servitude. This, however, leads to the following question: What is the effect of personal servitudes on the transferability and value of assets in an estate?

Estate planning is per definition the gathering of information and planning of the distribution of wealth in order to build an estate.³ The process of estate planning can be broken down into two stages, namely the preparation and implementation of an estate plan prior to and after the client's death.⁴ The first phase of estate planning, which takes place during the life of the estate owner, involves the taking of measures to 'freeze' the estate at its current value in order to minimise estate duty

¹ Davis, Beneke and Jooste *Estate Planning* para 1.1.

² Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 22.

³ Davis, Beneke and Jooste *Estate Planning* para 1.1.

⁴ Davis, Beneke and Jooste *Estate Planning* para 1.1.

and capital gains tax implications. However, the estate planner must still ensure that no liquidity problems will arise as a result of the 'freezing' of the estate value.⁵ Usufructs are often used in combination with trusts as estate planning tools in order to achieve this 'freezing' of the estate value with estate duty being saved when assets with the potential for capital growth are transferred to a trust during the lifetime of the estate owner.⁶ The second phase then takes place after the death of the estate owner and involves the implementation of the prepared estate plan. This is achieved by implementing the provisions of the will of the estate owner and any other measures such as trusts, in order to achieve the objectives of the estate owner.⁷

Scholars have listed the objectives of estate planning as follows: flexibility; the minimisation of estate duty and taxes; the provision of liquidity, capital and income for dependants of the estate owner; the provision of retirement capital and income; the generation of an income during the estate owner's lifetime; protection against insolvency and inflation; administration of the estate; the protection of all interests and succession planning, amongst others.⁸ A brief discussion of some of these objectives now follows:

Flexibility is considered an objective of estate planning since every estate plan should possess the possibility to be adaptable to changing circumstances.⁹ Sufficient flexibility is required in every estate plan to provide for changes in the legal environment and in the personal relationships of the estate owner.¹⁰ It is important to note that according to scholars, an estate plan always remains subject to the preferences of the persons involved, which may limit the flexibility of the plan.¹¹

⁵ Goodall *et al* *The South African Financial Planning Handbook* para 35.2.

⁶ Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 15.

⁷ Goodall *et al* *The South African Financial Planning Handbook* para 35.2.

⁸ Davis, Beneke and Jooste *Estate Planning* para 1.2.

⁹ Goodall *et al* *The South African Financial Planning Handbook* para 35.2.

¹⁰ Davis, Beneke and Jooste *Estate Planning* para 1.2.1.

¹¹ Davis, Beneke and Jooste *Estate Planning* para 1.2.1.

However, the plan must never become so inflexible in nature that it is unable to provide for the present needs and wishes of the estate owner.¹²

Arguably, one of the most important objectives of estate planning should be to minimise all costs, including taxes. The different types of costs and taxes in relation to estate plans, especially with regard to personal servitudes, are discussed in Chapter 4 below. An additional objective of any estate plan is the provision of liquidity. The estate plan must identify all income requirements of the estate owner and his or her dependants and consequently ensure that they are adequately provided for.¹³ It is necessary to assess and calculate whether an estate will have sufficient cash to pay for all liabilities after the death of the client in order to avoid having to dispose of assets at the wrong time and for lower profits.¹⁴ The objective of liquidity can be linked to two other objectives of any well-thought out estate plan, namely: the provision of capital and income for dependants and the provision of retirement capital and income for the estate owner during his or her lifetime.¹⁵

It can be concluded from this list of objectives that estate planning entails much more than the mere preparation of a will and succession planning. Some scholars suggest that the most important objective is the implementation of the wishes of the client; the primary objective is thus the production of a cost-effective, commercially sound plan in accordance with the wishes of the estate owner.¹⁶

The use of personal servitudes is a handy estate-planning tool. A servitude is defined as a limited real right or *ius in re aliena* that gives the holder thereof the right to either the use and enjoyment of a property without being the owner or to insist that the owner of said property is not permitted to exercise certain entitlements which he or she would have had if the servitude did not exist.¹⁷ Therefore, it can be said that the core function of a servitude is providing the servitude-holder with 'a real right to the advantage of the property of another' and that it is exactly this undeviating

¹² Goodall *et al* *The South African Financial Planning Handbook* para 35.2.

¹³ Davis, Beneke and Jooste *Estate Planning* para 1.2.5.

¹⁴ Goodall *et al* *The South African Financial Planning Handbook* para 35.2. Also see Davis, Beneke and Jooste *Estate Planning* para 1.2.5.

¹⁵ Davis, Beneke and Jooste *Estate Planning* para 1.2.6 and para 1.2.7.

¹⁶ Goodall *et al* *The South African Financial Planning Handbook* para 35.2.

¹⁷ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 321.

relationship between the servitude holder and the relevant property that sets a servitude apart from a normal contractual right against the property owner.¹⁸

A distinction is made between two types of servitudes, namely: a praedial servitude which is defined as a real right over one piece of land in favour of another piece of land and a personal servitude, which is a real right in favour of another person and confers to that person the right to the use and enjoyment of the property of another.¹⁹ The scope of this dissertation is focused on personal servitudes as estate planning instruments.

The holder of the servitude is theoretically in a stronger position pertaining to the unrestricted exercise of his or her servitude, with regard to the relationship between the servitude-holder and the owner of the property.²⁰ Therefore, the owner of the property may only use the servient object in such a manner that no infringement is made upon the servitude-holder's rights.²¹ The holder of the servitude may perform all necessary acts for the exercise of his or her rights with reference to the servitude.²² However, the servitude-holder must exercise these rights in a civilised manner whilst also being considerate to the property owner.²³ It is the right of the property owner to exercise all of his powers as owner that do not infringe upon the servitude-holder's rights. Specifically he or she may grant other servitudes providing that these new servitudes do not influence the existing servitude.²⁴

Personal servitudes are generally discussed with reference to three specific types of personal servitudes namely *usus*, *ususfructus* and *habitatio*. The nature, transferability, and registration of servitudes over immovable property, the vesting of servitudes over movable property and the extinction of servitudes all receive attention. Thereafter, a brief discussion follows on the remedies of the holder of the servitude.

¹⁸ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 321.

¹⁹ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 321.

²⁰ Joubert and Faris *The Law of South Africa* 459.

²¹ Joubert and Faris *The Law of South Africa* 459.

²² Joubert and Faris *The Law of South Africa* 459.

²³ Joubert and Faris *The Law of South Africa* 459.

²⁴ Joubert and Faris *The Law of South Africa* 459.

The purpose of this study is to provide a brief overview of the legal nature and creation of each of these personal servitudes as estate-planning tools, as well as the extent to which each of the servitudes is a burden to the property. The limitations that these servitudes place on the owner of the property will be discussed, as well as the rights acquired by the servitude-holder. The statutory requirements pertaining to the context of estate planning will also be discussed. In the case of agricultural land, the consent of the Minister of Agriculture must be obtained before personal servitudes, affecting only a part of a particular property, can be registered in a deeds registry. In this regard, the effect of the *Subdivision of Agricultural Land Act*²⁵ on estate planning will be discussed. Furthermore, the implications of each of these servitudes in relation to estate planning will also be examined, with special emphasis being placed on the taxation of usufructs.

The hypothesis of this study is that the use of personal servitudes as estate-planning instruments can be both beneficial as well as detrimental to the estate-planning process. It is suggested that estate planners must consider all aspects of personal servitudes and all effects that it may have on an estate before making use of these limited real rights.

This study is based on a literature review of textbooks, journal articles, national legislation, case law and electronic resources. The above-mentioned primary and secondary sources are critically analysed and incorporated throughout this study. The nature of personal servitudes is explored in Chapter 2 while the extent to which personal servitudes may be registered in South Africa is discussed in Chapter 3. The implications of personal servitudes as they relate to estate planning are subsequently discussed in Chapter 4, with special emphasis being placed on the tax implications thereof for individuals and trusts. Lastly, this study is concluded in Chapter 5, which also contains a number of recommendations and findings.

A discussion on the nature of personal servitudes follows in Chapter 2 in order to provide a general background of these limited real rights.

²⁵ 70 of 1970 (hereafter the *Subdivision of Agricultural Land Act*).

2. The nature of personal servitudes

2.1. *Servitudes in general*

A servitude is defined as a limited real right or *ius in re aliena* which gives the holder thereof the right to either the use and enjoyment of a property without being the owner, or to insist that the owner of said property is not permitted to exercise specific entitlements which he or she would have had if the servitude did not exist.²⁶ In other words, this limited real right restricts the entitlements of the owner while establishing a direct relationship between the holder of the right and the property to which it relates. Furthermore, this relationship is enforceable against any owner of the property.²⁷ Therefore, it can be said that the core function of a servitude is to afford the servitude-holder with 'a real right to the advantage out of the property of another'.²⁸

A distinction is made between two types of servitudes, namely a praedial servitude and a personal servitude. Praedial servitudes are defined as a real right over one piece of land in favour of another piece of land.²⁹ Personal servitudes are a real right in favour of another person than the owner and confer to that person the right to the use and enjoyment of the property of another. Personal servitudes are enforceable against an owner and his or her successors in title.³⁰ The distinction between personal and praedial servitude is essentially based on the distinct economic impacts of the different servitudes. A praedial servitude is intended to enhance the use of the dominant land while the function of a personal servitude is to benefit the holder thereof in an individual capacity.³¹

Although a distinction is made between praedial and personal servitudes, they do possess common characteristics. These characteristics include both being recognised

²⁶ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 321.

²⁷ Grobler *The Salva Rei Substantia requirement in personal servitudes* 51.

²⁸ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 321.

²⁹ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 321; *Resnekov v Cohen* 2012 1 SA 314 para 6.

³⁰ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 321; *Resnekov v Cohen* 2012 1 SA 314 para 6.

³¹ Grobler *The Salva Rei Substantia requirement in personal servitudes* 34.

as limited real rights.³² The maxim *nulli res sua servit*, translated into English means that a person cannot create a servitude on his or her own property and applies to both these categories.³³ In both cases, a further servitude cannot be imposed based on an existing servitude in terms of the *servitutis esse non potest* principle.³⁴

There are two rebuttable presumptions regarding servitudes. Firstly, it is presumed that the ownership of a thing is free from servitudes and that the onus lies on the person affirming the existence of the servitude to prove it.³⁵ Secondly, when it is uncertain whether a servitude is personal or praedial in nature, it is automatically presumed to be a personal servitude.³⁶ An example of where the uncertainty regarding the nature of a servitude was considered can be found in the case of *Resnekov v Cohen*.³⁷ In this case, Griesel J pointed out that the decisive factor in differentiating between personal and praedial servitudes is whether a dominant tenement exists or not – if there is no such dominant tenement in existence, the servitude is presumed to be personal in nature.³⁸

With regard to the relationship between the servitude-holder and the owner of the property, the holder of the servitude is theoretically in the stronger position pertaining to the unrestricted exercise of his or her servitude.³⁹ Therefore, the owner of the property may only use the servient object in such a manner that no infringement is made upon the servitude-holder's rights.⁴⁰ The holder of the servitude may perform all necessary acts for the exercise of his or her rights with reference to the servitude.⁴¹ However, the holder must exercise these rights in a civilised manner, in terms of the *civiliter modo* requirement, while being considerate to the property owner.⁴² It is the right of the property owner to exercise all of his powers as owner

³² Van der Merwe *Sakereg* 462.

³³ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 323.

³⁴ Joubert and Faris *The Law of South Africa* 458; Van der Merwe *Sakereg* 463.

³⁵ *Ex Parate Will G Hare (Pty) Ltd* 1958 (4) SA 416 (C) para 6.

³⁶ Joubert and Faris *The Law of South Africa* 458; Van der Merwe 2013 *TSAR* 341; *Resnekov v Cohen* 2012 1 SA 314 para 9.

³⁷ 2012 1 SA 314 (hereafter the Resnekov case).

³⁸ The Resnekov case para 8.

³⁹ Joubert and Faris *The Law of South Africa* 459; Van der Merwe *Sakereg* 464.

⁴⁰ Joubert and Faris *The Law of South Africa* 459.

⁴¹ Joubert and Faris *The Law of South Africa* 459.

⁴² Joubert and Faris *The Law of South Africa* 459; *Tshwane City v Link Africa and Others* 2015 6 SA 440 (CC) para 87; *Brink v Van Niekerk en 'n Ander* 1986 3 SA 428 (T).

that do not infringe upon the servitude-holder's rights. In particular, he or she may grant other servitudes, provided that these new servitudes do not impact on the existing servitude.⁴³

The scope of this dissertation is focused on personal servitudes and a discussion on the specific requirements of personal servitudes now follows.

2.2. Personal servitudes

As mentioned earlier, personal servitudes are established for the benefit of specific persons over things and offer a variety of benefits to their holders.⁴⁴ The duration of personal servitudes is limited to a specific timeframe or the occurrence of a future event. No personal servitude can be in effect after the death of the servitude-holder and in the case of a juristic person, the lifetime of a servitude is considered a century.⁴⁵ As a personal servitude is bound to the holder of the servitude, it is inalienable; which means that it cannot be inherited and it expires at the moment of death of the right-holder or by the effluence of time, whichever occurs first.⁴⁶

Although leading textbooks on the subject state that personal servitudes are bound to the holder of the servitude and as such is not inheritable,⁴⁷ some scholars have speculated that in light of the modern South African property law, this rule should be subject to change in certain circumstances.⁴⁸ This subject was addressed in the *Resnekov* case in which one of the main considerations was whether personal servitudes could be made transferable to successors in title if the restrictive condition in the title deed of the property is correctly worded.⁴⁹ It was argued on behalf of the applicant that the wording in the restriction 'and his successors in title' rendered it perpetual in nature and while personal servitudes usually expire upon the death of the servitude-holder, this is not the case when an agreement to the contrary is

⁴³ Joubert and Faris *The Law of South Africa* 459; Van der Merwe *Sakereg* 467; *Roeloffze NO and Another v Bothma NO and Others* 2007 2 SA 257.

⁴⁴ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 338.

⁴⁵ Van der Merwe *Sakereg* 360.

⁴⁶ Van der Merwe *Sakereg* 360.

⁴⁷ Van der Merwe *Sakereg* 360; Joubert and Faris *The Law of South Africa* 496; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 338.

⁴⁸ Van der Merwe 2013 *TSAR* 340-348.

⁴⁹ For a summary of the facts of the case see Van der Merwe 2013 *TSAR* 340-348.

made.⁵⁰ The applicant quoted a passage from Hall and Kellaway in support of the above-mentioned argument.⁵¹ The passage states that the inalienability of personal servitudes has become a matter of the intention of the contracting parties owing to the development in South African mining and mineral rights.⁵²

The court rejected this argument by referring to section 66 of the *Deeds Registries Act*⁵³ which states that no personal servitude, intending to exist beyond the lifetime of the holder thereof, shall be registered. Finally, the applicant relied on the decision in *Durban City Council v Woodhaven Ltd*,⁵⁴ in which the court left open the question of whether a personal servitude could be made alienable through an agreement between the parties.⁵⁵ The court held that there was no direct authority in the South African law for the presumption that personal servitudes can be alienable through agreement. Griesel J pointed out that the opinion of Hall, as quoted by the applicant, had not been followed by courts and that their reasoning was faulty because mineral rights are indeed transferable and inheritable. Furthermore, mineral rights are indeed classified as limited real rights, but not as personal servitudes.⁵⁶ The court therefore reaffirmed the position that a personal servitude is inseparably bound to the holder of the right and as such, the right is terminated upon the death of the beneficiary.⁵⁷

2.2.1. *Types of personal servitudes*

The focus of this dissertation will be on three specific types of personal servitudes that require further discussion, namely *usus*, *habitatio* and usufruct. These types of personal servitudes are chosen because the nature of these servitudes requires them to always be personal and therefore they are classified as personal servitudes *par excellence*.⁵⁸

⁵⁰ Para 7 of the Resnekov case as discussed in Van der Merwe 2013 *TSAR* 342.

⁵¹ Hall *Servitudes* 163-164.

⁵² Hall *Servitudes* 163-164; the Resnekov case as discussed in Van der Merwe 2013 *TSAR* 342.

⁵³ 47 of 1937 (hereafter the *Deeds Registries Act*).

⁵⁴ 1987 3 SA 555 (A) (hereafter the Durban case).

⁵⁵ The Resnekov case as discussed in Van der Merwe 2013 *TSAR* 343.

⁵⁶ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 411.

⁵⁷ Van der Merwe 2013 *TSAR* 342.

⁵⁸ Hall *Servitudes* 162.

2.2.1.1. *Usus*

The servitude of *usus* entitles the holder of the right, also known as the usuary, to use the property of another without detriment to the substance of the property.⁵⁹ The usuary is entitled to gather the fruits of the property for his or her own daily needs and the daily needs of their household. The rest of the produce belongs to the owner.⁶⁰ The usuary may not alienate the property or transfer the right of use to another party.⁶¹ When the right of use is related to a house, the usuary is entitled to occupy the house, together with his household, servants, and guests.⁶²

The usuary is ordinarily not entitled to sublease the house, but certain exceptions to this rule can be identified. For example, if the house is too big for only the family of the usuary to occupy, he or she may sublease parts of the house as long as he or she remains in occupation.⁶³ The rule pertaining to expenses states that the usuary does not have to contribute to the paying of expenses unless he or she takes all the fruits or has the sole use of the *corpus*.⁶⁴

2.2.1.2. *Habitatio*

Habitatio, or the right to habitation, is in effect a right to occupation that entitles the holder of the servitude to live in a certain building or on a farm.⁶⁵ The holder of this right is entitled to dwell in the house provided that he or she does not cause any damage to the substance of the property.⁶⁶ The holder of this right is also entitled to grant a lease or sublease to a third party.⁶⁷ The right to habitation ceases with the death of the holder of the right but not with the death of the grantor thereof, unless the right was granted *precario*, which means that the successors in title of the

⁵⁹ Joubert and Faris *The Law of South Africa* 496.

⁶⁰ Hall *Servitudes* 177; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 341; *Vairetti v Zardo NO and Others* (unreported) case number 12423/2007 of 12 April 2010 para 22-23.

⁶¹ Joubert and Faris *The Law of South Africa* 496.

⁶² Joubert and Faris *The Law of South Africa* 459.

⁶³ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 338.

⁶⁴ Hall *Servitudes* 177; *Vairetti v Zardo NO and Others* (unreported) case number 12423/2007 of 12 April 2010 para 27.

⁶⁵ Joubert and Faris *The Law of South Africa* 497.

⁶⁶ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 341.

⁶⁷ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 341.

grantor will have the right to revoke the right.⁶⁸ Furthermore, if there is any uncertainty pertaining to whether the house itself or only the right to occupy it was bequeathed to a legatee, the presumption is that only a right of *habitatio* was granted and the onus is on the legatee to prove otherwise.⁶⁹

An interesting question concerning the personal servitude of *habitatio* was considered in the decision in *Kidson v Jimspeed Enterprises*.⁷⁰ The facts of the case can be summarised as follows:⁷¹ The first applicant, Kidson, registered a personal servitude of *habitatio* for himself over the farm that he had sold to the first respondent, Jimspeed. The servitude entitled him to occupy the farmhouse as it was linked to his lifetime and registered against the title deed of the farm. Kidson and his wife later decided to move away from the farmhouse because of the alleged conduct of the owner which had made it impossible for them to continue living there. While the Kidsons were absent, Jimspeed (owner) sold the farm to a buyer who then subsequently resold it to a family trust, of which the second respondent, Sinclair, was the trustee. During this time, the Kidsons were forced to leave their new home due to mining activities and decided to move back to the farmhouse over which the servitude was registered. To their shock, the Kidsons found out that Jimspeed had destroyed the house in the meantime and that Sinclair was now in control of the property.

The question raised in this case is therefore whether the right to occupy was terminated when the house was demolished. The Court decided that the true determination for termination should be whether it is possible to rebuild, as the servitude can only be terminated when it is no longer possible for the land to support the infrastructure, or alternatively, when the holder of the right dies.⁷²

⁶⁸ Hall *Servitudes* 178.

⁶⁹ Van der Merwe *Sakereg* 374. Also see Hall *Servitudes* 179.

⁷⁰ 2009 5 SA 246 (GNP).

⁷¹ Scott 2011 *THRHR* 155-169.

⁷² Scott 2011 *THRHR* 155-169.

Accordingly, the Court issued an order stating that the servitude entitled the Kidsons to exercise their right of *habitatio* for the duration of Mr Kidson's life, by the rebuilding of the house or by utilising an alternative means of abode.⁷³

2.2.1.3. Usufruct

Scholars have defined a usufruct as a personal servitude that grants the holder thereof the right to use the property of another and to gather the fruits thereof, with the obligation to return said object to the owner without causing any damage to the substance of the property.⁷⁴ Usufructs are highly personal in nature and therefore they cannot be granted for a period longer than the lifetime of the usufructuary.⁷⁵ The usufructuary does not obtain a right to the dominium of the property but merely the right to possess and enjoy the property.⁷⁶

The object of the usufruct may be movable or immovable, corporeal or incorporeal.⁷⁷ In addition to this, a usufruct may be granted over a collection of things, for example a herd of cattle or even the entire estate of the grantor.⁷⁸ The specific object, and all its accessories together with all servitudes attached to it, is subject to the usufruct. A usufruct may not be granted over things that can be consumed by use, but a quasi-usufruct may be constituted in such a case.⁷⁹ The quasi-usufructuary is entitled to use and enjoy the property and acquire all income derived from it for him or herself. However he or she must return the object, not in specie, but in kind to the owner when the quasi-usufruct expires.⁸⁰

Usufructs are most commonly used in the law of succession, occurring where a testator grants a usufruct over his estate to his spouse while bequeathing ownership thereof to his children.⁸¹ The use of usufructs is however not exclusive to the law of

⁷³ Scott 2011 *THRHR* 155-169.

⁷⁴ Grobler *The Salva Rei Substantia requirement in personal servitudes* 45.

⁷⁵ Joubert and Faris *The Law of South Africa* 487.

⁷⁶ Hall *Servitudes* 165.

⁷⁷ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 386.

⁷⁸ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 386.

⁷⁹ Hall *Servitudes* 176.

⁸⁰ Joubert and Faris *The Law of South Africa* 487. Also see Hall *Servitudes* 176.

⁸¹ Van der Merwe *Sakereg* 362.

succession and may be established *inter vivos*.⁸² A usufruct may also be used as an estate-planning instrument to ensure advantageous tax consequences.⁸³

With regard to the rights of the usufructuary, he or she is entitled to the possession, administration, use and enjoyment of the property and to the fruits thereof.⁸⁴ The usufructuary becomes the owner of the fruits by gathering them or by someone gathering them for him or her. However, fruits that are not gathered when the usufruct expires do not pass on to the successors of the usufructuary.⁸⁵ Vegetables, crops, fruits of animals (their young, milk, manure, wool, *et cetera*) and plantations planted with the purpose of being felled have been categorised as natural fruits; while civil fruits include rent, quitrent and interest.⁸⁶ Civil fruits become the property of the usufructuary as they fall due; when the usufruct expires the civil fruits are divided between the successors of the usufructuary and the owner of the property, in proportion to the time that the usufruct was in existence.⁸⁷

General rights of the usufructuary include the owner of the bare dominium not being entitled to interfere in such a manner that infringes upon the rights of the servitudeholder. The owner is also not permitted to create any further servitudes over the property without the consent of the usufructuary.⁸⁸ However, it is uncertain whether the rights of the usufructuary include the right to alienate the usufruct.⁸⁹ It is accepted that the usufructuary is not entitled to transfer his or her usufruct to a third person but he or she may transfer their usufructuary interest. However, the interest of said third party will expire when the usufruct of the usufructuary expires.⁹⁰

⁸² Van der Merwe *Sakereg* 362.

⁸³ Grobler *The Salva Rei Substantia requirement in personal servitudes* 46. See discussion on the use of personal servitudes as estate planning instruments in chapter 4 below.

⁸⁴ Joubert and Faris *The Law of South Africa* 489.

⁸⁵ Joubert and Faris *The Law of South Africa* 489; Du Bois *et al Wille's Principles of South African Law* 606.

⁸⁶ Du Bois *et al Wille's Principles of South African Law* 606; Andrews 1993 *Law and Contemporary Problems* 174.

⁸⁷ Joubert and Faris *The Law of South Africa* 489.

⁸⁸ Hall *Servitudes* 167.

⁸⁹ Joubert and Faris *The Law of South Africa* 489; see discussion on inalienability of personal usufructs in Section 2.2 above.

⁹⁰ Joubert and Faris *The Law of South Africa* 491.

The alienability of the usufructuary interest was considered in the Durban case. It was held that the distinction between the usufructuary right and –interest did indeed exist, but that the nature and purpose of the relevant servitude must be taken into account when considering whether the rights under the usufruct will be alienable or not.⁹¹

The duties of the usufructuary can be summarised by stating that he or she must exercise their rights as a rational person would.⁹² The most important duty of the usufructuary is to exercise his or her rights in a civilised manner and to return the property without any substantial damage thereto in terms of the *salva rei substansia* requirement.⁹³

Additional duties of the usufructuary are related to the inventory and security, repairs and expenses, insurance and replacement, and the deterioration of the usufruct object. It is the obligation of the usufructuary, if the owner so requires, to frame an inventory of the property subject to the usufruct and to provide security to the owner for the proper use and enjoyment of the property.⁹⁴ Although the usufructuary is further responsible for ordinary repairs and expenses necessary for the day-to-day maintenance of the property, it is not, however, the obligation of the usufructuary to pay for extraordinary repairs, insurance premiums or the replacement of buildings that have been destroyed but not as a consequence of the conduct of the usufructuary.⁹⁵

It is necessary to discuss the *salva rei substansia* requirement with regard to personal servitudes, and in particular usufructs, in detail. As stated above this requirement demands that the usufructuary must use and enjoy the object of the usufruct in such a manner that the substance thereof is not impaired. According to scholars the concept has two legs. Firstly, when the object of the usufruct is a

⁹¹ Joubert and Faris *The Law of South Africa* 491.

⁹² Joubert and Faris *The Law of South Africa* 493; Van der Merwe *Sakereg* 516.

⁹³ Van der Merwe *Sakereg* 367; Yutar *The Law of Servitudes in South Africa* 152. The *salva rei substansia* requirement will be discussed in greater detail below.

⁹⁴ Joubert and Faris *The Law of South Africa* 494; Van der Merwe *Sakereg* 368; Yutar *The Law of Servitudes in South Africa* 148.

⁹⁵ Grobler *The Salva Rei Substansia requirement in personal servitudes* 53; Joubert and Faris *The Law of South Africa* 494-495; Van der Merwe *Sakereg* 369.

physical object a negative duty is implied which prevents interference with the substance of the object together with the positive duty to take care of or maintain the object should it be necessary.⁹⁶ Secondly, the usufructuary must refrain from altering the economic destination of the object.⁹⁷

While the *civilter modo* requirement is applicable to all servitudes, the *salva rei substantia* requirement is specifically reserved for personal servitudes.⁹⁸ The reason for this distinction is that the scope of the use and enjoyment in the case of personal servitudes is greater than the scope of praedial servitudes,⁹⁹ especially in the case of usufructs where the servitude-holder is entitled to the full use and enjoyment of the property while the owner is excluded from said use and enjoyment.¹⁰⁰ It can thus be concluded that the owner of the servient property in the case of personal servitudes is entitled to greater protection in order to ensure that he or she has the use and enjoyment of their property once it is returned to them.

2.2.2. Creation of personal servitudes

Only an owner or all the co-owners of the property, may grant a servitude pertaining to the property, but a usufructuary or lessee does not have the necessary authority to do so.¹⁰¹ It is also of importance to note that mortgaged property may only be burdened with a servitude with the consent of the mortgagee.¹⁰² Personal servitudes are most commonly created by the reaching of an agreement between the relevant parties and thereafter the registration of this agreement.¹⁰³ The registration of servitudes takes place either through a reservation in a deed of transfer, in the case of circumstances stated in the *Deeds Registries Act*,¹⁰⁴ or through the registration of

⁹⁶ Grobler *The Salva Rei Substantia requirement in personal servitudes* 55; also see Beneke v Van der Vijver 1905 22 SC 523.

⁹⁷ Grobler *The Salva Rei Substantia requirement in personal servitudes* 55.

⁹⁸ Grobler *The Salva Rei Substantia requirement in personal servitudes* 56.

⁹⁹ For a detailed discussion of the scope and enjoyment of praedial servitudes see Van der Merwe *Sakereg* 467-501.

¹⁰⁰ Grobler *The Salva Rei Substantia requirement in personal servitudes* 58-59; also see discussion on usufructs in Section 2.2.1.3 above.

¹⁰¹ Du Bois *et al Wille's Principles of South African Law* 611.

¹⁰² Du Bois *et al Wille's Principles of South African Law* 610.

¹⁰³ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 342. The registration of servitudes will be discussed in great detail in Chapter 3 of this dissertation.

¹⁰⁴ S 67 states as follow: 'A personal servitude may be reserved by condition in a deed of transfer of land if the reservation is in favour of the transferor, or in favour of the transferor and his or her

a notarial deed together with an endorsement against the title deed of the servient property.¹⁰⁵ In the case of *Malan v Ardconnel Investments (Pty) Ltd*,¹⁰⁶ the court stated that it is exactly this registration of the servitude in the title deed of the servient property that constitutes the servitude in law.

The reason or *causa* for the acquisition of a servitude includes: a contract, a stipulation to the benefit of a third party, a last will and testament, judgement in a decree of divorce and a declaratory order or other court order.¹⁰⁷ Moreover, a personal servitude can further be constituted in the following ways: (a) by state grant; (b) by registration against the title deeds of the servient land or by delivery of movable property; (c) through prescription; or (d) by statute.¹⁰⁸

A servitude is constituted by state grant when, as the phrase suggests, the state grants a servitude over state land.¹⁰⁹ The deed is executed by the owner of the servient land and the person in whose favour the servitude is created in the case of the registration of a personal servitude against the title deed of the servient land. A personal servitude over movable property is created by the delivery of the movables to the usufructuary.¹¹⁰ A testamentary disposition, accompanied with a personal agreement to grant a personal servitude, is not sufficient to create a personal servitude. It must be completed by the registration of the servitude as described above.¹¹¹ Lastly, a servitude can be created through statute.¹¹²

2.2.3. *Extinction of personal servitudes*

Section 68 of the *Deeds Registries Act* provides for the extinction of servitudes. Section 68(1) of the *Deeds Registries Act* obliges the registrar to note the lapse of a

spouse or the survivor of them, if they are married in community of property, or in favour of the surviving spouse if transfer is passed or given from the joint estate of spouses who were married in community of property'.

¹⁰⁵ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 342.

¹⁰⁶ 1988 2 SA 12 (A) para 37 E-G.

¹⁰⁷ Du Bois *et al Wille's Principles of South African Law* 611.

¹⁰⁸ Joubert and Faris *The Law of South Africa* 499; Yutar *The Law of Servitudes in South Africa* 135.

¹⁰⁹ Joubert and Faris *The Law of South Africa* 499; Yutar *The Law of Servitudes in South Africa* 135.

¹¹⁰ Joubert and Faris *The Law of South Africa* 499.

¹¹¹ Joubert and Faris *The Law of South Africa* 499. The registration of personal servitudes will be discussed in length and detail in chapter three of this dissertation.

¹¹² Van der Merwe *Sakereg* 380.

personal servitude on application in writing by or on behalf of the owner of the servient land. However, the registrar is only obliged to note such lapse if the application is accompanied by the proof of the lapse thereof, the title deed of the land and the title deed of the servitude, if such a title deed exists. Section 68(2) of the *Deeds Registries Act* provides for the cancellation of the registration of a personal servitude in terms of an agreement between the holder of the right and the owner of the servient land. Such cancellation shall be effected by a notarial deed.

Servitudes are automatically terminated when the exercise of the rights in terms of the servitude has been made permanently impossible. However, with regard to the destruction of property the servitude will automatically be revived if the former condition of the property is restored.¹¹³ In the case where the servitude was created subject to the fulfilment of a condition or a specific timeframe the servitude will cease to exist when the condition is fulfilled or when the time for which it was granted has expired.¹¹⁴ Furthermore, when a servitude over a property is granted subject to a *fideicommissum*, the servitude will expire when the condition is fulfilled and the property passes to the *fideicommissary* heirs.¹¹⁵

If the servitude-holder abandons his or her rights in terms of the servitude to the benefit of the owner of the servient land, the servitude will cease to exist. The owner then has complete, unencumbered ownership over his or her property.¹¹⁶ This abandonment takes place either expressly or in a tacit manner. Express abandonment involves the dominant owner and the servitude-holder coming to an agreement that the servitude is to be cancelled.¹¹⁷ Tacit abandonment on the other hand, refers to the situation in which the servient-holder allows the owner of the servient object to do something that will obstruct the exercise of the servitude and does nothing to prevent it.¹¹⁸ In terms of the maxim *nulli res sua servit*, no one can

¹¹³ Hall *Servitudes* 151. Also see discussion with regards to the destruction of a dwelling in 2.2.1.2. above.

¹¹⁴ Van der Merwe *Sakereg* 387.

¹¹⁵ Hall *Servitudes* 152.

¹¹⁶ Van der Merwe *Sakereg* 383.

¹¹⁷ Van der Merwe *Sakereg* 383.

¹¹⁸ Hall *Servitudes* 141.

hold a servitude over his or her own property,¹¹⁹ and therefore the servient will be extinguished by merger the moment the same person becomes the owner of the dominant and the servient land.¹²⁰

Furthermore, servitudes can be terminated through prescription. Section 7 of the *Prescription Act*¹²¹ provides for extinction through prescription by stating that a servitude will be extinguished if it has not been exercised for an uninterrupted period of 30 years.¹²² The section further states that negative servitudes will be deemed exercised as long as nothing is done on the servient land to prevent the exercise thereof.¹²³ Prescription is a form of original acquisition.¹²⁴ This means that the title of the acquirer of the personal servitude through prescription is not derived from any predecessor and is subsequently not affected by any weaknesses in the title of said predecessor.¹²⁵ In the case of prescription, the servitude comes into existence automatically and immediately after a period of 30 years, it is however, only registered after a court order is obtained.

A servitude can further be terminated in the following ways: Through the determination of the interest of the servitude-holder in the servient land, through agreement between the parties, through expropriation, the death of the servitude-holder or lastly, the registration of a transfer of land free from any servitudes on a sale in execution.¹²⁶

2.2.4. Remedies with regard to personal servitudes

The holder of a servitude may approach the court for relief if his or her servitude-related rights are endangered.¹²⁷ The court will grant a declaratory order if the holder of the servitude proves, on a balance of probabilities, that he or she is indeed the holder of the servitude and that the defendant did indeed infringe on his or her

¹¹⁹ Van der Merwe *Sakereg* 383.

¹²⁰ Hall *Servitudes* 149.

¹²¹ 68 of 1969 (hereafter the *Prescription Act*).

¹²² S 7(1) of the *Prescription Act*.

¹²³ S 7(2) of the *Prescription Act*.

¹²⁴ Van der Merwe *Sakereg* 216.

¹²⁵ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 68.

¹²⁶ Joubert and Faris *The Law of South Africa* 503.

¹²⁷ Joubert and Faris *The Law of South Africa* 507.

rights in terms of the servitude or if the defendant threatens to do so.¹²⁸ He or she also has the option to apply for an interdict in order to protect his or her rights, as a mandatory interdict may be used to compel the person who infringed on his or her rights to restore the situation to the state it was in before the infringement took place. Moreover, a prohibitory interdict will ensure that the wrongdoer is prohibited from committing future infringements.¹²⁹

An alternative remedy was made available to the holder of a servitude in the decision of *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*¹³⁰ where it was decided that the *mandament van spolie* is available to restore the lost possession of a right in terms of a servitude.¹³¹ It is not a requirement to prove that the servitude does indeed exist in the case of the *mandament van spolie*, but rather that the status *quo* must be restored until such time when it can be determined whether the servitude did in actual fact, exist.¹³²

Finally, the holder of the right is entitled to institute an action for damages when all the requirements for a delictual action are met.¹³³ The holder of the servitude is also entitled to take the law into his or her own hands in certain emergencies by removing any obstacles that hinder him or her from exercising the rights granted in terms of the servitude.¹³⁴ An example of such a situation can be identified in the case of a right of way where an obstacle is placed in the road blocking the servitude-holder from using the road. The servitude holder may not overstep his or her bounds, and will be held liable for any damages caused by him or her that were not reasonably necessary in the situation.¹³⁵

The remedies of the owner of the servient land can be summarised by means of the *civiliter modo* requirement. This means that if the holder of the servitude fails to

¹²⁸ Van der Merwe *Sakereg* 387.

¹²⁹ Joubert and Faris *The Law of South Africa* 507.

¹³⁰ 1998 (1) SA 508 (A). Hereafter the *Bon Quelle* case.

¹³¹ Joubert and Faris *The Law of South Africa* 507; Also see discussion of the case in Sonnekus 1989 *TSAR* 429.

¹³² The *Bon Quelle* case.

¹³³ Mostert *et al The principles of the law of property in South Africa* 254.

¹³⁴ Van der Merwe *Sakereg* 388.

¹³⁵ Van der Merwe *Sakereg* 388.

exercise his or her rights in a civilised manner and causes damage to the servient object the owner is entitled to claim damages from the holder of the servitude.¹³⁶

It can thus be concluded that personal servitudes restrict the entitlements of the owner and establish a direct relationship between the holder of the personal servitude and the servient property.¹³⁷ This relationship can further be enforced against the owner of the property. While the holder of the servitude seems to be in a stronger position than the owner of the property,¹³⁸ the owner has certain remedies available to him or her in order to ensure that the property is protected in terms of the *salva rei substantia* requirement.¹³⁹ The owner has additional protection in the form of duties imposed on the holder of the servitude to act in accordance with the *civiliter modo* requirement.¹⁴⁰

With specific reference to estate planning, it is important to note that personal servitudes are inalienable and non-transferable since they are linked to the lifetime of the servitude-holder.¹⁴¹

Personal servitudes can be created in a number of ways¹⁴² but are only legally enforceable after registration takes place. Chapter 3 discusses the registration requirement in further detail.

¹³⁶ Van der Merwe *Sakereg* 389.

¹³⁷ See Section 2.1 above.

¹³⁸ See Section 2.1 above.

¹³⁹ See Section 2.2.4 above.

¹⁴⁰ See Section 2.2.3 above for the duties of the usufructuary.

¹⁴¹ See Section 2.2 above.

¹⁴² See Section 2.2.2 above.

3. Registration requirements in respect of personal servitudes

3.1. Registration procedure

The servitude will only come into existence as a real right after the registration of the agreement. Registration takes place in two ways: Through the registration of a notarial deed¹⁴³ accompanied by an endorsement against the title deed of the servient land or by means of a reservation in a deed of transfer as set out in section 67 of the *Deeds Registries Act*.¹⁴⁴

In the case of registration by means of a notarial deed, a deed of servitude must be drawn up and attested by a notary. Thereafter, the deed of servitude and the title deed of the servient land with an endorsement recorded on it must be submitted to the registrar.¹⁴⁵ It is accepted in case law that when the registrar signs this endorsement on the title deed, the servitude will come into existence as a limited real right.¹⁴⁶ According to section 65(2) of the *Deeds Registries Act*, the notarial deed must consist of a description of the land encumbered by the servitude and must mention the title deed of such land. Section 65(3) further requires that if the servient land is mortgaged or subject to any conflicting real right, the bond or any other registered deed must be presented to the registrar accompanied by the written consent of the holder of such right.

With reference to the registration of a personal servitude by means of a reservation in a deed of transfer, section 67 of the *Deeds Registries Act* states that a personal servitude may be reserved if it is in favour of the transferor, both the transferor and his or her spouse if they are married in community of property, or for the benefit of the surviving spouse, to whom the deceased was married in community of property. However, if the testator was married out of community of property, this method of registration will not be available and the more costly route of registration through the notarial deed method will have to be followed.¹⁴⁷

¹⁴³ As envisaged in s 65 of the *Deeds Registries Act*.

¹⁴⁴ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 373.

¹⁴⁵ Van Schalkwyk and Van der Spuy *General Principles of the Law of Things* 253.

¹⁴⁶ Van Schalkwyk and Van der Spuy *General Principles of the Law of Things* 253.

¹⁴⁷ Van Schalkwyk and Van der Spuy *General Principles of the Law of Things* 253.

Only the owner of the land, and not a usufructuary or lessee, may register a servitude over his or her land.¹⁴⁸ A co-owner of property is, however, entitled to register a servitude over his or her property provided that all the co-owners of the property give their consent.¹⁴⁹ It is also important to note that mortgaged property may only be burdened with a servitude if the consent of the mortgagee is given.¹⁵⁰

3.2. Effect of registration

The effect of registration of a servitude is to comply with the publicity principle required by property law. Publicity must be granted when a real right is transferred or comes into being,¹⁵¹ so that all new owners of the property acquire it. This is subject to the servitude and there is no need for it to be registered again.¹⁵² The registration of a servitude furthermore serves as notice to all third parties of the existence of the right. Consequently, any purchaser of the servient land is not entitled to a reduction in the price merely because the seller of the property did not inform him or her of the existence of the servitude. However, the purchaser can claim such a reduction if the seller deliberately concealed the existence of the servitude.¹⁵³

The question of what the legal position with regard to an unregistered servitude is, then arises. As stated above, the purchaser of land acquires it subject to all registered servitudes, but he or she is only bound to an unregistered servitude if he or she had knowledge of the agreement prior to the acquisition of the property.¹⁵⁴ Furthermore, once a person has bought such a property without any knowledge of the servitude and he or she resells it to a person who has knowledge of the existence of the servitude the second purchaser will, once again, be bound by the servitude.¹⁵⁵

¹⁴⁸ Van der Merwe *Sakereg* 378.

¹⁴⁹ Van der Merwe *Sakereg* 378.

¹⁵⁰ Du Bois *et al Wille's Principles of South African Law* 610.

¹⁵¹ Van Schalkwyk and Van der Spuy *General Principles of the Law of Things* 255.

¹⁵² Van der Merwe *Sakereg* 378.

¹⁵³ Hall *Servitudes* 155.

¹⁵⁴ Hall *Maasdorp's institutes of South African Law Volume II – The law of property* 156.

¹⁵⁵ Hall *Maasdorp's institutes of South African Law Volume II – The law of property* 156.

Although the unregistered servitude will not bind the unaware purchaser or other third parties, the agreement will immediately become binding *inter partes* and may still be enforced against third parties who were aware thereof.¹⁵⁶ In the case of unregistered servitudes it is necessary to take the interests of bona fide third parties into account, such as the interests of a mortgagee who has lent money against the security of the land while unaware that it was encumbered with a servitude.¹⁵⁷ In this instance the maxim *prior in tempore potior in iure* will find application, the mortgagee's real right was created before the right of the holder of the servitude and his or her *bona fide* will exclude the operation of the doctrine of notice.¹⁵⁸ The land will have to be sold free from the servitude if the value of the land was reduced as a result of the servitude and therefore, it is necessary to ensure that the full amount of the debt can be repaid, even if it has been registered by that point in time.¹⁵⁹

3.3. Agricultural land

The last aspect that requires attention is the impact of the *Subdivision of Agricultural Land Act* on the registration of personal servitudes. The *Subdivision of Agricultural Land Act* commenced on the 2nd of January 1971. The objective of the Act was, and still is, to control the subdivision and general use of agricultural land.¹⁶⁰ The Act has several implications for the use of agricultural land, with certain conditions being set for the registrations of specific limited real rights. This section endeavours to discuss these conditions and their impact on the registration of specific limited real rights, namely: usufruct, *usus* and *habitatio*.

The *Subdivision of Agricultural Land Act* is applicable to any agricultural land.¹⁶¹ With specific reference to this dissertation, it is stated in section 6(A)(1) of the Act that a servitude in respect of agricultural land, subject to certain exceptions, may not be registered by a Registrar of Deeds without the written consent of the Minister of

¹⁵⁶ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 380; Van den Berg v Van Tonder 1963 3 SA 558 (T); Grant and another v Stonestreet and others 1968 (4) SA 1 (A).

¹⁵⁷ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 381; Grant and another v Stonestreet and others 1968 (4) SA 1 (A).

¹⁵⁸ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 381.

¹⁵⁹ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 381.

¹⁶⁰ *Subdivision of Agricultural Land Act*.

¹⁶¹ For a definition of 'agricultural land' see s 1 of the *Subdivision of Agricultural Land Act*.

Agriculture. The exceptions referred to above are as follows: a right of way, aqueduct, pipe line or conducting of electricity with a width not exceeding 15 metres, a servitude which is supplementary to a servitude over agricultural land and which has a servitude area not larger than 225 square metres adjoining the area of the last-mentioned servitude, and a usufruct over the whole of the agricultural land in favour of one person or in favour of such person and his spouse or alternatively, the survivor if they are married in community of property.¹⁶²

The question then arises as to how a person would obtain the consent of the Minister of Agriculture in order to register another personal servitude other than a usufruct, or any personal servitude over a part of an agricultural unit. Section 4(1)(a) of the *Subdivision of Agricultural Land Act* states that any application for the consent of the Minister must be made by the owner of the relevant land (in this case the servient land). Furthermore, the application must be lodged in the place and manner determined by the Minister and should be accompanied with such plans, documents and information as determined by the Minister.

Subsection 4(2)(a) of the *Subdivision of Agricultural Land Act* further states that the Minister has the discretion to refuse or, subject to such conditions as he or she sees fit, grant the application. Subsection 4(2)(b) further asserts that should the Minister be satisfied that the land in question is not to be used for agricultural purposes as defined in section 1 of the *Subdivision of Agricultural Land Act*, he or she must then consult with the Administrator of the province in which the land is situated and may grant the application subject to the conditions that the Administrator may determine. Only a usufruct over the whole of an agricultural unit is explicitly exempted from consent by the Minister in terms of section 6(A)(1). It is therefore highly exceptional that the Minister will give consent for the registration of any personal servitude other than a usufruct over the whole of an agricultural unit, or the registration of a personal servitude over a part of an agricultural unit.

It is concluded that the nature of the property over which the servitude will be registered must be borne in mind by the estate planner when considering the use of

¹⁶² S 6A(1)(a) and (b) of the *Subdivision of Agricultural Land Act*.

a personal servitude as an estate-planning tool. The nature of the property will determine the difficulty of registering the personal servitude. This is especially important in relation to agricultural land as the consent of the Minister will have to be obtained before registering a personal servitude.

It is against this general background of the nature of personal servitudes that the implications of the use thereof as estate-planning instruments are discussed in Chapter 4 below.

4. The implications of personal servitudes for estate planning

4.1. Introduction

It is often claimed that the use of personal servitudes in the estate-planning process offers limited advantage to the estate planner and/or the estate owner, since these limited real rights are not very flexible in nature.¹⁶³ However, in certain instances, circumstances may dictate the use of personal servitudes. This chapter endeavours to explore the implications of the use of these limited real rights in the estate-planning process.

In order to determine the implications of the use of personal servitudes for estate planning one must first determine what constitutes an 'estate' and the manner in which these personal servitudes are valued for the purposes of estate planning. According to section 3(1) of the *Estate Duty Act*¹⁶⁴ the estate of any person shall consist of all of the property of that person on the date of his or her death and all the property that is deemed to be the property of that person in terms of the Act.¹⁶⁵ Section 25 of the *Constitution of the Republic of South Africa*¹⁶⁶ defines property for constitutional purposes and it can be argued that personal rights in land, such as personal servitudes, are included in the definition of constitutional property.¹⁶⁷ The definition of property for estate duty purposes is much wider than the definition of constitutional property.¹⁶⁸ Section 3(2) of the *Estate Duty Act* defines property to include any fiduciary, usufructuary or other like interest in property. Therefore personal servitudes fall within the ambit of 'property' in the context of the Act and it will be valued and administered in terms thereof.

It is important to note that section 3(1) of the *Estate Duty Act* requires that the property must have belonged to, or have been vested in, the deceased on the date of his or her death; and section 3(2)(a) further requires that the limited real right

¹⁶³ Davis, Beneke and Jooste *Estate Planning* para 12.1.

¹⁶⁴ 45 of 1955 (hereafter the *Estate Duty Act*).

¹⁶⁵ See s 3(3) of the *Estate Duty Act* for a detailed provision of all the property which is deemed to be the property of the deceased for estate duty purposes.

¹⁶⁶ Act 108 of 1996.

¹⁶⁷ Van der Walt *Constitutional Property Law* 118.

¹⁶⁸ Van der Walt *Constitutional Property Law* 113; S 25 of the *Constitution of the Republic of South Africa*, 1996; S 3 of the *Estate Duty Act*.

must have been held by the deceased immediately prior to his death. It can therefore be concluded that should a personal servitude cease prior to the death of the servitude-holder it will not be considered to be property of the deceased's estate. In order for a limited real right to have been held by the deceased it must have been vested in him or her. This means that a mere contingent interest, such as a hope or expectation that in fact confers no rights, would not qualify as a limited real right which constitutes property in terms of the *Estate Duty Act*.¹⁶⁹ An example of such a contingent right would be a discretionary trust where the trustees have the discretion to pay the trust income or transfer the assets of the trust to the beneficiaries, but where the beneficiaries do not have a right to claim any of the income or assets. Even if the trustees did, in their discretion pay income to the beneficiary on a continuing basis during his or her lifetime, there would be no limited real right created that would form part of the dutiable estate of the beneficiary upon his or her death.¹⁷⁰

The requirement demanding that a limited real right must vest in the deceased may tempt estate owners to avoid the inclusion of a limited real right in their dutiable estate by renouncing or waiving their right thereto prior to their death.¹⁷¹ It has been concluded that this strategy would be to no avail for the estate owner since such a waiver or renunciation of the interest, gratuitously or for less than adequate consideration, would be categorised as a donation in terms of section 58 of the *Income Tax Act*,¹⁷² and as such would be subject to donations tax.¹⁷³ However, this strategy may offer the estate owner some benefit as the amount of donations tax payable on such a donation may be lower than the amount of the estate duty would

¹⁶⁹ Delpont *An analysis and exposition of the definition of property for estate duty purposes with reference to a future capital transfer tax* 57.

¹⁷⁰ Delpont *An analysis and exposition of the definition of property for estate duty purposes with reference to a future capital transfer tax* 57. The vesting of rights is discussed in greater detail below.

¹⁷¹ Delpont *An analysis and exposition of the definition of property for estate duty purposes with reference to a future capital transfer tax* 56.

¹⁷² 58 of 1962 (hereafter the *Income Tax Act*).

¹⁷³ Delpont *An analysis and exposition of the definition of property for estate duty purposes with reference to a future capital transfer tax* 56.

have been, had the estate owner not donated the limited real right. This is largely dependent upon the ages of the respective donor and donee.¹⁷⁴

The implications of the use of personal servitudes in the estate-planning context arise mainly from the tax consequences thereof. The astute estate planner will keep the following costs and taxes in mind: estate duty, capital gains tax, donations tax, transfer duty and normal tax.¹⁷⁵ As such, several of these costs and taxes will be discussed under separate headings below.

4.2. Normal income tax

The *Income Tax Act* defines an asset for tax purposes to include 'a right or interest of whatever nature to or in such property' and it is thus clear that a personal servitude will also be subject to taxation in terms of the *Income Tax Act* if any income is received as a result thereof.¹⁷⁶ Section 5(1) of the *Income Tax Act* stipulates that any person, in respect of the taxable income received by them, will be held liable for the annual payment of income tax. The holding of a limited real right may also give rise to an income stream, for example a usufruct over fixed property can give rise to rental income, which will then be regarded as income for income tax purposes.¹⁷⁷ Other examples of income derived from personal servitudes include any income derived from the civil or natural fruits of the servient property, such as the produce from a farm, the young of animals and products (such as milk) from animals, accumulated interest or corporate distributions in the case of civil fruits.¹⁷⁸

4.3. Estate duty

Estate duty is levied at a rate of 20 percent on the dutiable amount of an estate. The dutiable amount is calculated in terms of the *Estate Duty Act* and with a R 3.5 million

¹⁷⁴ See discussion on valuation of limited real rights in Section 4.2. below.

¹⁷⁵ Goodall *et al* *The South African Financial Planning Handbook* para 35.2.

¹⁷⁶ Para 1(b) of the Eighth Schedule of the *Income Tax Act*.

¹⁷⁷ Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for individuals and for trusts* 32.

¹⁷⁸ For a distinction between natural and civil fruits of a property see Section 2.2.1.3 above.

abatement on the nett value of the estate that is exempt from estate duty.¹⁷⁹ There are certain allowable deductions pertaining to the *Estate Duty Act* that do not form part of the dutiable amount. These deductions are also applicable to personal servitudes since section 4(m) of the *Estate Duty Act* provides that the donation of a usufruct between spouses is an allowable deduction. However, if a spouse dies having enjoyed a usufruct over a property which was granted to him or her by a predeceased spouse there will be no deduction of the usufruct in his or her estate in terms of section 4(m). There can be no such deduction since the usufruct was most likely an allowable deduction under section 4(q) of the *Estate Duty Act* in the predeceased spouse's estate.

Section 5(b) of the *Estate Duty Act* specifically addresses limited real rights in property. It determines that the value of a fiduciary, usufructuary or other like interest in property at the date of death will be an amount determined by capitalising at 12 percent the annual value of the right which the deceased held over the life expectancy of the person who will receive such a right or should the right be held for a shorter time than the life of the person over such a lesser period. However, should it be proved to the satisfaction of the Commissioner that such a person paid a consideration of any kind for the right of ownership in the property in terms of which he became entitled to the right of enjoyment of said property upon the death of the deceased, the value of the limited real right will be that much of the value arrived at, in terms of section 5(b) of the *Estate Duty Act*, as exceeds the amount of the consideration paid together with interest at a rate of 6 percent per annum from the date of payment of the consideration to the date of the death of the deceased.¹⁸⁰

For example, if Mr X (58 years old) dies and bequeaths his farm of R 6 000 000.00 to his son (26 years old), subject to a usufruct in favour of his wife Mrs X (55 years of age), the value of Mrs X's usufruct can be calculated as follows:

R 6 000 000 x 12%¹⁸¹

¹⁷⁹ S 4A(1) of the *Estate Duty Act* states that the dutiable amount of the estate of any person must be determined by deducting an amount of R3.5 million from the net value of the estate.

¹⁸⁰ S 5(b) of the *Estate Duty Act*.

¹⁸¹ Capitalised at 12% in terms of s 5(b) of the *Estate Duty Act* as explained above.

$$= R 720\ 000 \times 7,799\ 65^{182}$$

$$= R 5\ 615\ 748$$

The capitalised value of Mrs X's usufruct will thus be R 5 615 748. In the instance where Mrs X paid a consideration to Mr X for the right of enjoyment the value of the consideration together with 6 percent interest per annum must be subtracted from the value of the usufruct as calculated above.¹⁸³

The section further provides that in instances where the full ownership of the property accrues to the holder of the bare dominium of the property at the time of the cessation of the interest of the deceased, the value of such interest may not exceed the difference between the fair market value¹⁸⁴ of that property at the date of cessation, and the value of the bare dominium at the date when said bare dominium was first acquired under the disposition which created the said interest held by the deceased.¹⁸⁵ Lastly, the section states that if it is not possible to ascertain until some future date which person or persons will become entitled to the right of enjoyment of the property, the value of the interest will be determined by capitalising the value of the right of enjoyment at 12 percent over a period of 50 years, unless the Commissioner and the executor of the estate agree that a lesser period would be more suitable according to the circumstances of the case.¹⁸⁶

For example, if Mr X bequeaths in his will to his first-born grandson a usufruct over the farm which he bequeathed to his son, the value of the usufruct will be determined by capitalising over a period of 50 years as follows:

$$R 6\ 000\ 000.00 \times 12\%$$

¹⁸² The present value of R1 per annum for a 56 year old female (Mrs X's age next birthday) in terms of the lifetime tables attached hereto as annexure A.

¹⁸³ See s 5(b) of the *Estate Duty Act* as explained above.

¹⁸⁴ S 1 of the *Estate Duty Act* defines 'fair market value' as follow:

(a) the price which could be obtained upon a sale of the property between a willing buyer and a willing seller dealing at arm's length in an open market; or

(b) in relation to immovable property on which a *bona fide* farming undertaking is being carried on in the Republic, the amount determined by reducing the price which could be obtained upon a sale of the property between a willing buyer and a willing seller dealing at arm's length in an open market by 30 per cent.

¹⁸⁵ S 5(b) of the *Estate Duty Act*.

¹⁸⁶ S 5(b) of the *Estate Duty Act*.

= R 720 000 x 7,602 01

= R 5 473 447.20

The capitalised value of the limited real right in favour of Mr X's grandson will thus be R 5 473 447.20

Section 5(2) of the *Estate Duty Act* provides that the annual value of the right of enjoyment of a property is considered to be an amount equal to 12 percent upon the fair market value of the full ownership of the property. However, the Commissioner does have the discretion to fix a sum representing the annual value as he deems reasonable if he is satisfied that the property could not reasonably be expected to produce an annual value of 12 percent.

In other words, a limited real right, such as a personal servitude, is made over the life expectancy of the person to whom it is bequeathed. In other words, the higher the life expectancy of the person holding the limited real right, the higher the value thereof for estate duty purposes.¹⁸⁷ The life expectancy of natural persons is calculated in terms of the *Estate Duty Act* as mentioned above and by means of the life expectancy tables.¹⁸⁸ In the case of the successor being a legal person rather than a natural person the life expectancy will remain constant at 50 years.

The estate-planning process will benefit most from the use of limited real rights in cases where the life expectancy of the person is exceeded, specifically where the interest has been valued in terms of the life expectancy tables and the person lives longer than that period.

4.4. Donations tax

The purpose of donations tax is to prevent estate owners from giving away their assets during their lifetime in an attempt to reduce the amount of estate duty payable on their death.¹⁸⁹ Donations tax is levied at a rate of 20 percent on actual donations and on disposals of property below the market value of that property.

¹⁸⁷ Davis, Beneke and Jooste *Estate Planning* para 12.1.

¹⁸⁸ Legal and Policy Division 2013 *SARS 300*; attached hereto as annexure A.

¹⁸⁹ Kourie and Ryder *Law and Estate Planning Easiguide* 131.

However, donations of less than R100 000 per person per year are not subject to donations tax.¹⁹⁰

Section 55(1) of the *Income Tax Act* defines a donation as 'any gratuitous disposal of property including any gratuitous waiver or renunciation of a right...' Where such a donation consists of a personal servitude, it must be valued in accordance with section 62 of the *Income Tax Act*. The section stipulates that for the purposes of donations tax the value of any property must be calculated by capitalising the annual value of the limited real right at 12 percent over the life expectancy of the donor or, if the right of enjoyment is to be held for a shorter time, over such period.¹⁹¹ Section 62(2) further provides that the annual value of the limited real right is considered to be an amount equal to 12 percent of the value of full ownership of the property, which is subject to the limited real right. However, should it be proved to the satisfaction of the Commissioner that the property could not reasonably be expected to produce such an annual value of 12 percent, he may fix a sum to represent the annual value thereof as he deems to be reasonable.¹⁹²

Furthermore, when property is disposed of for a less than adequate consideration, according to the ruling of the Commissioner, the difference between the value of the property and the consideration given will also be deemed to be a donation.¹⁹³ In terms of section 55(3) of the *Income Tax Act*, a donation will be effective from the date upon which all the legal formalities for a donation have been complied with. In most cases, a donation may be contracted verbally and will be considered to be in effect at the time of delivery. There is an exception to this rule, namely the donation of immovable property or executory donations.¹⁹⁴ In order for these executory donations to be considered valid, the agreement must be in writing and be attested by the donor and two other witnesses. Once these requirements have been fulfilled the donation will take effect and will be subject to donations tax.¹⁹⁵ Additionally, section 56 of the *Income Tax Act* lists certain assets that are exempt from donations

¹⁹⁰ Goodall *et al* *The South African Financial Planning Handbook* para 35.2.

¹⁹¹ S 62(1)(a) of the *Income Tax Act*.

¹⁹² S 62(2)(a) of the *Income Tax Act*.

¹⁹³ S 58 of the *Income Tax Act*; also see Chapter 4 above.

¹⁹⁴ Kourie and Ryder *Law and Estate Planning Easiguide* 132.

¹⁹⁵ Kourie and Ryder *Law and Estate Planning Easiguide* 133.

tax and while an exhaustive list of these exempt assets is out of the scope of this dissertation, it is important to note that property disposed of under, and in pursuance of a trust, is exempt from donations tax.¹⁹⁶

Older estate owners with a limited real right, such as a personal servitude, which they plan to bequeath to a younger or artificial person, should consider donating a limited real right to the successor during their lifetime rather than bequeathing it to them in a will.¹⁹⁷ The reason for this lies in the valuation of the interest, as stated above. If the interest holder dies, the interest is valued over the life expectancy of the donor in the case of donation. However, where the interest is bequeathed it will be valued over the life expectancy of the successor. Accordingly, a more advantageous action, aimed at the minimalisation of liable tax, would be to donate the interest so that it may be valued over the life expectancy of the older donor which will result in a lesser amount being subject to donations tax.¹⁹⁸

4.5. Transfer duty

Transfer duty is levied on transactions that constitute 'property' in terms of section 1(1) of the *Transfer Duty Act*,¹⁹⁹ subject to certain exemptions. The section defines 'property' as any land in the Republic of South Africa together with any fixtures thereon, it further includes any real right in land, any right to minerals, certain shares and contingent rights to any residential property, share or member's interest.²⁰⁰

The amount of transfer duty that is payable on any given transaction is the higher value of the consideration payable for the acquisition of the property, the declared value²⁰¹ of the property or the fair value²⁰² of the property.²⁰³

¹⁹⁶ S 56(1)(l) of the *Income Tax Act*.

¹⁹⁷ Davis, Beneke and Jooste *Estate Planning* para 12.4.

¹⁹⁸ Davis, Beneke and Jooste *Estate Planning* para 12.4; Kourie and Ryder *Law and Estate Planning Easiguide* 177.

¹⁹⁹ 40 of 1949 (hereafter the *Transfer Duty Act*).

²⁰⁰ S 1(1) of the *Transfer Duty Act*.

²⁰¹ See definition of 'declared value' in section 1 of the *Transfer Duty Act*.

²⁰² See definition of 'fair value' in section 1 of the *Transfer Duty Act*.

²⁰³ S 5(6) of the *Transfer Duty Act*.

The transfer duty rates differ from transaction to transaction based on the fair market value or consideration.²⁰⁴ It can therefore be concluded that, the amount of transfer duty payable on a personal servitude will, firstly, be determined by calculating the value of the limited real right, in the manner as set out by the *Estate Duty Act* as described above in 4.2, after which the transfer duty rate applicable to said amount will be used to calculate the amount of transfer duty payable.

The last aspect meriting further discussion is transactions involving the renunciation of a usufruct. In such cases, the amount by which the property is enhanced by the usufruct must be calculated in terms of the *Estate Duty Act*. This is done by calculating the annual value of said usufruct over the life expectancy of the holder of the usufruct or for the period for which it is to be enjoyed.²⁰⁵ In the case of a lesser personal servitude, such as *usus* or *habitatio*, an estimate of its annual value must be obtained, after which it must be capitalised over the life expectancy or period of enjoyment in a manner similar to the case of a usufruct.²⁰⁶

4.6. Capital gains tax

Capital gains tax was introduced in South Africa with effect from 1 October 2001 and is applicable to the disposal of an asset by a person, on or after that date. Capital gains tax is regulated by the Eighth Schedule of the *Income Tax Act*²⁰⁷ in accordance with section 26A of the *Income Tax Act*, which links the general provisions of the *Income Tax Act* to the Eighth Schedule. In terms of the Eighth Schedule, a capital gain arises when the proceeds made from the disposal of an asset exceeds the base cost.²⁰⁸ A capital loss in turn arises when the base cost exceeds the proceeds.²⁰⁹ It can therefore be said that the higher the base cost, the lower the gain on disposal.

An 'asset', for capital gains tax purposes, is broadly defined in paragraph 1 of the Eighth Schedule to include property of any nature, movable or immovable, corporeal or incorporeal, and with specific regard to limited real rights, a right or interest of

²⁰⁴ Legal and Policy Division 2015 *SARS* 95.

²⁰⁵ Legal and Policy Division 2013 *SARS* "Transfer Duty Guide" 46.

²⁰⁶ Legal and Policy Division 2013 *SARS* "Transfer Duty Guide" 46.

²⁰⁷ Hereafter referred to as the Eighth Schedule.

²⁰⁸ See definition of base cost below.

²⁰⁹ Legal and Policy Division 2015 *SARS* 55.

whatever nature to property is included in the definition. Furthermore, the base cost of an asset is considered to be the amount that the taxpayer paid for the asset together with any other costs that were directly related to the buying, selling or improving of the asset.²¹⁰

Capital gains tax is levied at different rates for different entities. The maximum effective rate for persons, special trusts for the disabled, and testamentary trusts created solely for minors, is 13.32 percent, while ordinary trusts have a maximum rate of 26.64 percent.²¹¹

If an estate owner sells, donates or otherwise disposes of an asset, the capital gains tax rules will apply. On death, a person is deemed to have disposed of their assets at market value, and thus, capital gains tax will apply upon the death of the estate owner.²¹² There is, however, an exception to the rule that a person is deemed to have disposed of his or her assets on death. In terms of this exception, the payment of capital gains tax may be deferred until the heir who inherits the asset eventually disposes of the asset – this method is referred to as the 'carry-over' approach and is only applicable in the case of transfers between spouses.²¹³

An anomaly exists with regard to capital gains tax and usufructs.²¹⁴ When a testator creates a usufruct in his will, the value is split between the bare dominium and the value of the usufruct, the latter being valued in terms of the *Estate Duty Act*, as explained above. The bare dominium value, or base cost, will be the amount by which the fair value of the full ownership of the property exceeds the value of such a limited real right.²¹⁵

²¹⁰ Legal and Policy Division 2015 *SARS* 56.

²¹¹ Clegg *LexisNexis Concise Guide to Capital Gains Tax* 8.

²¹² Goodall *et al The South African Financial Planning Handbook* para 35.2.

²¹³ Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 30.

²¹⁴ Van Jaarsveld *The levying of capital gains tax at death* 18.

²¹⁵ S 5(1)(f) of the *Estate Duty Act*.

This base cost can be calculated by subtracting the usufruct value²¹⁶ from the fair market value of the property.²¹⁷ In most cases, the bare dominium value will be very low; therefore, the creation of usufructs often results in what is referred to as 'an artificial drop in the base cost of an asset'. It is this artificial drop that creates an anomaly pertaining to capital gains tax and usufructs – when a usufruct expires, the rights in terms of the usufruct passes on to the bare dominium holder although his or her low base cost is not accordingly adjusted to the full value of the asset on the date on which the usufruct was created.²¹⁸ The result of this anomaly is that a substantial capital gain may be created when the former bare dominium holder, who has now gained full ownership of the asset, disposes of the asset.²¹⁹

This leads to the next topic of discussion, namely the capital gains tax implications regarding the use of personal servitudes as estate-planning tools. The capital gains tax implications for persons and trusts will be discussed under separate headings.

4.6.1. Capital gains tax implications of limited real rights held by persons

4.6.1.1. The position of the deceased

As indicated above, when a person dies, barring certain exceptions, he or she is deemed to have disposed of their assets at their market value, and his or her estate must be treated as having acquired those assets at the market value.²²⁰ It can therefore be concluded that if the deceased held a limited real right, such as a personal servitude, at the date of his or her death, he or she is deemed to have disposed of it at market value.²²¹ The question that then arises is: What is considered to be the market value of a limited real right at death? The determination of the

²¹⁶ The market value of an usufruct for capital gains tax purposes is calculated in terms of para 31(1)(d) of the Eighth Schedule by capitalising at 12 percent the annual value of that right over the expectation of life of the person to whom the right was granted in terms of the life expectancy tables; or if the right is to be held for a lesser period, over that lesser period. For a detailed discussion of para 31(1)(d) of the Eighth Schedule see chapter 4.6.1.1 below.

²¹⁷ Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 51.

²¹⁸ Van Jaarsveld *The levying of capital gains tax at death* 18.

²¹⁹ Van Jaarsveld *The levying of capital gains tax at death* 18.

²²⁰ Para 40(1) of the Eighth Schedule; Legal and Policy Division 2013 *SARS 580*.

²²¹ Jooste and Roeleveld 2002 *Acta Juridica* 86.

market value of a limited real right is uncertain in terms of the *Income Tax Act*. Paragraph 31(1)(d) of the Eighth Schedule defines 'market value' as follows:

In the case of a fiduciary, usufructuary or other similar interest in any asset, an amount determined by capitalising at 12 per cent the annual value of the right of enjoyment of the asset subject to that fiduciary, usufructuary or other like interest, as determined in terms of subparagraph (2), over the expectation of life of the person to whom that interest was granted, or if that right of enjoyment is to be held for a lesser period than the life of that person, over that lesser period;

The provision in paragraph 31(1)(d) falls under Part V of the Eighth Schedule and under the heading – 'Base Cost'. The uncertainty stems from this heading. The question is whether it was the intention of the legislature for the provisions of paragraph 31 to apply generally, or if they are only applicable to the determining of base costs. It can be argued that if it was the intention of the legislature for the provision to be applied generally, it would have been placed in paragraph 1 of the Eighth Schedule, which is a paragraph of general application. There is, however, no conclusive statement pertaining to this issue and it will therefore only be placed beyond doubt if legislative amendments are made.²²²

If it can be accepted that the provision only applies in a general sense, there will be no difficulty in the determination of the market value of the bare dominium although, the issue concerning the market value of a limited real right other than the bare dominium, still remains.²²³ As can be seen above, paragraph 31(1)(d) states that the interest must be valued according to the life expectancy of the person to whom the interest was granted but the difficulty arises when that person is the deceased as a deceased person clearly has no life expectancy. Roeleveld and Jooste²²⁴ have suggested that, should paragraph 31 have no application, the ordinary meaning of the phrase 'market value' will have to be given. Accordingly, the market value of the asset would be the value that it would fetch in an open market between a willing buyer and a willing seller.

²²² Jooste and Roeleveld 2002 *Acta Juridica* 89.

²²³ Jooste and Roeleveld 2002 *Acta Juridica* 90; Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 67.

²²⁴ Jooste and Roeleveld 2002 *Acta Juridica* 90.

The uncertainty regarding the market value may be better understood by making use of the following example:

If Mrs X, 55 years of age at the time of Mr X's death, received a usufruct over her late husband's farm, with a market value of R 6 000 000.00, upon his death she will be deemed to have disposed of the usufruct at market value upon her death. The question is: How is this market value to be calculated? If paragraph 31 of the Eighth Schedule is applied generally, the market value at the time of Mr X's death will be determined as follows:

R 6 000 000 x 12%

= R 720 000 (annual value) x 7,799 65²²⁵

= R 5 615 748 market value of Mrs X's usufruct in terms of paragraph 31 of the Eighth Schedule.

The issue now is that when Mrs X dies she clearly has no further life expectancy and the calculation will end after the annual value has been calculated. She will therefore be deemed to have disposed of the usufruct at R 720 000. It can be concluded that it is for exactly this reason that Roeleveld and Jooste argue that the market value of the limited real right should rather be the value that it would fetch in an open market between a willing buyer and a willing seller.

The question is whether it was the intention of the legislature for the market value to be nil, or should the life expectancy rather be determined as if the person was still alive?²²⁶ Once again legislative amendments are required to place this question beyond doubt. Should the market value be considered to be nil the deemed disposal thereof can give rise to no capital gain, only a loss.²²⁷

²²⁵ The present value of R1 per annum for a 56 year old female (Mrs X's age next birthday) in terms of the lifetime tables attached hereto as annexure A.

²²⁶ Jooste and Roeleveld 2002 *Acta Juridica* 90.

²²⁷ Jooste and Roeleveld 2002 *Acta Juridica* 90. Capital losses will be discussed in greater detail below.

4.6.1.2. The position of the successor

Paragraph 40(2) of the Eighth Schedule of the Income Tax Act states that if an asset is disposed of by a deceased estate to an heir such deceased estate is deemed to have disposed of the asset for proceeds equal to the base cost of the asset and the heir is in turn deemed to have acquired the asset at that same base cost.

4.6.1.3. The bequest of a limited real right

As stated in the first section of this dissertation, personal servitudes are often used when a testator wishes to leave his property to his son while still ensuring that his wife will have a place to live and some form of income. While the bequest of a limited interest in a personal servitude is a useful estate-planning tool, in this instance it also brings with it certain capital gains tax implications, and more often than not it is the heir of the bare dominium who suffers the most financially in this regard.²²⁸

It is important to note that when the study refers to the bequest of a limited right it is referring to the situation where the testator bequeaths certain property to one heir while bequeathing a personal servitude over the property to another heir. For example, Mr X bequeaths his farm to his son but bequeaths a usufruct over the farm property to his wife, Mrs X. It would be impossible for Mrs X to bequeath her usufruct over the farm property to another heir on her death since personal servitudes are linked to the lifetime of the holder of the right and the usufruct will cease to exist at the time of Mrs X's death.²²⁹

According to paragraph 67 of the Eighth Schedule, any disposal of an asset from one spouse to another must be disregarded for capital gains tax purposes. Therefore, the bequest of a limited interest in a personal servitude to the surviving spouse will not have any capital gains tax implications for the deceased estate. Although the capital gains tax implications cannot be disregarded in entirety, they are only deferred to the

²²⁸ Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 64.

²²⁹ For a detailed discussion on the inheritability of personal servitudes see Section 2.2 above.

estate of the surviving spouse.²³⁰ For example, if Mr X bequeaths a usufruct over a farm property to Mrs X there will be no capital gains tax payable by Mr X's deceased estate in terms of paragraph 67 of the Eighth Schedule. However, when Mrs X dies her deceased estate will be liable for the payment of capital gains tax on the disposal of the limited interest.

It can be argued that the *Income Tax Act* creates uncertainty in this regard, and while it is known that the surviving spouse has a rollover of a limited real right, it is uncertain at what base cost this rollover takes place.²³¹ The uncertainty stems from the fact that paragraph 40(2) of the Eighth Schedule requires the disposal of the full ownership of an asset. Therefore, it is not clear whether the provision is applicable to the bequest of the limited real right and bare dominium to separate persons.²³² It is thus concluded that paragraph 40(2) has no application in this instance and that the heirs of the usufruct and bare dominium are to be treated as having acquired the assets at no cost.²³³

Roeleveld and Jooste offer an alternative interpretation by stating that paragraph 33(1) of the Eighth Schedule may be applicable in these circumstances. The provision states as follows:²³⁴

Where part of an asset is disposed of the proportion of the expenditure attributable to the part disposed of is an amount which bears to the expenditure allowable in terms of paragraph 20 in respect of the entire asset the same proportion as the market value of the part disposed of bears to the market value of the entire asset immediately prior to that disposal;

Therefore, it can be concluded that if paragraph 33(1)(a) of the Eighth Schedule should find application in the instance where a limited real right is bequeathed, the market value of the asset will have to be apportioned between the personal servitude and the bare dominium in the ratio that their values respectively bear to the market

²³⁰ Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 64; Legal and Policy Division 2013 SARS 501.

²³¹ Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 64.

²³² Jooste and Roeleveld 2002 *Acta Juridica* 91.

²³³ Jooste and Roeleveld 2002 *Acta Juridica* 92.

²³⁴ Para 33(1)(a) of the Eighth Schedule.

value.²³⁵ SARS confirmed the application of paragraph 33(1) in the instance where a personal servitude is granted by stating that the granting of a usufruct will indeed be considered to be a part-disposal of the asset and that, the base cost will consequently be calculated in terms of paragraph 33(1).²³⁶

Following the example above in which Mr X bequeaths his farm with a market value of R 6 000 000.00 to his son and a usufruct over the farm property to his wife Mrs X, the capital gains tax payable in terms of paragraph 33(1) of the Eighth Schedule will be as follows:

Mr X's deceased estate will be held liable for the payment of capital gains tax on the bare dominium value and usufruct values respectively. The market value of the usufruct will be determined as follows:²³⁷

$$\begin{aligned} & \text{R } 6\,000\,000 \times 12\%^{238} \\ &= \text{R } 720\,000 \times 7,799\,65^{239} \\ &= \text{R } 5\,615\,748 \end{aligned}$$

However, there will not be any capital gains tax payable on this amount since it qualifies for inter-spousal rollover relief in terms of paragraph 67 of the Eighth Schedule. The market value of the bare dominium can then be calculated as follows:

$$\begin{aligned} & \text{R } 6\,000\,000 \text{ (market value)} - \text{R } 5\,615\,748 \text{ (usufruct value)} \\ &= \text{R } 384\,252 \text{ (base cost of the bare dominium)} \end{aligned}$$

The taxable capital gain of this bare dominium value must then further be calculated in accordance with the applicable capital gains tax rates for persons as follows:

$$\text{R } 6\,000\,000 \text{ (proceeds)} - \text{R } 384\,252 \text{ (base cost)}$$

²³⁵ Jooste and Roeleveld 2002 *Acta Juridica* 92.

²³⁶ Legal and Policy Division 2013 *SARS* 52.

²³⁷ See discussion on valuation of personal servitudes for estate duty purposes in Section 4.3 above.

²³⁸ Capitalised at 12% in terms of s 5(b) of the *Estate Duty Act* as explained above.

²³⁹ The present value of R1 per annum for a 56 year old female (Mrs X's age next birthday) in terms of the lifetime tables attached hereto as annexure A.

= R 5 615 748 x 40%²⁴⁰

= R 2 246 299.20

Lastly, this amount must be included in the total capital gains of the deceased estate. The capital gains tax payable by the estate will be an amount equal to 16.4 percent²⁴¹ of the total capital gain of the estate, barring certain exclusions.²⁴²

With regard to the heir of the bare dominium, the vesting of the bare dominium in the heir will be regarded as a disposal at market value on the date of death in terms of paragraph 40 of the Eighth Schedule. Following the argument of the scholars as explained above, it is implied that it is the market value as determined in the deceased estate. In other words, the base cost of the full market value of the property.²⁴³ The problem that the bare dominium holder therefore faces is that of the relatively low base cost of the property, which will affect the capital gains tax payable when he or she eventually disposes of it.²⁴⁴

4.6.1.4. The ceasing of a usufruct during the lifetime of the holder of the right

The lapsing of a usufruct during the lifetime of the holder of the right constitutes a disposal for capital gains tax purposes under paragraph 11 of the Eighth Schedule. Paragraph 38 of the Eighth Schedule finds application in the only instance where a usufructuary can receive any compensation for the lapsing of his or her limited interest.²⁴⁵ Paragraph 38 of the Eighth Schedule specifically states that if the new usufructuary or the bare dominium holder, in the case where the usufruct reverts back to the bare dominium holder, is a 'connected person' in relation to the old usufructuary, the disposal of the personal servitude will be deemed to have been at

²⁴⁰ Capital gains tax inclusion rate for persons.

²⁴¹ Effective capital gains tax rate for persons.

²⁴² See Paras VII and VIII of the Eighth Schedule of the Income Tax Act for the capital gains tax exclusions.

²⁴³ Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 65.

²⁴⁴ Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 65. See discussion on the anomaly with regard to capital gains tax and usufructs in Section 4.4. above.

²⁴⁵ Jooste and Roeleveld 2002 *Acta Juridica* 93.

the market value of the limited real right at the date of disposal.²⁴⁶ Paragraph 38(1)(b) of the Eighth Schedule further provides that the new usufructuary or the bare dominium holder will be deemed to have acquired the limited real right at the market value on the date of disposal. The market value at the date of disposal is considered the same as the market value would have been at the date of death, which, as previously mentioned, is considered to be nil.²⁴⁷

4.6.1.5. Donation of a personal servitude

The donation of an asset is deemed to be a disposal for capital gains tax purposes in terms of paragraph 11(1)(a) of the Eighth Schedule. The proceeds of such a donation pertaining to the donor are deemed the market value of the asset at the date of the disposal while the donee is deemed to have acquired the asset at market value for base cost purposes.²⁴⁸ It is important to note that an existing personal servitude cannot be donated since personal servitudes are non-transferable.²⁴⁹ When the study refers to the donation of a personal servitude it refers to the situation where a person owns property and then donates a personal servitude over the property to another person.

Once again, the issue arises with regard to the determination of the market value of the interest, and the question is yet again, whether paragraph 31 of the Eighth Schedule will find general application or if it is only limited to the determination of the base cost. As discussed above, should paragraph 31 not find general application it is suggested that the ordinary meaning of 'market value' would have to be given to determine the value of the asset.²⁵⁰ Further, paragraph 33 of the Eighth Schedule will once again find application in the determination of the base cost of the creation of the personal servitude.²⁵¹ The difference between the market value of the asset on

²⁴⁶ Para 38(1)(a) of the Eighth Schedule. See definition of 'connected persons' in s 1 of the *Income Tax Act*.

²⁴⁷ See Section on the position of the deceased in 4.4.1.1. above.

²⁴⁸ Para 38 of the Eighth Schedule.

²⁴⁹ See Section 2.2 above.

²⁵⁰ See discussion on the position of the deceased in Section 4.4.1.1. above.

²⁵¹ For a detailed discussion on *para* 33 of the Eighth Schedule see the Section on the bequest of a limited real right in 4.4.1.3. above.

the date of disposal and the donor's base cost will give rise to either a capital gain or a capital loss.²⁵²

4.6.1.6. Capital losses

Generally, when a loss arises from the disposal of an asset, the loss can be set off against the other capital gains of the disposer thereof.²⁵³ Further, any capital loss that is not set off against a capital gain in the current year of assessment may be carried over to the next year of assessment and then be set off against any capital gain in that year of assessment.²⁵⁴ Personal servitudes, amongst others, are however, an exception to this general rule. Paragraph 15(c) of the Eighth Schedule provides that a loss arising from the disposal of 'any fiduciary, usufructuary, or other similar interest must be disregarded. However, the paragraph 15(c) exclusion is only relevant if the interest was used for a purpose other than the carrying of a trade and if, over time, it decreased in value.²⁵⁵ The wording of the paragraph suggests that it is possible to hold a limited real right that does not decrease in value over time; although, Jooste and Roeleveld submit that it is not possible to have such an interest except in a situation where the value of the servient property increases to such an extent that the limited real right also increases, at least for a time.²⁵⁶

4.6.1.7. Disposals by non-residents

The Eighth Schedule is also applicable to non-residents in relation to the extent that they own property within the Republic of South Africa.²⁵⁷ Paragraph 2(1)(b) of the Eighth Schedule states that the Eighth Schedule applies to the disposal by a non-resident of any right to or in immovable property. It can be concluded from this provision that the Eighth Schedule applies to any limited real right, including personal servitudes, in immovable property held by a non-resident. Paragraph 72 of the Eighth Schedule further provides that any capital gain that has vested in a non-

²⁵² Jooste and Roeleveld 2002 *Acta Juridica* 94. Capital losses will be discussed below.

²⁵³ Para 6 of the Eighth Schedule.

²⁵⁴ Legal and Policy Division 2015 *SARS* 55.

²⁵⁵ Para 15(c) of the Eighth Schedule.

²⁵⁶ Jooste and Roeleveld 2002 *Acta Juridica* 98.

²⁵⁷ Legal and Policy Division 2013 *SARS* 51.

resident must be taken into account if that gain resulted from any gratuitous disposal made by a resident. Therefore, paragraph 72 will be applicable when a donation made by a resident of South Africa results in a gain that accrues to a non-resident.

For example, if Mr X, an American citizen, is the holder of a limited real right over a property within the Republic of South Africa, Mr X or his deceased estate will be held liable for the payment of capital gains tax if he disposes of the limited real right. Furthermore, Mr X will be liable for the payment of capital gains tax if his brother, Mr Y, a South African resident, donates a personal servitude over a property located within the Republic of South Africa to Mr X.

4.6.1.8. Paragraph 68 and 69 of the Eighth Schedule

Paragraph 68 of the Eighth Schedule pertains to the attribution of a capital gain to a spouse.²⁵⁸ The paragraph states that if a spouse has a capital gain which arose from the trade, donation, settlement or other gratuitous disposition from his or her spouse, the gain must not be taken into account for capital gains tax purposes of the spouse who made the capital gain, but should rather be taken into account concerning the spouse that gave rise to the gain.

For example, if Mr X donates a personal servitude to his wife, Mrs X, for a less than adequate consideration, the capital gain will not be taken into account in Mrs X's estate but rather in the estate of Mr X.

Paragraph 69 of the Eighth Schedule, in alignment with section 7(3) of the *Income Tax Act*,²⁵⁹ provides that if a minor child receives any capital gain from a trust which originated from a donation, settlement or gratuitous disposal made by the parents of

²⁵⁸ Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 69.

²⁵⁹ (3) Income shall be deemed to have been received by the parent of any minor child, if by reason of any donation, settlement or other disposition made by that parent of that child-
(a) it has been received by or has accrued to or in favour of that child or has been expended for the maintenance, education or benefit of that child; or
(b) it has been accumulated for the benefit of that child.

the child, it is the parents who are to be held accountable for that gain for capital gains tax purposes and not the child.²⁶⁰

Similar to the example above, should Mr X donate a personal servitude to his son, the resulting capital gain will not be taken into account in his son's estate but rather in his own estate.

4.6.2. *Capital gains tax implications of limited real rights held by trusts*

Although the minimisation of tax is not the primary objective of estate planning, some capital gains tax savings can be achieved through the utilisation of trusts. In addition to the capital gains tax savings, trusts are also very flexible in nature and can prove fruitful during the estate-planning process.²⁶¹ A discussion on the implications of the use of personal servitudes held by trusts as estate-planning tools and their capital gains tax consequences now follows.²⁶²

4.6.2.1. Disposal of an asset by a trust

Paragraph 80 of the Eighth Schedule stipulates that a capital gain arising from the disposal of a trust asset is subject to capital gains tax in the hands of the trust or the hands of the beneficiary. Paragraph 80 of the Eighth Schedule has the following three consequences: a) when a beneficiary acquires a vested interest in a trust asset he or she in effect acquires an asset for capital gains tax purposes; b) when such a trust asset is distributed to a beneficiary that has a vested interest in the asset, the beneficiary exchanges his or her personal right in the asset for ownership thereof and lastly; c) a discretionary interest of a beneficiary in a trust asset will constitute

²⁶⁰ Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 70.

²⁶¹ Burger *The future of trusts as an estate planning tool* 28; Carroll *SARS' ability to attribute trust income and capital gains to a donor-parent* 41.

²⁶² A detailed discussion on the legal nature of trusts and the different types of trusts is out of the scope of this dissertation. For a detailed discussion see Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* and Legal and Policy Division 2013 *SARS* 525.

an asset for capital gains tax purposes.²⁶³ Capital gains tax liability in terms of paragraph 80 of the Eighth Schedule is subject to paragraphs 68, 69, 71 and 72 of the Eighth Schedule, which shifts the liability to the person who originally made the disposal.²⁶⁴

Trusts are a complex subject matter and it is not always clear whether transactions constitute disposals for capital gains tax purposes or not. It is also sometimes unclear whether the asset was disposed by a trustee of the trust, a beneficiary of the trust, or a donor in relation to the trust. Accordingly, some transactions relating to disposals made under a trust and their capital gains tax consequences are now examined under separate headings.

4.6.2.2. Sale of a trust asset by a trustee

The sale of a trust asset does not always result in capital gains tax liability, as a trust will only incur such liability if the gain is not deemed that of a beneficiary or a donor in terms of paragraph 80 and paragraphs 68 to 73, respectively.²⁶⁵ However, when a capital gain arises from the disposal of a trust asset by a trustee in a year of assessment during which a trust beneficiary, being a resident, and who possesses or acquires a vested interest in the capital gain but not in the asset, the capital gain so vested must be entirely or partially disregarded for the determination of the capital gain or loss of the trust but must be regarded for the capital gain or loss of said beneficiary.²⁶⁶ It can therefore be concluded that in accordance with paragraph 80(2) of the Eighth Schedule, the capital gain implications of the disposal of a trust asset by a trustee will depend upon the time in which the disposal took place, whether the

²⁶³ Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 76.

²⁶⁴ Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 77. Paras 68-73 of the Eighth Schedule will be discussed below under the heading 'anti-avoidance provisions'.

²⁶⁵ Burger *The future of trusts as an estate planning tool* 30.

²⁶⁶ Para 82(2) of the Eighth Schedule.

distribution was allocated to a beneficiary, and whether the beneficiary was a South African resident or not.²⁶⁷

Paragraph 82(2) of the Eighth Schedule further clarifies that the provision only applies to instances where the beneficiary has a vested right in the capital gain and not the trust asset itself. When a beneficiary has a vested right in the asset, the disposal made by the trustee will be considered an action on behalf of the beneficiary and the beneficiary will therefore be liable for the capital gains tax.²⁶⁸

4.6.2.3. Distribution of a trust asset to a beneficiary

A distinction pertaining to this heading, must be made between beneficiaries with a vested right and one without. The distribution of a trust asset to a beneficiary without a vested right in the asset is regulated by paragraph 11(1)(d) of the Eighth Schedule. In accordance with this provision and subject to paragraph 80(2) of the Eighth Schedule, the beneficiary to whom the asset is distributed will be held liable for the capital gains tax resulting from such distribution. The distribution of a trust asset to a beneficiary who has a vested right in the asset is in turn regulated by paragraph 11(2)(e) of the Eighth Schedule and such a distribution does not constitute a disposal for capital gains tax purposes.

Paragraph 38 of the Eighth Schedule provides that when a disposal is made to a person who is a connected person to the person who disposed of the asset, the disposal will be considered to be at the market value of the asset at the date of the disposal and said 'connected person' will be considered to have acquired the asset at the market value.²⁶⁹ The provision will therefore apply in the instance where an asset is vested in a beneficiary of the trust, as a trust and its beneficiaries are considered connected persons. Such a distribution normally takes place without any consideration.²⁷⁰

²⁶⁷ Burger *The future of trusts as an estate planning tool* 30.

²⁶⁸ Burger *The future of trusts as an estate planning tool* 31.

²⁶⁹ 'Connected persons' are defined in s 1 of the *Income Tax Act*.

²⁷⁰ Honiball and Olivier *The Taxation of Trusts in South Africa* 131.

4.6.2.4. Vesting

A 'vested right' has been defined as follows:²⁷¹

a right belonging so absolutely, completely, and unconditionally to a person that it cannot be defeated by the act of any private person and that is entitled to governmental protection usually under a constitutional guarantee

In terms of the definition of 'disposal', the vesting of an interest in an asset of the trust constitutes a disposal and it is then the vesting of the interest and not the distribution of the asset that constitutes the disposal for capital gains tax purposes.²⁷²

A person has a vested interest if he or she is the owner of such an interest. However, a distinction relating to 'vesting', can be drawn between certainty and mere contingency, with the result that it is unnecessary for the vested interest to constitute ownership since a personal right against the trustee is sufficient to be a vested right.²⁷³

If a beneficiary has a vested interest in a trust asset and that asset is sold, the beneficiary must take any gain into account for their capital gains tax purposes.²⁷⁴

This will also apply if the gain is accumulated in the trust since the asset is disposed of on behalf of said beneficiary.²⁷⁵ If, on the other hand, a trust asset is disposed of and there are no vested rights, any gains not distributed to beneficiaries will be taxed in the hands of the trust.²⁷⁶

²⁷¹ Merriam-Webster date unknown <http://www.merriam-webster.com/dictionary/vested%20right>; also see Legal and Policy Division 2013 *SARS* 529.

²⁷² Para 11(1)(d) of the Eighth Schedule.

²⁷³ Legal and Policy Division 2013 *SARS* 532; Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 78; Carroll *SARS' ability to attribute trust income and capital gains to a donor-parent* 42.

²⁷⁴ Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 81.

²⁷⁵ Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 81.

²⁷⁶ Carroll *SARS' ability to attribute trust income and capital gains to a donor-parent* 42; Van der Mescht *Limited real rights in property – An overview of limited real rights in property with particular reference to the taxation of usufructs and more specifically the capital gains tax effects on disposal for persons and for trusts* 81.

4.6.2.5. Disposal by a beneficiary of a vested or contingent right

A beneficiary of a discretionary trust is entitled to dispose of his or her interest in the trust with such a disposal being subject to capital gains tax. In this regard, it is important to note that, in terms of paragraph 81 of the Eighth Schedule, the base cost of a person's interest in a discretionary trust is always nil and therefore, it can safely be concluded that the capital gain arising from such an interest will be equal to the proceeds made from the disposal.²⁷⁷ Furthermore, while the base cost of a discretionary right will always be nil, this will not be the case with a vested right where the base cost is considered the market value of the right at the time of vesting.²⁷⁸

4.6.2.6. Value-shifting arrangements

A value-shifting arrangement has been defined as follows:²⁷⁹

A value-shifting arrangement involves the effective transfer of value from one entity to another without constituting an ordinary disposal for capital gains tax purposes.

The *Income Tax Act* defines a value-shifting arrangement as an arrangement in terms of which a person retains an interest in a company, trust or partnership. However, following a change in the entitlements of the interests in said legal entity, the market value of that person's interest will decrease while the value of the interest of a connected person increases.²⁸⁰ The decrease in value of a person's interest in a trust as a result of such an arrangement will constitute a disposal for capital gains tax purposes.²⁸¹ As can clearly be seen from the wording of the *Income Tax Act* definition of 'value-shifting arrangements', the restrictions thereto are limited to arrangements between connected persons. The reasoning behind this restriction is the protection of *bona fide* commercial arrangements.²⁸²

With specific reference to trusts, a value-shifting arrangement will come into being when changes are made in the interest of the beneficiaries without adequately

²⁷⁷ Legal and Policy Division 2013 *SARS* 561.

²⁷⁸ Burger *The future of trusts as an estate planning tool* 33.

²⁷⁹ Williams *Capital Gains Tax – a practitioner's manual* 81; Legal and Policy Division 2013 *SARS* 696.

²⁸⁰ Para 1 of the Eighth Schedule.

²⁸¹ Para 11(1)(g) of the Eighth Schedule.

²⁸² Williams *Capital Gains Tax – a practitioner's manual* 81.

compensating the beneficiaries whose interest is being diminished as a result thereof.²⁸³ Nevertheless, no value-shifting arrangement can occur when the beneficiaries only have discretionary interest in a trust since, as previously mentioned, discretionary interests have a base cost of nil. As a result of this, it is not possible to determine a market value for such an interest. Consequently, no capital gains tax consequences can be incurred.²⁸⁴

4.6.2.7. Anti-avoidance provisions

As indicated above, the sale of a trust asset does not always result in capital gains tax liability since, a trust will only incur such liability if the gain is not deemed to be that of a beneficiary or a donor in terms of paragraph 80 and paragraphs 68 to 73 (also known as the anti-avoidance provisions), respectively.²⁸⁵ A brief discussion of each of these provisions now follows.

In some instances where one spouse has a higher income than the other the spouses may be tempted to enter into an agreement to transfer income from the higher earning spouse to the other. Section 7(2) of the *Income Tax Act* is an anti-avoidance provision that focuses specifically on these types of arrangements.²⁸⁶ Paragraph 68 of the Eighth Schedule, which contains provisions similar to section 7(2) of the *Income Tax Act*, attribute the capital gain to the spouse in certain circumstances.²⁸⁷ Where a person's capital gain can be attributed to any donation, settlement, other disposition, transaction, operation or scheme made by his or her spouse in order to reduce, avoid or postpone any tax liability, the capital gain must be disregarded for the person but regarded for his or her spouse's capital gain.²⁸⁸ Paragraph 68(2) further states that if a person's capital gain is derived from any trade which the person conducted with his or her spouse or from a partnership or private company of which that person's spouse was a partner or main shareholder,

²⁸³ Burger *The future of trusts as an estate planning tool* 33.

²⁸⁴ Williams *Capital Gains Tax – a practitioner's manual* 92.

²⁸⁵ Burger *The future of trusts as an estate planning tool* 30.

²⁸⁶ Williams *Capital Gains Tax – a practitioner's manual* 361.

²⁸⁷ Legal and Policy Division 2013 *SARS* 568.

²⁸⁸ Para 68(1) of the Eighth Schedule.

the capital gain must be disregarded in a similar manner as stated in paragraph 68(1) of the Eighth Schedule above.

Paragraph 69 of the Eighth Schedule in turn mirrors section 7(3) and (4) of the Income Tax Act and stipulates that if a capital gain of a minor child can be attributed to any donation, settlement, or other disposition made by the parents of the child or another person in return for any donation made by the parents of that child, the capital gain must be disregarded when determining the child's aggregate gain and should instead be taken into account when determining the capital gain of his or her parent.²⁸⁹ These anti-avoidance provisions attempt to eliminate any tax advantages that a parent may seek in this manner.²⁹⁰

Paragraph 70 of the Eighth Schedule, in accordance with section 7(5) of the *Income Tax Act*, regulates the attribution of a capital gain subject to conditional vesting. This anti-avoidance provision aims to prevent the situation in which a donor attempts to avoid tax consequences by not allowing the beneficiary of an asset immediate enjoyment but merely postpones such enjoyment until some future event takes place or until the trustees exercise their discretion to allow the beneficiary to enjoy that asset.²⁹¹ According to the provision, any capital gain which is retained by the trust must be included when calculating the donor's capital gains tax liability.

Paragraph 71 of the Eighth Schedule, in a manner similar to section 7(6) of the *Income Tax Act*, which only finds application in cases where the gains are awarded to the beneficiary, is in contrast to paragraph 70, since the latter only applies where the gains are accumulated in the trust.²⁹² According to this provision, in certain instances, the gain must be disregarded for the beneficiary and instead be regarded when determining the aggregate capital gain or loss of the donor.²⁹³ This includes instances where a right to receive a capital gain resulting from a donation, settlement, or other disposition, is conferred upon a resident beneficiary by said

²⁸⁹ Legal and Policy Division 2013 *SARS* 570.

²⁹⁰ Williams *Capital Gains Tax – a practitioner's manual* 363.

²⁹¹ Burger *The future of trusts as an estate planning tool* 36.

²⁹² Burger *The future of trusts as an estate planning tool* 36.

²⁹³ Legal and Policy Division 2013 *SARS* 571.

donation, settlement, or other disposition and that gain may be revoked or conferred upon another person with the capital gain being vested in the beneficiary.²⁹⁴

Paragraph 72 of the Eighth Schedule in its turn provides for the attribution of a capital gain in a non-resident.²⁹⁵ This provision mirrors section 7(8) of the *Income Tax Act* and aims to ensure that a resident donor will take into account any donation, settlement or other disposition made to a non-resident if that gain is attributable to a donation, settlement, or other disposition made by the resident.²⁹⁶

Lastly, paragraph 73 limits the amount of income and capital gains that are attributed to a donor to the amount of the benefit derived from the donation, settlement, or other disposition.²⁹⁷

Apart from the tax consequences there are several other issues to consider which pertain to the use of personal servitudes as estate-planning tools, these issues are discussed below.

4.7. Issues to consider with regard to the use of personal servitudes as estate planning tools

An issue relating to the use of personal servitudes arises from section 11(a)(i) of the *Estate Duty Act*. The section states that the person who benefits from the cessation of a limited real right is liable for the estate duty payable as a result thereof. Thus, in addition to the benefit that the person receives they must also pay the amount of estate duty liable. This amount is calculated by capitalising the value of the limited real right over his or her life expectancy. It can be concluded from the facts that should the beneficiary die sooner than expected as related to the life expectancy tables, he or she would receive far fewer benefits from the limited interest while his or her estate will still be held liable for the payment of the estate duty in full.²⁹⁸ The

²⁹⁴ Burger *The future of trusts as an estate planning tool* 36; Williams *Capital Gains Tax – a practitioner's manual* 367.

²⁹⁵ Legal and Policy Division 2013 *SARS* 573.

²⁹⁶ Para 72 of the Eighth Schedule.

²⁹⁷ Burger *The future of trusts as an estate planning tool* 37; Carroll *SARS' ability to attribute trust income and capital gains to a donor-parent* 44; Legal and Policy Division 2013 *SARS* 574.

²⁹⁸ Davis, Beneke and Jooste *Estate Planning* para 12.1.

Act in effect requires the beneficiary to pay in advance for benefits that he or she has not yet received and may in fact never receive.²⁹⁹

It is in the best interest of an estate planner, from an estate-planning point of view to provide for the estate duty implications of bequeathing limited real rights by, for example, ensuring that the estate duty liable will be paid out of the residue of the estate.³⁰⁰

Section 44(1) of the *Administration of Estates Act*³⁰¹ provides for the situation in which a minor or an unborn person will, when born, be entitled to movable property subject to, amongst others, a usufruct in favour of any other person.³⁰² The section stipulates that the executor must, in the absence of any contradictory statement in the will, pay over any funds to the Master and deal with any other movable property in the manner the Master directs.³⁰³ The section further states that no movables or money may be paid or delivered to the minor entitled to the limited real right before such a minor attains majority, unless the Master directs the executor to do so or the minor furnishes security for the ultimate delivery thereof.³⁰⁴ If no security is provided for the ultimate delivery, only the interest on the money will be paid to the usufructuary, which must then be deposited in the Guardian's fund. However, this situation can be avoided by the testator through providing in his will that the holder of the limited interest should be exempt from security.³⁰⁵

As discussed in section 2.1.1.2. above, it is common for a testator or testatrix to leave his or her home to their children while bequeathing a personal servitude in the form of *habitatio* to their surviving spouse. The bequest of such a right of occupation can have severe estate duty implications. The house will be property in the testator's estate, and upon the death of the beneficiary, the right of occupation will be property in the beneficiary's estate resulting in estate duty pertaining to the dwelling

²⁹⁹ Davis, Beneke and Jooste *Estate Planning* para 12.1.

³⁰⁰ Davis, Beneke and Jooste *Estate Planning* para 12.1.

³⁰¹ 66 of 1965. Hereafter the *Administration of Estates Act*.

³⁰² Davis, Beneke and Jooste *Estate Planning* para 12.1; Carroll *SARS' ability to attribute trust income and capital gains to a donor-parent* 44.

³⁰³ S 44(1) of the *Administration of Estates Act*.

³⁰⁴ S 44(1)(b) of the *Administration of Estates Act*.

³⁰⁵ Davis, Beneke and Jooste *Estate Planning* para 12.1.

being levied on both estates, at full market value in the testator's estate and again at a lesser but similar value, in the estate of the beneficiary.³⁰⁶

4.8. One-year usufructuary schemes

Many an estate planner has made use of the well-known 'one-year usufructuary scheme'.³⁰⁷ This scheme operates as follows: the testator or testatrix leaves his or her property, subject to a usufructuary right to the surviving spouse, to a testamentary trust. When the surviving spouse dies, the testamentary trust will enjoy full, unencumbered ownership of the property.³⁰⁸ The advantage of this arrangement is that the usufructuary interest created will be exempt from estate duty in the testator's or testatrix's estate.³⁰⁹ However, this estate duty is only deferred to the death of the surviving spouse, at which time the property will have to be valued over a fifty-year period for estate duty purposes, since the beneficiary is a trust.³¹⁰

This is where the one-year scheme, also known as the 'one year wonder', takes effect.³¹¹ In order to avoid the postponed estate duty liability the testator or testatrix additionally provides that, after the death of the surviving spouse, the usufructuary interest will pass to someone else for a period of one year after which the testamentary trust will enjoy full ownership of the property.³¹² Therefore, the property will be valued for estate duty purposes over a period of one-year and not fifty-years, resulting in a estate duty saving.³¹³ Although this scheme has been implemented for a long period of time without being attacked, it is the concern of scholars that courts will see through this scheme and see it for what it actually is, namely, 'a fig leaf disguising the trust's true interest in the succession'.³¹⁴ The court

³⁰⁶ Davis, Beneke and Jooste *Estate Planning* para 12.1.

³⁰⁷ Divaris 2009 *Tax Planning* 28.

³⁰⁸ Divaris 2009 *Tax Planning* 28.

³⁰⁹ Harris AM *The use of retirement annuities as an estate planning tool 2*; Maitland 2009 *Moneyweb's Personal Finance* 7.

³¹⁰ Divaris 2009 *Tax Planning* 28.

³¹¹ Harris AM *The use of retirement annuities as an estate planning tool 2*.

³¹² Divaris 2009 *Tax Planning* 28; Maitland 2009 *Moneyweb's Personal Finance* 7.

³¹³ Divaris 2009 *Tax Planning* 29; Harris AM *The use of retirement annuities as an estate planning tool 2*.

³¹⁴ Divaris 2009 *Tax Planning* 29.

may then order that the fifty-year estate duty valuation must be used and that there be a discount for the one-year delay, only.³¹⁵

The operation of this scheme has been addressed by SARS in Tax Proposals 2009/10 in which SARS acknowledged the existence of these one-year usufructuary schemes, explained the operation thereof, and finally stated the following:³¹⁶

The scheme essentially relies on the misapplication of the 12 per cent per annum valuation presumption within the context of a one-year interest. This scheme will accordingly be closed.

Therefore, it can, be concluded that action will be taken to address this scheme and to stop its future use while those currently relying on such a scheme will have to be aware of any amendments to be made to the law to assess and decide what the next best step should be.³¹⁷

4.9. Concluding remarks with regard to the tax consequences of personal servitudes

In conclusion, a limited real right in property, such as a personal servitude, will be considered part of the dutiable estate of a person upon his or her death if certain requirements are met. Furthermore, these limited real rights will have a number of tax consequences in an estate-planning context. These taxes include income tax, estate duty, donations tax, transfer duty and capital gains tax. The estate may be liable for income tax in certain instances where an income stream is created as a result of the personal servitude.

With regard to estate duty and donations tax, it can be concluded that age is the most important consideration when using a personal servitude as an estate-planning tool. A second important aspect is that of donations tax liability between spouses and while donations tax cannot be excluded, it can be deferred until such time as the surviving spouse's time of death.

³¹⁵ Divaris 2009 *Tax Planning* 29.

³¹⁶ Divaris 2009 *Tax Planning* 29; Harris AM *The use of retirement annuities as an estate planning tool* 2.

³¹⁷ Maitland 2009 *Moneyweb's Personal Finance* 7.

With regard to capital gains tax, it can be concluded that, an anomaly exists pertaining to capital gains tax and usufructs in that there is an 'artificial drop in the base cost of the asset' which leads to severe capital gains tax consequences for the bare dominium holder of the asset. It is further concluded from this chapter that a trust may offer greater benefits in an estate-planning context although the capital gains tax rates of trusts are higher than that of a person.³¹⁸

It can lastly be concluded that, pertaining to one-year usufructuary schemes, SARS has indicated that the operation of these schemes will be examined. It is therefore suggested that estate planners should be wary of these schemes to protect the interests of their clients.

5. Concluding remarks

This study set out to explore the implications of the use of personal servitudes as estate-planning instruments with specific emphasis being placed on the tax consequences of personal servitudes within the estate-planning context.³¹⁹ In so doing, the following aspects were considered: the nature of estate planning; the nature of servitudes and particularly; personal servitudes; the extent to which personal servitudes may be registered in South Africa and lastly; the implications of the use of personal servitudes for estate planning purposes.

Chapter 1 of this dissertation considered the nature of estate planning by providing a definition of the term 'estate planning' followed by a discussion of several aspects related thereto, including the phases in which estate planning takes place and the objectives thereof. The chapter further explained that personal servitudes can be useful estate-planning tools in the case of immovable property and proceeded to discuss servitudes in general.³²⁰

Chapter 2 of this dissertation further described servitudes in general by, firstly, defining servitudes and, secondly, drawing a distinction between personal and praedial servitudes. In addition, the common characteristics of personal and praedial

³¹⁸ The benefits of trusts will be discussed in detail in Chapter 5 below.

³¹⁹ See Chapter 4 above.

³²⁰ See Chapter 1 above.

servitudes were explained and, finally, the relationship between the servitude holder and the owner of the property was discussed.³²¹ The focus of the chapter was then shifted to personal servitudes.³²² General aspects of personal servitudes, such as the duration and inheritability thereof, were discussed after which a detailed discussion of three different types of personal servitudes, namely *usus*, *habitatio*, and usufruct followed.³²³ The chapter continued with a general examination of personal servitudes by addressing the manner in which personal servitudes are created³²⁴ and terminated,³²⁵ as well as the respective remedies available to the both servitudeholder and the property owner.³²⁶

While it is suggested that the use of personal servitudes may not offer much advantage to the estate planner since these limited interest are not very flexible in nature,³²⁷ they do still offer a variety of benefits when implemented at the right time and in the right manner, as related in particular to tax benefits.³²⁸

Chapter 3 of the study endeavoured to explore the extent to which personal servitudes may be registered in South Africa. By means of the examination of the creation of personal servitudes, the study concluded that personal servitudes as a real right only comes into existence after the registration of the agreement and that this required registration takes place in one of two ways: a) through the registration of a notarial deed, or, b) by means of a reservation in a deed of transfer.³²⁹ The effect of the registration was subsequently explained and it was concluded that the registration of a personal servitude serves as a notice to all third parties of the existence of the right in terms of the publicity principle.³³⁰ It was further concluded that the buyer of land will only be bound to an unregistered servitude if he or she

³²¹ See Section 2.1 above.

³²² See Section 2.2 above.

³²³ See Section 2.2 above.

³²⁴ See Section 2.2.2 above.

³²⁵ See Section 2.2.3 above.

³²⁶ See Section 2.2.4 above.

³²⁷ As can be seen from the discussion on the characteristics of personal servitudes in Chapter 2 above.

³²⁸ See Chapter 4 above for the tax benefits of the use of personal servitudes as estate planning tools.

³²⁹ See Chapter 3 above.

³³⁰ See Chapter 3 above.

had prior knowledge of the agreement relating to the acquisition of the property.³³¹ Lastly, the chapter addressed the impact of the *Subdivision of Agricultural Land Act* on the registration of servitudes. The Act had several implications concerning the use of agricultural land, including setting certain conditions for the registration of specific limited real rights. These conditions include the forbiddance of the registration of a servitude in respect to agricultural land by a Registrar of Deeds without the written consent of the Minister of Agriculture.

It is recommended that the nature of the property over which the servitude will be registered must be borne in mind by the estate planner when considering the use of a personal servitude as an estate-planning tool. The nature of the property will determine the difficulty of registering the personal servitude. This is especially important in relation to the question of agricultural land since the consent of the Minister will have to be obtained before registering a personal servitude.

Chapter 4 went on to examine the implications of the use of personal servitudes in the estate-planning context, with special emphasis being placed on the tax consequences thereof.³³² In doing so, the study considered what constitutes an estate in terms of the *Estate Duty Act* and consequently found that a limited real right in property, such as a personal servitude, would be considered a part of the dutiable estate of a person upon his or her death if certain requirements were met.³³³ The study, under separate headings, further considered several costs and taxes with regard to the use of personal servitudes as estate-planning instruments.

Firstly, with regard to normal tax it was stated that the Income Tax Act may be applicable in the case of personal servitudes as the holding of such a limited real right may give rise to an income stream which will then be liable for income tax.³³⁴

Secondly, the study addressed estate duty by explaining the valuation-method of personal servitudes for estate duty purposes. It was concluded that the first and arguably the most important consideration when using a personal servitude as an

³³¹ See Chapter 3 above.

³³² See Chapter 4 above.

³³³ See Chapter 4 above.

³³⁴ See Section 4.1 above.

estate-planning tool, is age. A limited interest is made over the life expectancy of the person to whom it is bequeathed and as such the estate-planning process will benefit most from the use thereof in an instance where the interest has been valued in terms of the life expectancy tables and the person lives longer than expected.³³⁵ The age of the successor is thus a very important consideration.

The study then examined the donations tax implications of personal servitudes by defining the term 'donations tax' and discussing the donations tax rates and the method of valuation of an asset for donations tax purposes. It can be concluded from this chapter, that the most beneficial option, pertaining to the estate, is the making of a donation during the lifetime of an older donor, rather than a bequest in his or her will. Similarly to the case where a personal servitude is bequeathed, age plays a very important role with regard to donations. This is because the donation is valued over the life expectancy of the donor which means the older the donor, the lower the donations tax liability.

Apart from age, a second important consideration is that of donations between spouses. The donation of a usufruct between spouses is an allowable deduction and is not subject to donations tax. However, the liability is only deferred until the surviving spouse disposes of the limited real right or until the time of death.³³⁶

In the instance where a personal servitude ceases prior to the death of the holder, it will not be considered amongst the property of the deceased estate and as such, no estate duty will be payable as a result thereof.³³⁷ This may offer the taxpayer some advantage as he or she can donate their right thereto prior to their death and while this donation will be subject to donations tax, the taxpayer may still save some money depending on the respective ages of the donor and donee.³³⁸

The fourth cost that the chapter considered was that of transfer duty. The study once again offered a definition of the term 'transfer duty', explained the different transfer duty rates and lastly, addressed the situation with regard to the renunciation

³³⁵ See Section 4.2 above.

³³⁶ See Chapter 4 above.

³³⁷ S 3(2)(a) of the *Estate Duty Act* as discussed in chapter 4 above.

³³⁸ See discussion of donations tax in chapter 4.3 above.

of a personal servitude. It can be concluded from this chapter that transfer duty must be kept in mind when considering the use of personal servitudes as an estate-planning tool.

The last type of tax that was considered by the study was that of capital gains tax. The study offered a brief, general discussion of capital gains tax and it was illustrated that a personal servitude is included in the definition of 'property' for capital gains tax purposes.³³⁹

The chapter then proceeded to review several general aspects of capital gains tax and explored an existing anomaly related to capital gains tax and usufructs, namely that the bare dominium value of the property over which the usufruct is created will, in most cases, be very low and therefore the creation of usufructs often results in what is referred to as 'an artificial drop in the base cost of an asset'.³⁴⁰ Consequently, when a usufruct expires, the rights in terms of the usufruct are passed on to the bare dominium holder. However, his or her low base cost is not adjusted according to the full value of the asset on the date on which the usufruct was created.³⁴¹ The result of this anomaly is that a substantial capital gain may come into being when the former bare dominium holder, who has gained full ownership of the asset, disposes of the asset.³⁴² While this may not influence the deceased estate of an estate owner, it will most certainly have a tremendous impact on the estate of the person to whom the interest is bequeathed and therefore this anomaly must be kept in mind before a usufruct is created.

The chapter further proceeded to discuss the capital gains tax implications for persons and trusts under separate headings. Firstly, with regard to persons, aspects of the position of the deceased, the position of the successor, the implications of the bequest of a limited real right, the ceasing of a usufruct during the lifetime of the holder of the right, the capital gains tax implications of the donation of a personal servitude, capital losses, and disposals by non-residents were discussed.³⁴³ With

³³⁹ See Section 4.5 above.

³⁴⁰ See Section 4.5 above.

³⁴¹ See Section 4.5 above.

³⁴² See Section 4.5 above.

³⁴³ See Section 4.5.1 above.

regard to trusts, several transactions and their capital gains tax implications were discussed, namely disposal of an asset by a trust, transfer of an asset to a trust, sale of a trust asset by a trustee, distribution of a trust asset to a beneficiary, vesting of trust assets, and value-shifting arrangements.³⁴⁴

The consideration pertaining to the issue of the capital gains tax implications of a person versus that of a trust must be explored in more depth. It is proposed that while the tax rates of a person are lower than that of a trust it is still the better option to make use of a trust. Trusts offer such a benefit since the capital gains tax is deferred and the value of the estate is 'frozen'.³⁴⁵ Trusts also offer a number of other significant benefits such as the protection of assets, succession planning, providing for minors and other dependants, and assisting in the administration process when death occurs, which are all considered to be objectives of estate planning.³⁴⁶

The chapter further discussed certain anti-avoidance provisions and it was concluded that the purpose of these provisions are to ensure that the capital gains tax liability incurred as a result of certain transactions cannot be avoided or shifted to a third party.³⁴⁷ It can be concluded from these anti-avoidance provisions that when the main objective of the creation of a trust is to avoid or minimise tax consequences, such a trust must not be created. This is applicable to the use of personal servitudes as estate-planning instruments since capital gains tax liability or in fact any tax liability resulting from the creation of a personal servitude, cannot be avoided by using a trust.

Apart from the tax consequences thereof, the use of personal servitudes as estate-planning instruments brings with it certain other issues that demand consideration. These issues were discussed in Section 4.6 and the chapter commenced by referring to section 11(a)(i) of the *Estate Duty Act* in terms of which a person who is the recipient of a limited real right is held liable for the estate duty incurred as a result

³⁴⁴ See Section 4.5.2 above.

³⁴⁵ See Chapter 1 above.

³⁴⁶ Burger *The future of trusts as an estate planning tool* 138; also see chapter 1 above.

³⁴⁷ See Section 4.5.2.8 above.

thereof. It was concluded that should a person die sooner than expected in terms of the life expectancy tables, that person will pay for more benefits than he or she received. It was further suggested that the estate planner can avoid this situation by, for example, ensuring that the estate duty will be paid from the residue of the estate.³⁴⁸

Section 44(1) of the *Administration of Estates Act* was subsequently discussed and concluded that to best provide for the situation where a minor is entitled to a limited real right, the testator should state in his or her will that the holder of the limited real right should be exempt from security.³⁴⁹ Lastly, it was stated that it is important for an estate planner to keep in mind that when a right of occupation is bequeathed, the possibility arises that double liability for estate duty may arise, first in the testator's estate, since the house is property in his estate and then once again in the beneficiary's estate, as the right of occupation will be property in his or her estate.³⁵⁰

Chapter 4 concluded with a discussion of one-year usufructuary schemes. The operation of these schemes was examined and it was concluded that while the schemes have not been stopped up to date, their existence was addressed by SARS and action is expected to follow. Consequently, estate planners with clients currently relying on such schemes, will have to be very aware of any amendments to the law in order to ensure that they act in the best interest of their clients.

The study therefore concludes that the use of personal servitudes as estate-planning instruments may be both beneficial as well as detrimental to the estate-planning process. Estate planners should therefore make informed decisions based on the discussion above when considering the use of these limited real rights.

³⁴⁸ See Section 4.6 above.

³⁴⁹ See Section 4.6 above.

³⁵⁰ See Section 4.6 above.

ANNEXURE A

Table A

The Expectation of Life and the Present Value of R1 per Annum for Life Capitalised at 12 per cent over the Expectation of Life of Males and Females of Various Ages

Expectation of Life			Present value of R1 Per Annum for Life		
Age	Males	Females	Males	Females	Age
0	64,74	72,36	8,327 91	8,331 05	0
1	65,37	72,74	8,328 28	8,331 14	1
2	64,50	71,87	8,327 76	8,330 91	2
3	63,57	70,93	8,327 14	8,330 64	3
4	62,63	69,97	8,326 44	8,330 33	4
5	61,69	69,02	8,325 67	8,329 99	5
6	60,74	68,06	8,324 80	8,329 61	6
7	59,78	67,09	8,323 81	8,329 18	7
8	58,81	66,11	8,322 71	8,328 69	8
9	57,83	65,14	8,321 46	8,328 15	9
10	56,85	64,15	8,320 07	8,327 53	10
11	55,86	63,16	8,318 49	8,326 84	11
12	54,87	62,18	8,316 73	8,326 08	12
13	53,90	61,19	8,314 80	8,325 22	13
14	52,93	60,21	8,312 65	8,324 27	14
15	51,98	59,23	8,310 29	8,323 20	15
16	51,04	58,26	8,307 70	8,322 03	16
17	50,12	57,29	8,304 89	8,320 71	17
18	49,21	56,33	8,301 80	8,319 26	18
19	48,31	55,37	8,298 41	8,317 64	19
20	47,42	54,41	8,294 71	8,315 84	20
21	46,53	53,45	8,290 61	8,313 83	21
22	45,65	52,50	8,286 13	8,311 61	22
23	44,77	51,54	8,281 17	8,309 12	23
24	43,88	50,58	8,275 64	8,306 33	24
25	43,00	49,63	8,269 59	8,303 26	25
26	42,10	48,67	8,262 74	8,299 81	26
27	41,20	47,71	8,255 16	8,295 95	27
28	40,30	46,76	8,246 77	8,291 71	28
29	39,39	45,81	8,237 37	8,286 97	29
30	38,48	44,86	8,226 94	8,281 70	30
31	37,57	43,91	8,215 38	8,275 83	31
32	36,66	42,96	8,202 57	8,269 30	32
33	35,75	42,02	8,188 36	8,262 10	33
34	34,84	41,07	8,172 62	8,254 00	34
35	33,94	40,13	8,155 36	8,245 09	35
36	33,05	39,19	8,136 47	8,235 17	36
37	32,16	38,26	8,115 58	8,224 26	37
38	31,28	37,32	8,092 74	8,211 99	38
39	30,41	36,40	8,067 81	8,198 66	39

40	29,54	35,48	8,040 30	8,183 86	40
41	28,69	34,57	8,010 67	8,167 62	41
42	27,85	33,67	7,978 44	8,149 83	42
43	27,02	32,77	7,943 44	8,130 12	43
44	26,20	31,89	7,905 47	8,108 81	44
45	25,38	31,01	7,863 80	8,085 27	45
46	24,58	30,14	7,819 24	8,059 56	46
47	23,79	29,27	7,771 09	8,031 19	47
48	23,00	28,41	7,718 43	8,000 26	48
49	22,23	27,55	7,662 36	7,966 17	49
50	21,47	26,71	7,602 01	7,929 50	50
51	20,72	25,88	7,537 13	7,889 67	51
52	19,98	25,06	7,467 48	7,846 46	52
53	19,26	24,25	7,393 87	7,799 65	53
54	18,56	23,44	7,316 31	7,748 34	54
55	17,86	22,65	7,232 34	7,693 55	55
56	17,18	21,86	7,144 14	7,633 63	56
57	16,52	21,08	7,051 78	7,568 96	57
58	15,86	20,31	6,952 25	7,499 27	58
59	15,23	19,54	6,850 04	7,423 21	59
60	14,61	18,78	6,742 06	7,341 35	60
61	14,01	18,04	6,630 10	7,254 57	61
62	13,42	17,30	6,512 32	7,160 20	62
63	12,86	16,58	6,393 01	7,060 46	63
64	12,31	15,88	6,268 22	6,955 37	64
65	11,77	15,18	6,137 89	6,841 61	65
66	11,26	14,51	6,007 26	6,723 93	66
67	10,76	13,85	5,871 65	6,598 93	67
68	10,28	13,20	5,734 03	6,466 35	68
69	9,81	12,57	5,591 82	6,328 18	69
70	9,37	11,96	5,451 65	6,184 66	70
71	8,94	11,37	5,307 75	6,036 07	71
72	8,54	10,80	5,167 44	5,882 78	72
73	8,15	10,24	5,024 37	5,722 22	73
74	7,77	9,70	4,878 76	5,557 43	74
75	7,41	9,18	4,734 90	5,388 93	75
76	7,07	8,68	4,593 54	5,217 27	76
77	6,73	8,21	4,446 63	5,046 79	77
78	6,41	7,75	4,303 09	4,870 92	78
79	6,10	7,31	4,158 98	4,693 89	79
80	5,82	6,89	4,024 40	4,516 47	80
81	5,55	6,50	3,890 51	4,343 99	81
82	5,31	6,13	3,768 02	4,173 15	82
83	5,09	5,78	3,652 76	4,004 82	83
84	4,89	5,45	3,545 46	3,839 88	84
85	4,72	5,14	3,452 32	3,679 21	85
86	4,57	4,85	3,368 64	3,523 71	86
87	4,45	4,58	3,300 66	3,374 26	87
88	4,36	4,33	3,249 07	3,231 75	88
89	4,32	4,11	3,225 97	3,102 96	89
90*	4,30	3,92	3,214 38	2,989 12	90

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