

**A re-evaluation of what constitutes
“property” for purposes of the
Administration of Estates Act 66 of
1965**

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ABSTRACT

The purpose of this study was to determine whether the current omission of a definition of “movable property” in the *Administration of Estates Act* 66 of 1965 (hereafter the *Administration of Estates Act*) is problematic and, if so (and with reference to related legislation), how can this situation be addressed?

The study found that the most important classification of things is immovable and movable things. In addition, the *Administration of Estates Act* defines both immovable property and property, although movable property is not defined in the *Administration of Estates Act*. In other words, it would be necessary to consult either the definition of property or of immovable property, in order to determine which property forms part of an estate in terms of the Act or to consult court cases.

The *Administration of Estates Act* is the principal act when it comes to the administration of a deceased estate. The undescriptive definition of “property” creates uncertainty and results in academics and practitioners using the *Estate Duty Act* 45 of 1955 (hereafter the *EDA*) to define property.

Furthermore, the word “property” is constantly in use in the *Administration of Estates Act*. Although movable property should be self-explanatory, it appears to create problems which even the courts are struggling to define.

It is concluded that property is constantly changing in modern society. With the constant change in modern society it is imperative to amend the outdated and undescriptive definition of “property” in the *Administration of Estates Act*.

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LIST OF ABBREVIATIONS

Act	Pension Fund Act 24 of 1956
Administration of Estates Act	Administration of Estates Act 66 of 1965
CGT	Capital Gains Tax
DOJ&CD	Department of Justice and Constitutional Development
EDA	Estate Duty Act 45 of 1955
FCA	Firearm Control Act 60 of 2000
FLD	First and Final Liquidation and Distribution
Interim Constitution	Constitution of the Republic of South Africa 200 of 1993
ITA	Income Tax Act 58 of 1962
LAWSA	The Law of South Africa
MPA	Matrimonial Property Act 88 of 1984
PER	Potchefstroomse Elektroniese Regsblad
SALJ	The South African Law Journal
SARS	South African Revenue Services
SCA	Supreme Court of Appeal
TDA	Transfer Duty Act 40 of 1949
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Constitution	Constitution of the Republic of South Africa, 1996
VAT	Value-added tax

1 Introduction

1.1 Background

A deceased estate is made up of assets and liabilities belonging to a person at date of death. A deceased estate may include immovable property, shares, personal possessions, accrual claims and money in bank accounts, to mention but a few. Some assets will, however, be excluded from the estate. A deceased estate is administered within the framework of the *Administration of Estates Act* 66 of 1965.¹ The nominated executor will collect all the relevant information to report the estate to the Master of the High Court.² Once all the documents have been lodged at the Master's office, the executor will receive letters of executorship.³ Upon receipt, the executor will place the first advertisement to invite all the debtors and creditors to lodge their claims against or in favour of the estate.⁴ The executor will draft the liquidation and distribution account, once he/she has collected all the relevant information.⁵ The liquidation and distribution account is accordingly a reflection of all the assets and liabilities of the estate.

In addition to the *Administration of Estates Act*, the following legislation is also applicable when dealing with the administration of deceased estates, namely the *Estate Duty Act* 45 of 1955,⁶ the Eighth Schedule to the *Income Tax Act* 58 of 1962⁷ and the *Transfer Duty Act* 40 of 1949.⁸ Income tax, capital gains tax (CGT), transfer duty and estate duties, are all possible levies that can be charged on deceased estates. The mentioned levies are based on the property declared in the final liquidation and distribution account. Each of the above-mentioned pieces of legislation, however, defines property differently.

A condensed definition of "property"⁹ in terms of the *EDA*, is provided by Greeff,¹⁰ namely:

¹ 66 of 1965 (hereafter the *Administration of Estates Act*).

² See s 15(1) of the *Administration of Estates Act*.

³ See s 14 of the *Administration of Estates Act*.

⁴ See s 29(1) of the *Administration of Estates Act*.

⁵ See s 35 of the *Administration of Estates Act*.

⁶ 45 of 1955 (hereafter the *EDA*).

⁷ 58 of 1962 (hereafter the *ITA*).

⁸ 40 of 1949 (hereafter the *TDA*).

⁹ See s 3(2) of the *EDA* for the full description of "property" for purposes of this Act.

¹⁰ Greeff Attorneys 2018 <https://greeffattorneys.co.za/2018/06/13/estate-duty-property-vs-deemed-property/>.

All assets of the deceased whether movable, immovable, corporeal and incorporeal and includes all rights or interests in properties, lump sum payments paid by pension/provident/retirement fund which are due and payable as a result of death of the deceased, as well as any property that the deceased was competent to dispose of for his own benefit or for the estate's benefit, immediately before his death.

The *ITA*¹¹ refers to "asset" as follows, namely an asset includes:

property of whatever nature, whether movable or immovable, corporeal or incorporeal, excluding any currency, but including any coin made mainly from gold or platinum; and
(b) a right or interest of whatever nature to or in such property ...

The *TDA*¹² defines "property" as:

Land and fixtures, and includes real rights in land, rights to minerals, a share or interest in a "residential property company" or a share in a share-block company.¹³ It also includes a share or member's interest in a company, if that company and all of its subsidiary companies would be a residential property company if all such companies were regarded as a single entity.

The *Administration of Estates Act*, however, defines "property" in section 1 only as "any contingent interest in property." In contrast to the extensive definition in the *EDA* (which makes provision for both the inclusion and exclusion of applicable properties), the definition of property in the *Administration of Estates Act* is vague. A contingent interest is an uncertain interest. It does not take effect until a certain condition has been met.¹⁴ The inadequate definition of "property" in the *Administration of Estates Act* is problematic for (at least) two reasons, namely:

a. The inclusion of "any" contingent interest in the definition of property in the *Administration of Estates Act* is the exact reason why some estate practitioners include retirement annuity as an asset in their final liquidation and distribution account. Even though retirement annuity falls within the ambit of the *Pension Funds Act*,¹⁵ it can be debated that the retirement annuity is a contingent interest; therefore, according to the definition provided in the *Administration of Estates Act*, retirement annuity falls within the estate. Furthermore, there is often confusion whether life policies form part

¹¹ Eight Schedule, Section 1.

¹² Section 1 of the *TDA*.

¹³ SARS Transfer Duty 2017 <https://www.sars.gov.za/TaxTypes/TransferDuty/Pages/default.aspx>.

¹⁴ SRD Law Notes year unknown <https://www.srdlawnotes.com/2016/05/contingent-interest.html?m=1>.

¹⁵ Section 37C of the *Pension Funds Act* 24 of 1956.

of a deceased estate.¹⁶ The proceeds of a life policy will not form part of the estate if there is a nominated beneficiary.¹⁷ It will, however, form part of the deemed property in the estate duty return.¹⁸ On the other hand, if no beneficiaries were nominated, the proceeds of the policy will form part of the estate and will trigger executor fees and possible estate duty.¹⁹ Domestic policies²⁰ registered under an ante-nuptial contract for the benefit of the spouse do not form part of the estate.²¹ But yet, in practice, these policies are included in the inventory and final liquidation and distribution accounts, inflating executor fees,²² and creating possible estate duty. RSA Retail Savings Bonds are investments with the Government, earning interest at a fixed rate. In the past, the National Treasury allowed investors to nominate beneficiaries on these retail bonds; however, when it was found that their directive was in conflict with the *Administration of Estates Act*, they amended their stance.²³ Gordon²⁴ reported that in future the savings bond would be paid directly to the estate. The consequence of nominating beneficiaries was that the investments were not included in the estate before October 2018, resulting in a loss of executor fees and in some cases estate duty and capital gains tax.

- b. In 1965, when the *Administration of Estates Act* was promulgated, property was not as intricate as it is today. A simple example will be the computer. The first personal computer was introduced in 1975, a decade after the commencement of the afore-

¹⁶ IOL 2017 <https://www.iol.co.za/personal-finance/fees-and-taxes-on-life-policy-payouts-9010383>.

¹⁷ Fourie 2019 <https://www.psg.co.za/news/wealth/wealth-perspective/2019/q4/estate-matters>.

¹⁸ See s 3(3)(a) of the *EDA*; Also see Meyerowitz, *Administration of Estates and Their Taxation* 27.29.

¹⁹ Fourie 2019 <https://www.psg.co.za/news/wealth/wealth-perspective/2019/q4/estate-matters>.

²⁰ Meyerowitz *Administration of Estates and Their Taxation* 27.30 defines domestic policy as a life policy issued anywhere upon an application made or presented to a representative of the insurer concerned.

²¹ See s 3(3)(a)(i) of the *EDA*; also see Meyerowitz *Administration of Estates and Their Taxation* 27.36; Graham 2017 <https://www.iol.co.za/personal-finance/fees-and-taxes-on-life-policy-payouts-9010383>.

²² Section 51(1) of the *Administration of Estates Act* refers to every executor being entitled to remuneration as prescribed in the will or a remuneration shall be assessed according to the prescribed tariff. The Master of the High Court may, in terms of s 51(3)(a), increase or reduce the remuneration, provided that there is a special reason for doing so.

²³ The National Treasury was in conflict with s 11 of the *Administration of Estates Act*; Also see IOL 2018 <https://www.iol.co.za/personal-finance/savings-bonds-will-no-longer-bypass-your-estate-16653549>. For more information on the RSA Retail Savings Bonds see RSA Retail Savings Bonds 2021 <http://www.rsaretailbonds.gov.za>.

²⁴ IOL 2018 <https://www.iol.co.za/personal-finance/savings-bonds-will-no-longer-bypass-your-estate-16653549>.

mentioned Act. Currently, computers form part of the assets/property in an estate. As modern life develops, property becomes more complex.

It is unclear as to why the legislature would insert a definition that is so vague, especially when it comes to deceased estates. The *Administration of Estates Act* defines “immovable property” separately and consequently it will not form part of this thesis.

1.2 Motivation

Not only does the *Administration of Estates Act* define “property” vaguely, but the *Administration of Estates Act* does not define movable property at all. Any property that falls within the final liquidation and distribution account will possibly attract tax (i.e. estate duty, income tax and CGT) Therefore, legal certainty regarding the scope and nature of “property” (specifically movable property), is accordingly necessary for purposes of the administration of deceased estates. The primary aim of the study is thus to address the following research question, namely, “Is the current omission of a definition of “movable property” in the *Administration of Estates Act* problematic and, if so (and with reference to related legislation), how can this situation be addressed?”

In order to address this research question, the definition of “property” will be re-evaluated. This study will, however, not focus on property as an estate planning tool; it will focus on the different definitions of property and what should be included as property, and more specifically “movable property” in a deceased estate.

1.3 Research question

Taking into account that income tax, capital gains tax and estate duty are levied on a deceased estate based on the property declared in the final liquidation and distribution account, is the current omission of a definition of “movable property” in the *Administration of Estates Act* problematic and, if so (and with reference to related legislation), how can this situation be addressed?

1.4 Objective of the study

The primary aim of the study is to address the above-mentioned research question. In order to do so, the following objectives are identified, namely to:

- give a basic overview of the concept of “property” by the classification and characteristics of a thing.
- examine the different theories of what constitutes property and the different approaches to the property concept.
- discuss the right in or to property and other like interest.
- provide an outline of the allocation of property in a deceased estate with reference to the appearance of the word “property” in the *Administration of Estates Act*.
- refer to the definitions of “property” and more specifically the inclusion of “movable property” in related legislation.
- make recommendations regarding the inclusion of “movable property” in the definition of “property” for purposes of the *Administration of Estates Act*.

1.5 Research method

The study is characterised by a literature study of *inter alia* relevant legislation, case law, memoranda and guidelines issued by the South African Revenue Services (hereafter SARS), articles, books and electronic resources. The different pieces of legislation applicable to deceased estates and property will be examined to obtain a better understanding of the undated and undescriptive definition of property in the *Administration of Estates Act*.

1.6 Framework of the study

The concept of “property” is very complex, as it indicates many things.²⁵ A deceased estate consists of property owned by the deceased at date of death. Movable property

²⁵ Roman jurists divided private law into three groups, namely the laws relating to persons, things, and

can be tangible or intangible; movable property does not automatically mean tangible assets. As mentioned above, the *Administration of Estates Act* defines “immovable property”²⁶ separately and will accordingly not form part of this study. The purpose of chapter 2 is to explore the concept “property” by providing a brief outline of the different theories, characteristics and classification of property. This outline is necessary in order to have a better understanding of the definition of “property” as it currently appears in section 1 of the *Administration of Estates Act*, namely “any contingent interest”.

It is imperative that assets are allocated correctly, as it can create detrimental consequences for the estate. As previously mentioned,²⁷ the administration process is regulated by the *Administration of Estates Act* and the Master of the High Court oversees the entire process. Accordingly, the allocation of “property” in deceased estates are dealt with in chapter 3 of this study with reference to the various references to “property” in the *Administration of Estates Act*.

As indicated above, the administration of a deceased estate can become challenging since the *Administration of Estates Act* does not contain a proper definition of “property”, and even more so when taking into consideration the different definitions of the term “property” in the various other pieces of legislation. The definition of “property” as defined in other applicable legislation relevant to deceased estates will accordingly be discussed and outlined in chapter 4 of this study.

Concluding remarks and recommendations relating to the research question will be provided in chapter 5 of this study.

action. It is evident from this division that anything that was recognized by private law, other than individuals and acts, was recognised as “res” or “things”. Accordingly, not only physical but intangible objects, including rights, have been regarded as a 'thing' in the legal sense. Badenhorst *et al Silberberg and Schoeman's The Law of Property* 18.

²⁶ Section 1 of the *Administration of Estates Act* defines “immovable property” as land and every real right in land or minerals. Furthermore, these rights are registrable in any office in the Republic.

²⁷ See section 1.1 of this study.

2 The concept of “property”

2.1 Introduction

Upon the death of an individual, a deceased estate comes into existence. A deceased estate consists of all the assets and liabilities the deceased held at date of death. These assets and liabilities must be distributed in terms of the law of succession.²⁸

The law of succession operates in the private sphere. It comprises formal rules describing the distribution process in a deceased estate.²⁹ The succession rules identify the beneficiaries and the extent of inheritance.³⁰ It also determines the beneficiaries’ rights and duties with reference to inheritance. Furthermore, succession may take place in terms of a valid will or in terms of the law of intestate³¹ succession.

There are various pieces of legislation³² that are applicable when dealing with the administration of deceased estates. Even though a few of these acts will be mentioned in the thesis, the main focus will be on the *Administration of Estates Act*. The *Administration of Estates Act* prescribes the procedure which must be followed to administer a deceased estate.³³ As previously mentioned,³⁴ section 1 of the *Administration of Estates Act* defines “property” as “any contingent interest in property.”

²⁸ The law of succession includes *inter alia* the rules describing the administration process of a deceased estate. Also see Jamneck *et al The Law of Succession in Southern Africa* 1.

²⁹ Jamneck *et al The Law of Succession in Southern Africa* 1.

³⁰ Jamneck *et al The Law of Succession in Southern Africa* 1.

³¹ Intestate succession applies where a person died without a will, or where a will does not comply with the formalities set out in the *Wills Act* 7 of 1953, or where the testator did not deal with all the assets in his/her will. Intestate succession will also apply if the residue does not make provision for such an asset, lastly where a will becomes partly inoperative for some or other reason; also see Jamneck *et al The Law of Succession in Southern Africa* chapter 2.

³² Including the *Administration of Estates Act*, *Children’s Act* 38 of 2005, *Children’s Status Act* 82 of 1987, *Civil Union Act* 17 of 2006; *Constitution of the Republic of South Africa*, 1996; *Immovable Property Act* 94 of 1965, *Intestate Succession Act* 81 of 1987 (hereafter the *Intestate Succession Act*); *Maintenance of Surviving Spouses Act* 27 of 1990; *Marriage Act* 25 of 1961; *Recognition of Customary Marriages Act* 120 of 1998; *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009; *Trust Property Control Act* 57 of 1988 and the *Wills Act* 7 of 1953.

³³ DOJ&CD 2021 *Deceased Estates* <https://www.justice.gov.za/master/deceased>.

³⁴ See section 1.1 of this study.

The term “property” is more nuanced than one might think, as it refers to many things, and furthermore, every person has a different view on what it means.³⁵

The purpose of this chapter is to explore the concept “property” by providing a brief outline of the different theories, characteristics and classification of property. This outline is necessary in order to have a better understanding of the definition of “property” as it currently appears in section 1 of the *Administration of Estates Act*, namely “any contingent interest”.

2.2 Different theories of what constitutes “property”

In an attempt to explore the definition of property, one needs to understand where the concept “property” originated from. There are various interpretations and approaches of the concept from different perspectives. For one, most philosophers integrated “property” into their dogmatic³⁶ framework, resulting in an invariable ideological tainted concept of property.³⁷ Furthermore, it might be difficult to develop an accurate and exhaustive definition of “property” due to the emotional overtone of the word.³⁸ In other words, the term property often depends on the context in which it is used.³⁹

2.2.1 Normative theories of justification of property

2.2.1.1 Occupation theory

The occupation theory is one of the earliest justifications for private property.⁴⁰ Grotius⁴¹ and Pufendorf⁴² were of the opinion that natural resources were given to mankind in

³⁵ Erlank *Property in Virtual Worlds* 212.

³⁶ In other words, referring to “a person or a group who strongly express their beliefs as if it were facts”. Also see Cambridge <https://dictionary.cambridge.org/dictionary/english/dogmatic>.

³⁷ Badenhorst *et al Silberberg and Schoeman’s The Law of Property* 2.

³⁸ Badenhorst *et al Silberberg and Schoeman’s The Law of Property* 2.

³⁹ Badenhorst *et al Silberberg and Schoeman’s The Law of Property* 2.

⁴⁰ Panesar *Theories of Private Property in the Modern Property Law* 113.

⁴¹ Panesar *Theories of Private Property in the Modern Property Law* 113; Also see Grotius *De Jure Belli ac Pacis* Book 2 chapters 1, 2 and 4-5.

⁴² Panesar *Theories of Private Property in the Modern Property Law* 115; Also see Bohling *De jure naturae et gentium*; Kennett *Of the Law of Nature and Nations* chapter 8.

general.⁴³ Blackstone⁴⁴ supported their view and wrote that the earth and all things therein are the common property of mankind, excluding other beings. He also pointed out that everyone took from the public stock as and when necessary.⁴⁵

These philosophers⁴⁶ classified things according to man and nature.⁴⁷ They believed that individuals would claim material things from Mother Nature as and when required, therefore creating a system of peace and order.⁴⁸ Material things became private property by way of an agreement with the rest of mankind.⁴⁹

In this theory, the division of private property took place by reference to agreement. It is submitted that the basic principle of this theory is that the first *occupatio* gave rise to private property.⁵⁰

Despite the obvious simplicity of the theory, the question of who took the first *occupatio* when applied to factual circumstances was much more complex.⁵¹ In *R v Mafohla and Another*⁵² claims were based on the wounding of a kudu. However, it was obvious from the facts⁵³ that the mere wounding of the kudu did not bestow ownership of the kudu to the accused.⁵⁴ The kudu had never lost the character of an animal, as far as the accused were concerned.

⁴³ Panesar *Theories of Private Property in the Modern Property Law* 115.

⁴⁴ Lurye *The Evolution and Philosophy of Property* 113; Blackstone *Commentaries on the Laws of England* Vol II para 1.

⁴⁵ Panesar *Theories of Private Property in the Modern Property Law* 113.

⁴⁶ Grotius, Pafendorf and Blackstone.

⁴⁷ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 31.

⁴⁸ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 31.

⁴⁹ Panesar *Theories of Private Property in the Modern Property Law* 113.

⁵⁰ Panesar *Theories of Private Property in the Modern Property Law* 113.

⁵¹ The decision in *Pierson v Post* 3 Caines. R. 175 (Ny. Sup. Ct. 1805) (an American legal case) is quite important and seek to lay down general rules as to when first occupation took place. In *Pierson v Post*, it was held that the mere discovery and pursuit of a wild animal does not give possession to a person. Even if an animal has been identified, it does not offer right to ownership. The animal must have been caught or killed for possession.

⁵² [1958] 2 All SA 262 (SR) (hereafter the *Mafhola* case).

⁵³ A hunter wounded a kudu, but the kudu was taken by others. The accused were charged with the theft of the carcass of a kudu.

⁵⁴ *Mafhola* case 264.

The judge further held that the case posed an issue which was the subject of dispute⁵⁵ among Roman lawyers but which was resolved, as far as Roman law was concerned.⁵⁶

It seems, therefore, that the rule was, if a wild animal had been reduced to possession, it would not recover its natural liberty upon escape until it had passed from sight or, while still in sight, its pursuit had become difficult.⁵⁷ The wild animal becomes the property of a man only when he actually captures it.

Therefore, the first *occupatio* is where there is physical control. One cannot own a thing if physical control has not taken place. The element of physical control refers to the physical or actual control exerted over the object. The degree of actual contact required for physical control to be established is usually greater in the case of movables, such as in this case the kudu.

In summary, original acquisition is normally achieved by *occupatio*.⁵⁸ One of the reasons why the theory is essential is the fact that the theory offers the most basic justification for private property.

Property *occupatio* also plays an important role in deceased estates. A simple example would be where Mr Poggenpoel bought a new vehicle and gave it to his daughter as a graduation gift. The vehicle is registered in the name of Mr Poggenpoel; however, it is considered by the daughter as her vehicle. Even though the daughter is driving the vehicle, her father took physical control over the vehicle by registering it in his name. Should Mr Poggenpoel pass away without a will,⁵⁹ the vehicle will be a movable asset in his estate, irrespective of whether it was a graduation gift.

⁵⁵ Namely the control element. In other words, physical control is crucial for *occupatio*.

⁵⁶ *Mafohla* case 264.

⁵⁷ *Mafohla* case 264.

⁵⁸ Occupation of property; also see Erlank *Property in Virtual Worlds* 358.

⁵⁹ Or in the event where Mr Poggenpoel neglected to mention in his will that the vehicle is bequeathed to his daughter. If the vehicle was not mentioned in the will at all, it will form part of the residue of the estate and will be distributed in terms of the *Intestate Succession Act*.

2.2.1.2 Labour theory

A second perspective that could apply to a deceased estate is the labour theory.⁶⁰ What might seem clear to a lay person is a point of contention for endless debate within academia. In the 17th and 18th centuries, legal and political philosophers argued that the right of individuals to possess and dispose of private property was a fundamental right of the individual. For example, in his *Two treatises of government*, Locke⁶¹ argued that private property rights existed before the state and independently of state laws.⁶²

Property rights were the natural rights of persons and were therefore not permitted to be controlled by the principles of natural justice, government interference or reorganisation of those rights without the consent of the individual.⁶³ The traditional line of reasoning behind natural law is that there are certain rights that originate from the law of God,⁶⁴ nature or reason. There are some moral concepts that depend on the nature of the universe and that are discovered by reason. These values, such as the right to life, liberty and the pursuit of happiness, shape natural rights and are protected by natural law.⁶⁵

Although it is commonly recognised that natural law is derived from nature itself and discovered by reason, there have been different lines of thought as to what is meant precisely by nature and reason.⁶⁶ If for good cause such laws are found, whose reasoning then prevails? The question, by its very nature, is subjective and therefore open to a variety of different answers.

Locke argued that one of the fundamental rights of a person was the right to private property and this right was thereby protected by natural law.⁶⁷ The right was natural, not

⁶⁰ An example would be the legal position of a deceased musical composer's interest in his compositions after date of death.

⁶¹ John Locke, more often than not in relation to his so-called labour theory or labour claim for property, was a well-known philosopher in legal circles. As a philosopher, his work is ubiquitous in the politics of the United States of America (USA); also see Erlank *Property in Virtual Worlds* 144.

⁶² Panesar *Theories of Private Property in the Modern Property Law* 122; also see Laslett *Two Treatises of Government* 287-288; Macpherson *Property: Mainstream and Critical Positions* 17.

⁶³ Panesar *Theories of Private Property in the Modern Property Law* 122.

⁶⁴ Panesar *Theories of Private Property in the Modern Property Law* 122.

⁶⁵ Tiffany *Treatise on Government, and Constitutional Law* 16.

⁶⁶ Panesar *Theories of Private Property in the Modern Property Law* 123.

⁶⁷ Panesar *Theories of Private Property in the Modern Property Law* 123.

in the sense that every person was born with the right to property, but rather in the sense that the right was obtained by conduct that is natural to man.⁶⁸

Locke's treatment of property is widely considered to be one of his most significant contributions to political thought, but it is also one of the areas of his ideology that has been most harshly condemned.⁶⁹ Locke's main passage, where he describes his basic argument for property, is as follows:

Though the Earth, and all inferior Creatures, be common to all Men, yet every Man has a *Property* in his own *Person*: this no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joined to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.⁷⁰

The above passage is commonly used as the basis for criticism by law critics. The part where he says "he hath mixed his *Labour* with, and joined to it something that is his own, and thereby makes it his *Property*" seems to attract the most criticism.

Locke's reference to the mixing of labour as a mechanism of creating or obtaining property is something that continues to be a source of frustration to modern critics.⁷¹ A brief summary of the comments made by critics, as discussed by Mossoff,⁷² will be adequate to illustrate this position.

Olivecrona⁷³ claimed that Locke's theory may not have meant that the labour of killing a deer or taking an acorn from the ground is respectively mixed with the deer or the acorn.

⁶⁸ Panesar *Theories of Private Property in the Modern Property Law* 123.

⁶⁹ Erlank *Property in Virtual Worlds* 212.

⁷⁰ Laslett *Two Treatises of Government* 287-288; also see Erlank *Property in Virtual Worlds* 145.

⁷¹ Mossoff 2002 *The University of Chicago Law School Roundtable* 156; also see Erlank *Property in Virtual Worlds* 145.

⁷² Mossoff 2002 *The University of Chicago Law School Roundtable* 156-158; also see Erlank *Property in Virtual Worlds* 146.

⁷³ Olivecrona 1974 *The Philosophical Quarterly* 220, 226.

He, Locke, could only have meant that how something of the spiritual ego was infused into the object was the action of killing the deer or selecting the acorn.⁷⁴

According to Mavrodes,⁷⁵ there is no point in the labour-based arguments for property. He further stated that there is no "metaphysical criterion" for a labour-based theory of property.⁷⁶ Mavrodes believes that labour theories of property leave unanswered fundamental questions about how "labour mixing" actually works in the creation of property rights.⁷⁷

Nozick⁷⁸ mocked Locke's theory by comparing it with a can of tomato juice.⁷⁹ Nozick wasn't the only philosopher that mocked Locke's theory. Waldron⁸⁰ compared the theory with a sandwich dropped into a block of cement. Waldron then raised the question whether he could claim the concrete block to protect his entitlement to the sandwich.⁸¹ He went further and answered his own question by stating that it would surely be regarded "... as some sort of joke".⁸²

The above analyses of the philosophy professors leave no doubt as to their view of Locke's labour theory.⁸³ Locke's claim that property arises from mixing one's pre-owned labour with unowned things is not only a mockery but "absurd" (Olivecrona), "meaningless" (Mavrodes), "unworkable" (Nozick), "incoherent" (Waldron), and a "joke" (Waldron).⁸⁴

⁷⁴ Mossoff 2002 *The University of Chicago Law School Roundtable* 156.

⁷⁵ George Mavrodes is a philosopher of religion and social philosophy; also see Mossoff 2002 *The University of Chicago Law School Roundtable* 155-164.

⁷⁶ Mossoff 2002 *The University of Chicago Law School Roundtable* 157.

⁷⁷ Mossoff 2002 *The University of Chicago Law School Roundtable* 157.

⁷⁸ Mossoff 2002 *The University of Chicago Law School Roundtable* 157.

⁷⁹ Nozick *Anarchy, State and Utopia* 174-75 states that: "Why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?"

⁸⁰ Jeremy Waldron, a legal scholar and philosopher writing from largely the opposite side of the political spectrum as Nozick; Mossoff 2002 *The University of Chicago Law School Roundtable* 158.

⁸¹ Mossoff 2002 *The University of Chicago Law School Roundtable* 158.

⁸² Mossoff 2002 *The University of Chicago Law School Roundtable* 158; also see Erlank *Property in Virtual Worlds* 147.

⁸³ Mossoff 2002 *The University of Chicago Law School Roundtable* 158.

⁸⁴ Mossoff 2002 *The University of Chicago Law School Roundtable* 158.

Mossoff⁸⁵ presented a compelling counter-argument to these influential contemporary scholars' negative critiques raised against Locke.⁸⁶ He believed that the problematic issues raised by these scholars stem from their education in the linguistic analysis methodology of the twentieth century and that, as a consequence, this approach results in the use of literal analysis of individual terms without referring to "the larger historical and intellectual sense in which such words can be used".⁸⁷

Mossoff⁸⁸ further argued that the scholars first adopted the literal definition of "labour" and then analysed the incoherence of mixing labour with unknown objects to create property. By using this approach they were violating the concept of charity.⁸⁹ It is anachronistic to dismiss the ideas of a past philosopher as "absurd" and as a "joke" without understanding or respecting the underlying principles of the work.

If one acknowledges that Locke saw labour as a logical and purposeful value-creating operation,⁹⁰ it becomes apparent that Locke's labour argument for property is within the confines of the metaphysical sense of his theory of natural law and should not be interpreted in isolation.⁹¹ Mossoff⁹² argued that the importance of this observation is that it indicated that the mixture of labour was (according to Locke) a moral activity that leads to the creation of a moral right to property. Furthermore, that labour generated value as it related to the productive activities that man carries out in order to survive and succeed.⁹³

⁸⁵ Mossoff 2002 *The University of Chicago Law School Roundtable* 159.

⁸⁶ Mossoff 2002 *The University of Chicago Law School Roundtable* 159.

⁸⁷ Mossoff 2002 *The University of Chicago Law School Roundtable* 159.

⁸⁸ Erlank *Property in Virtual Worlds* 148.

⁸⁹ In other words, when other philosophers interpret a fellow philosopher's works, the theory of charity restricts the interpreter to maximize the truth or rationality in the subject's statements; Blackburn *The Oxford Dictionary of Philosophy* 59. As such, for the sake of nit-picking, they should not mischaracterize the essence of their opponents' claims; Also see Erlank *Property in Virtual Worlds* 148.

⁹⁰ Buckle *Natural Law and the Theory of Property: Grotius to Hume* 151; also see Erlank *Property in Virtual Worlds* 149.

⁹¹ Mossoff 2002 *The University of Chicago Law School Roundtable* 162; also see Erlank *Property in Virtual Worlds* 149.

⁹² Mossoff 2002 *The University of Chicago Law School Roundtable* 162; also see Erlank *Property in Virtual Worlds* 149.

⁹³ Mossoff 2002 *The University of Chicago Law School Roundtable* 162; also see Erlank *Property in Virtual Worlds* 149.

Mossoff⁹⁴ concluded that "it is hardly absurd or confusing when Locke's labour argument is seen within its proper philosophical context". In order to confute the criticism of the scholars referred to above, Mossoff⁹⁵ argued that:

[w]hen contemporary philosophers apply a linguistic methodology that ignores Locke's broader natural law philosophy, that adopts a literal ahistorical meaning of "labor," and then reduces the "mixing labor" metaphor to absurdity, they have not done Locke justice – nor the myriad legal doctrines defined and promulgated under this conception of property.

Locke's natural law premises and his view of production as a fundamentally moral act may be criticised and these ideas may be considered to be unsatisfactory, incomplete or even inconsistent, but such conclusions should not be drawn on the basis of analyses that mischaracterise the nature of Locke's moral claim that "mixing labour" produces property.

In fact, Locke referred to his contemporary and future detractors exactly on this point. He stated that:

If anyone, concerned really for Truth, undertake the Confutation of my *Hypothesis*, I promise him either to recant my mistake, upon fair Conviction; or to answer his Difficulties. But he must remember two Things; *First*, that Cavilling here and there, at some Expression, or little incident of my Discourse, is not the answer to my Book. *Secondly*, that I shall not take railing for Arguments, nor think either of these worth my notice: Though I shall always look on myself as bound to give satisfaction to any who shall appear to be conscientiously scrupulous in the point, and shall shew any just Grounds for his Scruples.⁹⁶

It is clear from the above that instead of concentrating on denotation or interpreting terms in isolation, one should look at the wider sense of what Locke wanted to say. At the end of the day, the concepts arising from labour theory continue to be articulated in the fields of intellectual property rights and unfair competition law and policy. Through their labour and intelligence, individuals who build, produce, or invent things strive to make these things theirs through their acts of labour. It has been stated that intellectual

⁹⁴ Mossoff 2002 *The University of Chicago Law School Roundtable* 164; also see Erlank *Property in Virtual Worlds* 150.

⁹⁵ Mossoff 2002 *The University of Chicago Law School Roundtable* 164.

⁹⁶ Laslett *Two Treatises of Government* 138-139; also see Erlank *Property in Virtual Worlds* 150.

property law is a branch of law that protects some of the finest manifestations of human achievement.⁹⁷

From a deceased estate perspective, a deceased person's labour and hard work does not always form part of the estate. Let us for instance take a music composer. His hard work and labour are protected by the *Copyright Act* 98 of 1978.⁹⁸ In the event where a surviving spouse is assigned the interest, the children of the late composer may not be entitled to copyright on the composition, even if the assignment agreement had been entered into before the first 25 years had elapsed.⁹⁹

As stated above, the concept of "property" should not be interpreted in isolation, but one should look at the wider sense thereof. However, before one can look at the wider sense of property, one need to understand the characteristics and classification of property.

2.3 The legal concept of "property"

The concept of "property" has different meanings in the legal system. It all depends on the context in which it is used.¹⁰⁰ For instance, in practice, a lay perspective on the concept of "property" would be a house, whereas for a deceased estate administrator the concept of "property" would be all the assets the deceased held at date of death.

To further complicate matters, one finds that even in a specific field of expertise there is no real consensus about the concept of "property".¹⁰¹ As such the interpretation and meaning of "property" fluctuates from a public, private or constitutional law approach.¹⁰²

⁹⁷ Erlank *Property in Virtual Worlds* 230.

⁹⁸ Hereinafter the *Copyright Act*.

⁹⁹ Sonnekus 2005 *SALJ* 465.

¹⁰⁰ Erlank *Property in Virtual Worlds* 230.

¹⁰¹ Erlank *Property in Virtual Worlds* 230.

¹⁰² Erlank *Property in Virtual Worlds* 213.

This can be seen from the various descriptive definitions assigned to "property", as well as from the various interpretations of the concept of "property" as either broad or narrow.¹⁰³

In private law the concept of "property" has two different meanings, namely the right¹⁰⁴ in a legal object and the object¹⁰⁵ to which that right relates.¹⁰⁶

Furthermore, the development of constitutional property law, in accordance with the incorporation of clauses protecting and regulating property as a fundamental right, both the *Interim Constitution of the Republic of South Africa* 200 of 1993¹⁰⁷ and the *Constitution of the Republic of South Africa*, 1996¹⁰⁸ have brought a new meaning to the concept of "property" in private law. However, before one can move on to the *Constitution*, one needs to understand the history and where the word "property" originated in the ancient times. The author will briefly discuss the Anglo-American and Roman-Germanic systems before moving on to the *Constitution*.

In the Anglo-American and Roman-Germanic legal systems, the word "property" has different definitions and often has different meanings in the latter, depending on whether the term is used in the sense of private or public law and whether it applies to rights or objects in private law.¹⁰⁹

¹⁰³ As previously mentioned, the *Administration of Estates Act* defines "property" as any contingent interest. Whereas the *Insolvency Act* 24 of 1936 (herein after *Insolvency Act*) defines property as movable or immovable property irrespective where it is situated within the Republic. The definition also includes contingent interest in property. However, the *Insolvency Act* also define "movable property" as every kind of property, including rights or interest which is not immovable property.

¹⁰⁴ Real rights, immaterial property rights, personal rights, real rights to other patrimonial objects, statutory personal rights created in contracts; and statutory rights against the state to certain resources or performances are all included in property rights; also see Badenhorst *et al Silberberg and Schoeman's The Law of Property* 13.

¹⁰⁵ "Property" can also be the source of property rights in various ways. Objects of property rights can be identified as: property, immaterial property, performance and patrimonial rights (real rights, personal rights and immaterial property rights) serving as objects of limited real rights.

¹⁰⁶ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 13.

¹⁰⁷ Hereinafter the *Interim Constitution*.

¹⁰⁸ Hereinafter the *Constitution*.

¹⁰⁹ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 1; also see Erlank *Property in Virtual Worlds* 213.

In Anglo-American systems, the term "property" refers to a broader range of assets than in Roman-Germanic legal systems.¹¹⁰ These assets may constitute an individual's patrimony and serve as the objects of the rights exercised in relation to those assets by an individual. Furthermore, it refers to assets being protected constitutionally.¹¹¹ Under Roman-German and South African law, these assets usually relate to tangible objects,¹¹² and in some instances, intangible assets¹¹³ are also included in this concept of "property". In Anglo American law, the emphasis is more on property rights than on the objects.¹¹⁴

A significant element of the distinction between the concept of property in private law and constitutional law is derived from the diverse reasons for recognition given to each of them.¹¹⁵ The recognition of property in private law varies from the recognition thereof in constitutional law, due to the fact that the object of private law recognition is to enforce security against other private actors, while the purpose of constitutional law is to enforce protection against interventions by the state.¹¹⁶

As stated above, the interpretation of the concept of "property" differs from a public, private or constitutional law approach.¹¹⁷ It is also clear from the above that the Anglo-American system has a wider approach to the meaning of "property", whereas the Roman-Germanic legal system has a much narrower approach. First the author will discuss the Anglo-American tradition of property, followed by a discussion of the Roman-Germanic tradition of property.

¹¹⁰ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 1.

¹¹¹ See generally Mincke "Objects of Property Rights" 652-653; also see Erlank *Property in Virtual Worlds* 214.

¹¹² See paragraph 2.4 of this study.

¹¹³ Examples of intangible assets are intellectual property.

¹¹⁴ Van der Walt *Constitutional Property Law* 2011 114-115; Also see Erlank *Property in Virtual Worlds* 215.

¹¹⁵ Erlank *Property in Virtual Worlds* 215.

¹¹⁶ Van der Merwe and De Waal *The Law of Things and Servitudes* 25; Also see Erlank *Property in Virtual Worlds* 215.

¹¹⁷ Erlank *Property in Virtual Worlds* 230.

2.3.1.1 Anglo-American private law

In Anglo-American private law, "property" is defined as a bundle of rights or expectations that are imposed on third parties.¹¹⁸ These rights include the right to use and possess. It does, however, not include the alienation of a thing.¹¹⁹

One of the critical features of "property" in the Anglo-American common law tradition is that "property" is always specified broadly.¹²⁰ In other words, there is no difference between private law and civil law. The concept "property" is used to refer to the rights¹²¹ with regard to property and the object of property is being ignored.¹²²

However, American and Commonwealth constitutional law recognises a broad range of objects that are deemed to be "property". Amongst other things, it includes intellectual property interest, personal and creditor's rights and other commercial interests.¹²³

2.3.1.2 Roman-Germanic tradition

As stated above the concept "property" in private law has two different meanings, namely the right¹²⁴ in a legal object and the object¹²⁵ to which that right relates. Legal objects are "things" of value in which legal subjects may gain rights. In other words, where a legal

¹¹⁸ Nelson *et al Contemporary Property* 5.

¹¹⁹ Nelson *et al Contemporary Property* 5; Also see Erlank *Property in Virtual Worlds* 215.

¹²⁰ Erlank *Property in Virtual Worlds* 215; Also see Nelson *et al Contemporary Property* 5.

¹²¹ An example would be personal and creditor's rights. However, it does not only include rights but interests as well. Examples of the interests would be intellectual property interests or other commercial interests (for example a claim to a bank account or the right to access an island). Then there is the "new property" which include participatory claims against state welfare and social benefits; also see Van der Walt *Constitutional Property Law* 83 and fns 81-82; Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 7, 324-325; Currie and De Waal *The Bill of Rights Handbook* 539; Erlank *Property in Virtual Worlds* 216.

¹²² Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 324; also see Erlank *Property in Virtual Worlds* 216.

¹²³ See Van der Merwe and De Waal *The Law of Things and Servitudes* 25; Van der Walt *Constitutional Property Law* (2005) 83; Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 7, 324-325; Currie and De Waal *The Bill of Rights Handbook* 539; and Beker *Defining virtual property in terms of the constitutional property clause* 14; also see Erlank *Virtual World of Property* 216.

¹²⁴ Real rights, immaterial property rights, personal rights, real rights to other patrimonial objects, statutory personal rights created in contracts; and statutory rights against the state to certain resources or performances are all included in property rights; also see Badenhorst *et al Silberberg and Schoeman's The Law of Property*.

¹²⁵ "Property" can also be the source of property rights in various ways. Objects of property rights can be identified as: property, immaterial property, performance and patrimonial rights (real rights, personal rights and immaterial property rights) serving as objects of limited real rights.

subject is entitled to something (for instance, a property), there is, to the degree of the entitlement, a legally secured relationship between the subject and the object.¹²⁶

Furthermore, rights are classified in terms of the objects to which they relate. Consequently, the type of subjective¹²⁷ right that an individual has in a particular instance depends on the subject matter of that right.¹²⁸

Moving forward, “property” in the sense of “rights” is generally seen as either ownership or a real right,¹²⁹ but may also be interpreted in a broad sense to include patrimonial rights.¹³⁰

It is important to note that although real rights have a “thing” as their object, not all rights relating to “things” are real rights. For instance, ownership is a real right to one’s own property, whereas a limited real right is a right with regard to property that belongs to someone else.¹³¹

In civil law the emphasis on property is generally on the objects of property rather than on the rights themselves. This is demonstrated by the fact that the distinction between

¹²⁶ A simple example would be where a son inherited property subject to a lifelong usufruct in favour of the mother. In other words, the mother is the subject that obtained a *usufruct right*, where the property is the object.

¹²⁷ A subjective right may be described as a dual relationship. It is, on the one hand, a legal claim based on a legal object by which the subject-matter acquires special powers with regard to the subject-matter and, on the other hand, it is a relationship between the subject-matter and third parties by virtue of which the claims of the subject-matter are legally binding on third parties. See Ramage *Capacities and rights of the legal subject* 7. The different subject rights would be real right, personal right, intellectual property right and personality rights.

¹²⁸ Example of these rights would be real rights or personal rights. See Ramage *Capacities and rights of the legal subject* 9.

¹²⁹ Real right is a right with respect to a thing. Because of the essence of the ownership principle, the most detailed right is ownership of property. All other real rights are limited rights, in the sense that they are rights to others' things. An example of a real right in respect of a movable thing would be the transfer of a motor vehicle. In other words, the transfer of rights occurs upon delivery of the thing. The transferor transfer, the right to the transferee. See Ramage *Capacities and rights of the legal subject* 9.

¹³⁰ Patrimonial rights are rights that have objects with a monetary or material value that is determinable. Patrimonial rights, including real rights, personal rights and immaterial property rights, are well-known in private law. Statutory rights given by the legislature to a party to an agreement that are enforceable against the other party to the agreement can be applied to these rights. The vesting of a right is, in general, a prerequisite for the acquisition by the holder of a right. See Badenhorst *et al Silberberg and Schoeman's The Law of Property* 14.

¹³¹ Van der Walt *Introduction to the law of property* 258.

property in general and things is a very significant distinction with respect to the property concept in Roman-Germanic law.¹³²

In the Roman-Germanic law the concept "property" includes everything that has a monetary value or can be regarded as an asset in a person's estate.¹³³ This wide definition of property includes corporeal¹³⁴ and incorporeal¹³⁵ objects, as can be seen in *Cooper v Boyes NO and Another*,¹³⁶ which dealt with a usufruct over shares.¹³⁷

In South African law, the "law of property" is often closely aligned with the "law of things", although, "property" is generally given a much broader meaning than "things". The "law of property" is defined as referring to a wide range of assets that make up a person's estate or belongings and which serve as objects of the rights that such a person exercised in respect thereof,¹³⁸ whereas the "law of things" is described as simply denoting the object of a right, in the narrow sense of referring only to corporeal or material objects. The law relating to these concepts should have a corresponding meaning. There is also no adequate equation of the broader term "property law" with the area of private law known as "patrimonial law".¹³⁹

It is submitted that in the Roman-Germanic tradition, as well as in the South African private law, property law is often referred to as the "law of things". The narrow meaning revolves around the characteristic of corporeality and it is commonly stated that, due to doctrinal and systematic reasons, it is better to use the "law of things" to define the branches of property law, which deals with "rights in respect of corporeal things".¹⁴⁰

From a historical point of view, the focus areas and subjects dealt with in a conventional system of property law, such as South African property law, were limited to real or tangible items. Basically, it only dealt with things that could be purchased and sold on

¹³² Erlank *Property in Virtual Worlds* 218.

¹³³ Du Bois *et al Wille's Principles of South African Law* 409; Erlank *Property in Virtual Worlds* 218.

¹³⁴ See section 2.4 in this study.

¹³⁵ See section 2.4 in this study.

¹³⁶ 1994 4 SA 521 (C) (hereinafter the *Cooper* case).

¹³⁷ Erlank *Property in Virtual Worlds* 218. The *Cooper* case will be further discussed under a *usufruct* as a right – see section 2.6.1.2 of this study.

¹³⁸ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 3.

¹³⁹ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 3.

¹⁴⁰ Erlank *Property in Virtual Worlds* 219.

the market or that were within commerce. In South Africa, property law has been classified as corporeal, impersonal to nature, external to an individual, independent and useful.¹⁴¹ However, this approach has been criticised and it appears that the courts¹⁴² and some authors are working with a wider concept of property.¹⁴³

In certain situations, the objects of property rights may include other patrimonial objects like intellectual property and performances.¹⁴⁴ Patrimonial rights can also serve the role of patrimonial objects by being the objects of other rights. In this respect, the notion of incorporeal things is recognised by the common law.¹⁴⁵

A unique perspective was provided by Cloete¹⁴⁶ in his LLD dissertation where he demonstrated how the dominant notions of society can affect this limitation of corporeality.¹⁴⁷ He analysed the history as well as the incorrectness of the argument that only a “narrow thing” concept (that accepts only corporeal things) is acceptable in the South African private law.¹⁴⁸

Furthermore, Cloete¹⁴⁹ stated that in Roman law and Germanic customary law, physical, incorporeal objects as well as rights were regarded as things.¹⁵⁰ Prior to 1950 the South

¹⁴¹ Erlank *Property in Virtual Worlds* 219.

¹⁴² See for example: *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 1 SA 144 (CC). *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 SA 744 (CC) (hereinafter the *Certification of the Constitution*) par 75. In the *Certification of the Constitution* case the question was raised whether intellectual property rights should fall under the protection umbrella of the constitutional property clause. It was held by the Constitutional Court that it is not necessary seeing that the property clause is wide enough to include all property interests. Meaning that intellectual property rights could be protected under the protection umbrella. In *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape and Others* 2015 6 SA 125 (CC) par 128, it was held that when one assesses if a liquor license constitutes property and if the Constitution clamours for its protection as property, it is important to determine if the interest or permission in question is subject to arbitrary confiscation or material alteration.

¹⁴³ Kleyne *et al Silberberg & Schoeman: The Law of Property* 9; Badenhorst *et al Silberberg and Schoeman's The Law of Property* 17; and Erlank *Property in Virtual Worlds* 220.

¹⁴⁴ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 12; Van der Walt *Constitutional Property Law* 115. Also see Erlank *Property in Virtual Worlds* 220.

¹⁴⁵ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 17.

¹⁴⁶ Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* viii.

¹⁴⁷ Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* viii.

¹⁴⁸ Erlank *Property in Virtual Worlds* 221.

¹⁴⁹ Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* viii.

¹⁵⁰ Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* viii.

African law of property provided a broad interpretation of the concept of a “thing”. As a consequence, items were said to denote either corporeal or incorporeal objects.¹⁵¹

With the reception of the *Pandectist* theories in the South African law of things, the recognition of incorporeal things suffered a setback during the 1950s.¹⁵² It is submitted that the reception of the *Pandectist* theory could, in all probability, be accredited to authors such as Joubert¹⁵³ and Van der Merwe.¹⁵⁴ These authors preferred a narrow interpretation of “things” that only included corporeal things.¹⁵⁵ After the *Pandectist* theory, incorporeal things were merely considered as an exemption to the rule that things could only be corporeal.¹⁵⁶

Cloete,¹⁵⁷ however, did not share the same view. He stated that the narrow interpretation of things, was not generally accepted as correct. He further found that it is possible to accommodate incorporeal objects and rights, either within the current private law paradigm or within the broader constitutional paradigm. Cloete¹⁵⁸ went further and suggested that *ad hoc* legislation should be adopted in some cases to provide better protection and security for unique categories of objects or interest in property.

It is evident from Cloete’s¹⁵⁹ literature analysis that the dogmatic¹⁶⁰ view that incorporeal objects cannot be treated as “things”, is incorrect.¹⁶¹ The development of the broader concept of public law, viewed in conjunction with the current theoretical and practical

¹⁵¹ Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* viii.

¹⁵² Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* viii.

¹⁵³ Joubert *Grondslae van die persoonlikheidsreg*; Joubert ‘n *Realistiese benadering van die Subjektiewereg* 12-15, 98-115; Beker *Defining virtual property in terms of the constitutional property clause* 16.

¹⁵⁴ Van der Merwe *Sakereg* 18-19; Beker *Defining virtual property in terms of the constitutional property clause* 16.

¹⁵⁵ Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* viii.

¹⁵⁶ Erlank *Property in Virtual Worlds* 221.

¹⁵⁷ Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* viii.

¹⁵⁸ Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* viii.

¹⁵⁹ Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* viii.

¹⁶⁰ The definition of “dogmatic” is the strong expression of opinions as if they were facts; also see Your Dictionary <http://www.yourdictionary.com/dogmatic>.

¹⁶¹ Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* viii.

pressures for the adoption of a broader concept of private law, may be a catalyst to finally put an end to the narrow private law approach.¹⁶²

2.3.1.3 The *Constitution*

Constitutional Courts have developed a broader concept of constitutional property. However, the broader concept differs from the concept of private property law, where the object of property rights is traditionally limited to corporeal things.¹⁶³ A number of incorporeal objects and rights are included in the concept of constitutional property, and, in this respect; the concept of constitutional property in the Roman-German jurisdictions is similar to the historically broader concept of private property in the Anglo-American jurisdictions.¹⁶⁴

The range of objects of constitutional property is relatively wide regardless of whether “property”, “possession” or “ownership” are referred to in the constitutional property clause, namely Section 25 of the *Constitution*.

In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*,¹⁶⁵ an objection was raised that the *Constitution* did not provide for the protection of intellectual property or mineral rights. The Constitutional Court held that the property clause was wide enough to include property interests that needed to be protected in accordance with international standards.¹⁶⁶ However, the Constitutional Court has not yet given a ruling as to whether the use of the term “property” in section 25 is limited to corporeal property.¹⁶⁷

According to Van der Walt,¹⁶⁸ the above objection was rejected on the grounds that there was no universally recognised formulation of the constitutional guarantee of property. He

¹⁶² Erlank *Property in Virtual Worlds* 222.

¹⁶³ Erlank *Property in Virtual Worlds* 223.

¹⁶⁴ Van der Walt *Constitutional Property Law* 109; Currie and De Waal *The Bill of Rights Handbook* 538-539; also see Erlank *Property in Virtual Worlds* 225.

¹⁶⁵ 1996 SA 744 (CC) (hereinafter the *Certification case*).

¹⁶⁶ *Certification case* par 75.

¹⁶⁷ Van der Walt *Constitutional Property Law* 81,113.

¹⁶⁸ Van der Walt *Constitutional Property Law* 85.

further stated that failure to specify a specific class of property¹⁶⁹ was neither a fatal deficiency in the provision, nor an indication that such an object isn't property.¹⁷⁰

It follows that, in so far as the property clause does not contain specific references to any particular category of property interest, the inference should be that:

if property is protected in general, and no mention is made of any specific kind of property, it has to be inferred that any kind of property interest that is not excluded explicitly or by necessary implication, is included, probably as long as it is recognised as property by law.¹⁷¹

Van der Walt¹⁷² further pointed out that this was particularly the case when the relevant category of interests was recognised as property in private law.

In other words, in South African constitutional law, certain incorporeals will be treated as property. Constitutional property, in the light of foreign examples, would possibly also include other commercial property interest¹⁷³, intellectual property¹⁷⁴ and certain "rights in rights".¹⁷⁵

In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*¹⁷⁶ the Constitutional Court held that:

[t]hat ownership of a corporeal movable must – as must ownership of land – lie at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right and must therefore, in principle, enjoy the protection of Section 25.¹⁷⁷

¹⁶⁹ Such as mineral rights or intellectual property.

¹⁷⁰ Van der Walt *Constitutional Property Law* 86; also see *Erlank Property in Virtual Worlds* 227.

¹⁷¹ *Erlank Property in Virtual Worlds* 227; also see Van der Walt *Constitutional Property Law* 87.

¹⁷² Van der Walt *Constitutional Property Law* 85; also see *Erlank Property in Virtual Worlds* 227.

¹⁷³ For example, shares, servitudes with regards to water.

¹⁷⁴ Such as trademarks, patents, copy rights and trade secrets.

¹⁷⁵ For example, a lease.

¹⁷⁶ 2002 4 SA 768 (CC) (hereinafter the *FNB* case)

¹⁷⁷ *FNB* case par 51; Also see footnote 86 on 44 in the *FNB* case stating that the writers recognize that ownership of fixed property and movable corporations must be included, regardless of any dispute with the outer limits of the sense of "property".

In addition, the court found that it was practically impossible to provide a comprehensive definition of property for the purposes of section 25 and that it was not legally wise to attempt to do so.¹⁷⁸

It appears that the courts will interpret the concept of property wide enough for constitutional purposes.¹⁷⁹ The concept of constitutional property would most likely extend well beyond mere corporeal objects.¹⁸⁰

2.4 Characteristics and classification of property

In the common language, the concept “property” encompasses a wide variety of assets that make up the estate of an individual, which serves as objects of the rights that such an individual exercises in respect thereof and which are constitutionally protected.¹⁸¹

A significant part of an individual’s assets is real and tangible.¹⁸² A simple example would be a house or a car. There are, however, assets which are not tangible and perceptible, but which, nevertheless, form part of the assets of an individual. Let’s take for instance the intellectual property of a musical composer, or the amount of money owed by the deceased in terms of a contract. The creditor will have a creditor’s right. All of these assets are objects of the right an individual exercise. Therefore, it is important to define rights in property.¹⁸³

Roman jurists divided private law into three groups, namely the laws relating to persons, things, and actions. It is evident from this division that everything that was cognised by private law, other than individuals and actions, was classified as *res* or “things”.¹⁸⁴ As a result, in the legal sense, not only tangible, but also incorporeal objects, including rights,

¹⁷⁸ *FNB case* par 51.

¹⁷⁹ Van der Walt *Constitutional Property Clauses: A Comparative Analysis* 351-353. Van der Walt *Constitutional Property Law* 81; Erlank *Property in Virtual Worlds* 226.

¹⁸⁰ Van der Walt *Constitutional Property Clauses: A Comparative Analysis* 353.

¹⁸¹ Van der Walt *Introduction to the law of property* 14.

¹⁸² Van der Walt *Introduction to the law of property* 14.

¹⁸³ Different rights in or to property will be discussed in section 2.6.

¹⁸⁴ Badenhorst *et al Silberberg and Schoeman’s The Law of Property* 18.

were considered as things. The former were classified as corporeal things and the latter as incorporeal things.¹⁸⁵

As in Roman law, a distinction was made between the corporeal and the incorporeal things; the latter group denoting rights.

Thus, in both Roman and Roman-Dutch law, what is actually considered to be real rights was acknowledged over incorporeal things, such as a *usufruct*¹⁸⁶ over an entire estate, including the personal rights that made up that estate.¹⁸⁷ Furthermore, the possession of incorporeal things was regarded as being *quasi-possessed* and protected by statute. However, according to the theories of the *Pandectists*, corporeality was highlighted as a prerequisite of things, and incorporeal things were merely treated as exceptions to the corporeal.¹⁸⁸

There have been correspondingly broad definitions in the concept of “thing”. Therefore, it has been believed that everything that could be the object of a right, was lawfully permissible and that anything was denoted with monetary value.¹⁸⁹ Consequently, “things” were often said to denote either corporeal or incorporeal objects, as was the position in Roman and Roman-Dutch law.

In modern South African property law, a “thing” is defined with regard to certain characteristics. In short, the characteristics are corporality, impersonal nature, independence, susceptibility to human control and the use and value of the legal subject.¹⁹⁰ The writer will be discussing the characteristics and classification to obtain a better understanding of the concept of “property”.

¹⁸⁵ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 18.

¹⁸⁶ See section 2.6.1.2 of this study.

¹⁸⁷ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 18.

¹⁸⁸ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 18.

¹⁸⁹ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 18.

¹⁹⁰ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 18.

2.4.1 Characteristics of things

2.4.1.1 Corporeality

A thing is generally classified as corporeal, that is, an object that is part of corporeal reality because it can be sensually¹⁹¹ observed and occupies a certain space.¹⁹² In Roman law, corporeal things were defined as things that could be touched or felt.¹⁹³

Roman-Dutch writers such as Voet,¹⁹⁴ Van der Keessel,¹⁹⁵ and Huber, scrupulously pursued the Roman law distinction between corporeals and incorporeals.¹⁹⁶ A somewhat broader concept of corporeals was introduced by other authors such as Grotius¹⁹⁷ and Van Leeuwen¹⁹⁸ to include not only material objects that could be touched, but also physical objects such as gases that could be experienced by all the senses.¹⁹⁹

In contrast to the strict adherence that only corporeal objects should qualify as things, various incorporeal things have been recognised in South African legislation. Subjective rights currently recognised in South African laws are real rights²⁰⁰ (with things as objects); personal rights²⁰¹ (with performance as objects); intellectual property rights (with intellectual property as objects); personal rights²⁰² (with aspects of personality as objects). As far as common law is concerned, if any of these arbitrary rights serves as

¹⁹¹ Using the five senses.

¹⁹² Van der Merwe and De Waal *The Law of Things and Servitudes* 13; also see Van der Walt *Introduction to the law of property* 15.

¹⁹³ Van der Merwe and De Waal *The Law of Things and Servitudes* 13; also see Van der Walt *Introduction to the law of property* 15.

¹⁹⁴ Van der Merwe "Things" par 17; also see *Commentarius* 1 8 11, 1 8 18.

¹⁹⁵ Van der Merwe "Things" par 17; also see *Prael ad Gr* 2 1 10, 2 1 14.

¹⁹⁶ Van der Merwe "Things" par 17; also see *Commentarius* 1 8 11, 1 8 18.; *Prael ad Gr* 2 1 10, 2 1 14.

¹⁹⁷ Van der Merwe "Things" par 17; also see *Inleidinge* 2 1 10.

¹⁹⁸ Van der Merwe "Things" par 17; also see RHR 2 1 4.

¹⁹⁹ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 14. Van der Merwe "Things" par 17.

²⁰⁰ *Kain v Kahn* 1986 4 SA 251 (C); In *Ex parte Geldenhuys* 1926 OPD 155, the will stated that the piece of land should be distributed in four parts amongst the children. Furthermore, locks would have to be drawn to see who gets which part. However, these locks will only be drawn once the first child reach majority. The child who draws the lock with the farmhouse would be obliged to pay the other three siblings. The registrar rejected the transfer as it did not amount to a real right.

²⁰¹ In terms of s 63(1) of the *Deeds Registries Act* 47 of 1937 only real rights in land can be registered, personal rights can only be registered if the Registrar is of the opinion that the personal right is complementary to the registrable real right.

²⁰² In *Lorentz v Melle* 1978 3 SA 1044 (T) the court distinguish between a real right and a personal right.

the object of a real right, they shall be treated as an incorporeal thing.²⁰³ However, if either of these arbitrary rights themselves acts as the object of a real right, it is considered to be an incorporeal thing in the sense of common law.

Dogmatic issues are triggered by the restriction of things to corporeals and the required corporeality characteristic. There are, nonetheless, a variety of ways to resolve this contradiction.²⁰⁴ One of the suggestions is that the concept of incorporeal things should be dismissed on dogmatic grounds and that the (infrequent) presence of such incorporeal thing should be limited to playing a limited role in practise.²⁰⁵ In such a case, the character of corporeality would be preserved, and the presence and recognition of intangible objects would be limited to the rare exception created by statute or precedent.²⁰⁶

Another suggestion to resolve this issue is the need for modern South African legal practise to accept the concept of incorporeal things and that it should be fulfilled by disregarding the characteristics of the corporeality of a thing.²⁰⁷

As a final solution, it is submitted that incorporeal things should be viewed for what they really are, namely patrimonial rights serving as the object of limited real rights. This essentially implies that, in the broader sense, certain patrimonial rights (together with corporate things) that serve as objects of limited real rights are treated as property.²⁰⁸

The problem remains that, if such classification proves necessary, whether incorporeal things should be classified as movable or immovable according to criteria. In other words, to establish whether a right is movable or immovable one needs to rely on the existence of the entity to which it relates. Logically, the answer to the question of whether a right is movable or immovable depends on the existence of the entity to which it relates.²⁰⁹

²⁰³ Examples of case law where incorporeal things have been acknowledged include: *Ben-Tovin v Ben-Tovin* 2001 3 SA 1074 (C); and *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 5 SA 309 (SCA); also see Erlank *Property in Virtual Worlds* 233.

²⁰⁴ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 18.

²⁰⁵ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 41.

²⁰⁶ Erlank *Property in Virtual Worlds* 234.

²⁰⁷ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 41.

²⁰⁸ Erlank *Property in Virtual Worlds* 234.

²⁰⁹ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 41.

As far as this approach is concerned, a distinction should be drawn between real and personal rights, all personal rights being movable. As far as real rights are concerned, a further distinction should be made between real rights of immovable and movable things as objects.

In the *Cooper* case,²¹⁰ a distinction was made between a *usufruct* and a *quasi-usufruct*.²¹¹ An example from a deceased estate point of view would be a *usufruct*. A *usufruct* over a vehicle would be regarded as a movable asset, whereas a *usufruct* over a property would be regarded as immovable.

In deceased estates the classification of a thing as corporeal or incorporeal plays an important role, especially with the division of things into movables and immovable.

However, the classification of incorporeality has been labelled as illogical, due to the fact that incorporeals cannot be moved.

In so far as the law relates to these two kinds of things, the importance of subdividing things into movable and immovable things is not only technically essential, but also of practical importance.

According to section 2 of the *Alienation of Land Act* 68 of 1981, there needs to be a written contract between the parties involved in the sale of immovable assets, whereas with a contract of sale in respect of movable assets one need not have a written contract. Another example would be where a transfer of ownership of a movable asset takes place

²¹⁰ In the *Cooper* case, Mr Cooper bequeathed one half of the residue of his estate to his son. The bequest was subject to a lifelong *usufruct* in favour of the surviving spouse. The spouse died on 02 September 1992. The first and final liquidation account was drawn up by the executrix, who is the first defendant in this case, reflecting the residue of the estate consisting of certain shares and cash to the value of R357 034.13. Half of the aforementioned cash sum, namely R178 517.07, and the amount of R315 156, is awarded to the claimant, being the market value of one half of those shares at the date of the testator's death. The plaintiff was not satisfied with the award, arguing that some of the shares were subject to adjustment and should have been valued on 02 September 1992. The defendant refused to amend as according to her the shares forming part of the testator's estate were subject to a *quasi-usufruct*. A life interest in the nature of a true *usufruct* can pertain to incorporeal property such as shares. However, shares, cannot be the subject of a *quasi-usufruct* since they are not capable of consumption through use.

²¹¹ *Cooper* case par 32.

on delivery, whereas immovable property would only be transferred by way of a deeds registration.

It is the author's understanding that the common-law distinction between corporeals and incorporeals is rooted in modern property law and also acts as a further sub-classification of things. In common law and practice, objects and incorporeal items in the form of rights are known as movables or immovables (corporeal). The respective classifications are also viewed separately.

"Movable" and "immovable" are the most important classification of things.²¹² According to Silberberg²¹³ immovables are land and everything attached to it, either by natural or artificial means.²¹⁴ However, according to the *Administration of Estates Act*, immovable property means land and any real right in land or minerals (other than any right under a bond) registerable in any office in the Republic used for the registration of title to land or the right to mine.²¹⁵

Movable things, on the other hand, are self-explanatory, provided that they can be easily moved from one place to another without being damaged or losing their identity.²¹⁶ The size, nature and composition must also be taken into account.

2.4.2 Impersonal nature

As mentioned in the introduction in paragraph 2.4 one of the characteristics of a "thing" is that it must be of an impersonal nature. In the modern society, human beings are never treated as human objects, but are regarded as legal subjects.²¹⁷

However, it is stated that a corpse or part thereof may be classified as a legal object.²¹⁸ Parts of a human body which are no longer connected to a human being may also be

²¹² Badenhorst *et al Silberberg and Schoeman's The Law of Property* 41.

²¹³ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 41.

²¹⁴ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 41.

²¹⁵ Section 1 of the *Administration of Estates Act*.

²¹⁶ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 41.

²¹⁷ Erlank *Property in Virtual Worlds* 234.

²¹⁸ Van der Walt *Introduction to the law of property* 17.

considered negotiable matter.²¹⁹ A simple example would be human hair used to make a wig.²²⁰

In terms of section 60 of the *National Health Act* 61 of 2003²²¹

No person, except- 20 (a) a hospital or an institution contemplated in Section 58(l)(a), a person or an institution contemplated in Section 63 and an authorised institution or, in the case of tissue or gametes imported or exported in the manner provided for in the regulations, the importer or exporter concerned, may receive payment in respect of the acquisition, supply, importation or export of any tissue or 2.5 gamete for or to another person for any of the purposes contemplated in Section 56 or 64.²²²

For this reason, this type of matter will not form part of property in a deceased estate.

2.4.3 Independence

When distinguishing between single and composite objects, the rule is regulated by Roman law.²²³ Stones, birds and metal objects are material objects which, according to lay rather than scientific perceptions, appear to have been considered as single entities.²²⁴ However, objects which have a commercial value only in certain quantities, such as grains of corn, salt or sand and bees, are also considered to be single objects.

Composite things (*universitas rerum cohaerentium*) consist of multiple component parts that have lost their independence by being united into a single entity either organically or mechanically.²²⁵ These parts cannot be removed from a composite thing without damaging or changing the entity. An examples of a composite thing would be a house.²²⁶

Composite things are distinguished from a collection of similar things. These collections are composed of several things that form an economic unit, for example an art collection.²²⁷ Collections of things are distinguished from universalities of rights and

²¹⁹ Van der Walt *Introduction to the law of property* 17.

²²⁰ Van der Walt *Introduction to the law of property* 17.

²²¹ *National Health Act* 61 of 2003.

²²² *National Health Act* 61 of 2003.

²²³ Van der Walt *Introduction to the law of property* 17.

²²⁴ Van der Walt *Introduction to the law of property* 18.

²²⁵ Van der Merwe and De Waal *The Law of Things and Servitudes* 21; also see Van der Walt *Introduction to the law of property* 18; Erlank *Property in Virtual Worlds* 249.

²²⁶ Van der Walt *Introduction to the law of property* 18.

²²⁷ Van der Walt *Introduction to the law of property* 18; also see Van der Merwe *Sakereg* 52.

things, such as the estate of an individual.²²⁸ These are juridical entities distinct from the rights and things of which they are composed. The concept of universalities plays an important role in succession; however, it has a limited role in the sphere of the law of things.²²⁹

2.4.4 Subject to human control

A thing must be subject to human control; otherwise it cannot be classified as a thing.²³⁰ Examples of things that are not subject to human control are the astronomical bodies, like planets or the moon. According to Erlank,²³¹ even shipwrecks that are unreachable at the bottom of the sea are objects that are not under human control.²³²

2.4.5 Use and value

A thing must be of value and use to the legal subject. There can be no legal relationship if the thing is of no use or value to the legal subject.²³³ However, it is important to note that a thing may not have an economic value, but to the individual it may have a sentimental value.²³⁴ The usefulness and value of each case is unique and will be determined objectively.

2.5 Classification of property

Grotius²³⁵ classified things according to their relation to man or to their nature. In other words, things may be classified out of commerce or in commerce. Things out of commerce would be things that cannot be owned privately, for instance common things

²²⁸ Van der Walt *Introduction to the law of property* 18.

²²⁹ Van der Walt *Introduction to the law of property* 18.

²³⁰ Van der Walt *Introduction to the law of property* 18.

²³¹ Erlank *Property in Virtual Worlds* 234.

²³² Due to technological advances, this category will cease as man finds new and innovative ways to get access to and take control of these things, also see Van der Merwe and De Waal *The Law of Things and Servitudes* 14. I support Erlank's view, however if the shipwreck is discovered, a country may claim ownership of the wreck if it was owned by the country in the first place; also see Reality check team BBC News, <https://www.bbc.com/news/world-44302476>.

²³³ Van der Walt *Introduction to the law of property* 18.

²³⁴ Van der Walt *Introduction to the law of property* 18.

²³⁵ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 31.

like the sea, and will thus not form part of this thesis, whereas, on the other hand, things in commerce would be things owned privately or objects of other real rights.²³⁶

The classification of things has always been regarded as a matter of principle. In the modern society it is universally accepted that it is a matter of convenience and that classification depends on the context and the purpose of a thing.

As stated above, things owned by a person are things in commerce that are privately owned by a legal subject at a particular point in time. However, Grotius²³⁷ classified things according to their nature as well. If one would divide things according to their nature it may be divided into corporeal and incorporeal; single and composite things; fungibles and non-fungibles; consumable and non-consumable things; divisible and indivisible things and finally movables and immovables. Corporeality and single and composite things have been discussed in paragraphs 2.3.1 and 2.3.3; the rest will be briefly discussed.

2.5.1 Fungibles and non-fungible things

A thing can be fungible or non-fungible, depending on whether it can be replaced with similar things or not. According to the law, fungible things are interchangeable. However, this characteristic also depends on the intention of the parties.²³⁸ Fungible things are often referred to in trade with reference to numbers, weights or measurements.²³⁹ A three-point plug, for example, would be a fungible thing, as it can be replaced with another similar one.

On the other hand, non-fungibles things have such unique individual features that they cannot be replaced.²⁴⁰ Let us take, for instance, the *Starry night*²⁴¹ painting. Should anything happen to this painting, it can never be replaced.

²³⁶ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 31.

²³⁷ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 31.

²³⁸ Van der Walt *Introduction to the law of property* 22.

²³⁹ Van der Walt *Introduction to the law of property* 22.

²⁴⁰ Van der Merwe and De Waal *The Law of Things and Servitudes* (1993) 22; also see Van der Merwe *Sakereg* 43; Erlank *Property in the Virtual Worlds* 248.

²⁴¹ The *Starry Night* is an oil on canvas painting painted by Vincent van Gogh in June 1889.

It is submitted that a fungible thing like a family Bible could become a non-fungible thing over the years.²⁴²

This distinction is fundamental, especially in deceased estates. Assume Mary Thompson bequeathed her valuable painting to her son John Thompson. The painting was valued at R3 million and is irreplaceable, as it is the original painting. When Mary passed away the executor neglected to collect the valuable painting. A month after Mary's death her house was vandalised, and the painting was stolen. The executor never took any insurance as he argued that it was only a simple painting. Due to the executor's negligence the legacy lapsed, as the painting is irreplaceable.

2.5.2 Consumable and non-consumable things

A thing is consumable when depleted in value, for example food, whereas non-consumable are things that are maintained, even when wear and tear occurs by way of usage.²⁴³

It might sound easy; however, that this classification is not without difficulties, especially in practise.²⁴⁴ From a deceased estate point of view, consumable and non-consumable things can become complicated. Mary Thompson bequeathed her motor vehicle to her son John Thompson, provided that her sister Cynthia would have a lifelong *usufruct* over the vehicle.

It is submitted that a *usufruct*²⁴⁵ can only be given regarding non-consumable things. However, in the case of consumable things, there is a requirement that the thing must be kept in the same condition it was received. In other words, Cynthia will have to return the vehicle in the same condition in which she received it. With regard to consumables, a *quasi-usufruct* can be given, in which case the holder of the right is compelled to return

²⁴² Van der Walt *Introduction to the law of property* 23.

²⁴³ Van der Walt *Introduction to the law of property* 23.

²⁴⁴ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 47.

²⁴⁵ *Usufruct* will be discussed in paragraph 2.6.1.2; A *usufruct* is a right to use property belonging to another person; also see Haupt *Notes on South African Income Tax* 853.

things in the same condition they received it.²⁴⁶ This will, however, apply to consumables only.

Consideration has been given in *the Cooper case*²⁴⁷ as to whether shares could be subject to *quasi-usufruct*, and it has been found that it may only be applied if the shares are bequeathed, or purposely made subject to a *usufruct*. The *usufructuary* will then have the right to earn dividends and/or other benefits.²⁴⁸

2.5.3 Divisible and indivisible things

Things can be further subdivided into divisible and indivisible things. If a thing can be divided into two or more portions, it is regarded as a divisible thing. It should, however, be noted that the divisible thing should not lose its value.²⁴⁹ A decrease in value occurs when the total value of the separate parts is less than the actual value.²⁵⁰ Examples involve a carcass or a large field.²⁵¹ Indivisible objects, on the other hand, cannot be divided, such as an animal or a house.

2.6 Right in or to property

The law of property deals with "property" in its widest sense, which includes the property²⁵² and rights²⁵³ that form part of a person's estate.²⁵⁴ According to Van der Walt,²⁵⁵ rights in property include all rights, claims and interest with regards to property.²⁵⁶ These rights, claims and interest forms part of a person's estate and are recognised and protected either by private law or by the *Constitution*.

²⁴⁶ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 47.

²⁴⁷ *Cooper case* par 32.

²⁴⁸ Haupt and Nel 2019 *Economic and Financial Sciences* 3.

²⁴⁹ Van der Merwe "Things" par 50.

²⁵⁰ Van der Merwe "Things" par 50.

²⁵¹ Van der Merwe "Things" par 50.

²⁵² Also known as assets.

²⁵³ The right to corporeal things, right to immaterial property and right deriving from an obligation such as a contract; See Van der Walt *Introduction to the law of property* 25.

²⁵⁴ Van der Walt *Introduction to the law of property* 9.

²⁵⁵ Van der Walt *Introduction to the law of property* 256.

²⁵⁶ Both corporeal and incorporeal.

2.6.1 Real right

A real right can be classified as a right in a corporeal or incorporeal thing, belonging to oneself, whereas a limited right can be classified as a right to a thing which belongs to someone else.²⁵⁷

Under the South African law, real rights can therefore be subdivided into two groups,²⁵⁸ namely ownership²⁵⁹ and limited real rights.²⁶⁰ Each group will be discussed below.

2.6.1.1 Ownership

Defining ownership is often difficult, as is generally the case with definitions, not only because of the different potential starting points, but also because the definition does not necessarily reflect the true nature of the concept as it currently exists, nor does it necessarily reflect the nature of the concept as it should exist.²⁶¹

In *Gien v Gien*²⁶² ownership was described by the court as the most comprehensive real right an individual can have in relation to a thing. Even so, it does not mean that you can do whatever you like, because it is still a right that can be limited by the rights of others.²⁶³ In other words, ownership has to do with the relationship between a person and a thing as well as the relationship between persons regarding a thing.²⁶⁴ These relationships are inconclusive²⁶⁵ and thus abstract.

²⁵⁷ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 53.

²⁵⁸ According to Van der Walt *Introduction to the law of property* 257 all the rights in property can be classified in two groups namely ownership and the rest.

²⁵⁹ According to Van der Merwe *Sakereg* 176 one of the characteristics of ownership is that it is an independent real right that provides the most extensive entitlement to a thing. Apart from ownership all the other real rights are dependent upon the mother right. In other words, ownership is independent; Also see Horn *The legal effect of rights specific to sectional title property in South Africa, with reference to selected aspects of the Australian and Dutch law* 13.

²⁶⁰ Van der Walt *Introduction to the law of property* 46.

²⁶¹ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 104.

²⁶² 1979 2 SA 1113 (T) (hereinafter the *Gien* case). In the *Gien* case 1120 the court defined ownership as: "Eiendomsreg is die mees volledige saaklike reg wat 'n persoon ten opsigte van 'n saak kan hê"; also see Van der Walt *Introduction to the law of property* 46.

²⁶³ *Van Der Merwe and Another v Taylor NO and Others* 2008 1 SA 1 (CC) par 26.

²⁶⁴ Van der Walt *Introduction to the law of property* 46.

²⁶⁵ They are inconclusive as they may vary from time to time or from relationship to relationship.

The content of ownership must be determined on a case-to-case basis. In this regard, two aspects should be taken into account, namely the entitlement²⁶⁶ of the owner and the limitation of ownership.²⁶⁷ It is impossible to compile a comprehensive list of ownership entitlements and the limitation thereof. These methods do not help to characterise ownership, considering that some of the attributes commonly assigned to ownership do not apply exclusively to ownership. They do, however, shed light on the fact that ownership theoretically confers the most comprehensive control over a thing.

Furthermore, these entitlements are technically constrained by external limits imposed by legislation²⁶⁸ and by the owner himself. Consequently, the scope of owners' rights is restricted to the rights of other persons using those rights which emerge from limited real rights and personal rights.

2.6.1.2 Limited real rights

As mentioned above, ownership of one's own property is the most comprehensive real right. In South African law there is a distinction between ownership as the only real right and limited real rights with regard to things that belong to someone else. In short, a limited real right is a right with regard to a "thing" that belongs to someone else. The most common limited real rights are servitudes and real security rights.²⁶⁹

a) Servitudes

Servitude is a limited real right to another person's movable or immovable property, which gives the entitled person the use and enjoyment of the specific property.²⁷⁰ These

²⁶⁶ Entitlement includes the entitlement to control, use, encumber, alienate and to vindicate. See Van der Walt *Introduction to the law of property* 46.

²⁶⁷ Van der Walt *Introduction to the law of property* 46; also see Badenhorst *et al Silberberg and Schoeman's The Law of Property* 105.

²⁶⁸ There are a number of statutory provisions that limit the owner's entitlement to his/her property. For instance, a motor vehicle licence has to be renewed every year. There are several statutory provisions when it comes to immovable property as well. Examples would be the *Expropriation Act* 63 of 1975, *Spatial Planning and Land Use Management Act* 16 of 2013, the *Land Reform Act* 3 of 1996, to only mention a few.

²⁶⁹ Van der Walt *Introduction to the law of property* 257; also see Erlank *Property in Virtual Worlds* 317.

²⁷⁰ Van der Walt *Introduction to the law of property* 260.

entitlements limit the owner of the specific property. One can differentiate between two different types of servitudes, namely a personal servitude and a *praedial* servitude.

In essence, the distinction between personal and *praedial* servitude is based on the distinct economic effects of the various servitudes. The purpose of a *praedial* servitude is to enhance the use of the dominant land, whereas the purpose of a personal servitude is to benefit the holder in his personal capacity.²⁷¹ In the event of uncertainty as to whether servitude is of a personal or *praedial* nature, it is presumed to be a personal servitude.²⁷²

The aim of this study is to obtain legal certainty as to what constitutes "property" in a deceased estate. Seeing that immovable property is defined separately in the *Administration of Estates Act*, movable property will be the main focus of this study. For this reason, *praedial* servitude will be addressed briefly and personal servitude will be discussed in more detail.

i) *Praedial* servitude

A *praedial* servitude is a servitude registered in favour of another piece of land, at which instance there is a dominant tenement and a servient tenement.²⁷³ The registered owner of the dominant tenement enjoys such servitude in his capacity as owner thereof, in perpetuity.²⁷⁴

Types of *praedial* servitudes include *inter alia* a right of way, right of encroachment, a parking servitude, and a right of aqueduct.²⁷⁵

²⁷¹ Grobler *The Salva Rei Substantia requirement in personal servitudes* 34; also see Marneweck *The implications of the use of personal servitudes as estate planning instruments* 12.

²⁷² *Resnekov v Cohen* 2012 1 SA 314 (WCC).

²⁷³ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 374; also see Du Bois *et al Wille's Principles of South African Law* 593.

²⁷⁴ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 322; Van der Merwe *Sakereg* 459; Mostert *et al The Principles of the Law of Property in South Africa* 240.

²⁷⁵ Section 66 of the *Deeds Registries Act* 47 of 1937; also see Le Roux *et al Explanatory Notes – Course in Notarial Practice* Part 1 Chapter 6 23.

ii) Personal servitudes

A personal servitude is a real right granting the holder thereof, in his personal capacity, the right to do something on the owner's property, or to prevent the owner from exercising some or other ordinary power as the owner thereof.²⁷⁶

Since a personal servitude is bound to the holder of the servitude, it cannot be transferred.²⁷⁷ In other words, it cannot be bequeathed or inherited and it expires upon the death of the right-holder or upon a future event.²⁷⁸

The common law recognises three types of personal servitudes, namely a *usufruct*, *usus* and *habitation*. These personal servitudes are often considered as estate planning tools by testators. As a personal servitude is personal to a person, it is not an asset in a joint estate,²⁷⁹ it cannot be alienated or inherited and "generally lapse on the death of the holder".²⁸⁰ Each of these personal servitudes will be briefly discussed.

1) *Usufruct*

A *usufruct* is a limited real right which gives the holder the right to use and enjoy the "property" of another person.²⁸¹ In addition, the holder has the right to derive both natural and civil fruits from the "property" to which the *usufruct* relates. On the other hand, the *usufructuary*²⁸² must ensure that, upon termination, the "property" is returned without impairment.²⁸³

²⁷⁶ Van der Merwe *Notarial Practice* 132; also see Badenhorst *et al Silberberg and Schoeman's The Law of Property* 383.

²⁷⁷ Section 66 of the *Deeds Registries Act*.

²⁷⁸ Van der Merwe *Sakereg* 360.

²⁷⁹ *Van der Merwe v van Wyk* NO 1921 EDL 298.

²⁸⁰ Le Roux *et al Explanatory Notes – Course in Notarial Practice* Part 1 Chapter 6 10; also see s 66 of the *Deeds Registries Act*; Van der Merwe 2013 *TSAR* 342; Hall *Servitudes* 162.

²⁸¹ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 383; also see Van der Walt *The Law of Servitudes* 464; Van der Merwe *Sakereg* 508.

²⁸² A *usufructuary* is the person who uses and enjoys the property of another; also see Haupt *Notes on South African Income Tax* 864; *Estate Watkins-Pitchford v CIR* 1955 2 SA 447 (A).

²⁸³ Van der Walt *The Law of Servitudes* 475; also see Badenhorst *et al Silberberg and Schoeman's The Law of Property* 384; Van der Merwe *Sakereg* 519.

It is important to note that the *usufructuary* does not acquire a right to the dominium of the property, but merely the right to use and enjoy the property.²⁸⁴ Furthermore, a *usufruct* can be created over movable things, immovable things, or a combination of both.²⁸⁵ A single thing or a composite thing may also be subject to *usufruct*.²⁸⁶

A *usufructuary* is entitled to all the natural and civil fruits²⁸⁷ derived from the property.²⁸⁸ In the case of natural fruits, the *usufructuary* shall, upon harvesting, become the owner of the fruits and shall be liable for all costs relating to the cultivation and collection of such natural fruits.²⁸⁹ Fruits that are not harvested when the *usufruct* expires, however, do not pass on to the *usufructuary's* successors.²⁹⁰ Civil fruits, on the other hand, become the property of the *usufructuary* as and when it becomes due. Upon expiry of the usufruct the civil fruits are divided between the successors of the *usufructuary* and the owner of the property.²⁹¹

As a general rule a *usufruct* may not be created over a consumable thing,²⁹² the reason being that it can be consumed by use.²⁹³ However, a *quasi-usufruct* may be constituted in such a case.²⁹⁴ The *quasi-usufructuary*²⁹⁵ is entitled to use and enjoy the property and

²⁸⁴ Hall *Servitudes* 165.

²⁸⁵ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 383; also see *Grotius* 2 39 2.

²⁸⁶ Example: a herd of cows; also see Badenhorst *et al Silberberg and Schoeman's The Law of Property* 384.

²⁸⁷ Natural fruit includes fruit and vegetables, crops, products from an animal (including milk, manure, wool, etc.), and plantations planted with the purpose to harvest. Civil fruit on the other hand includes rent, quitrent and interest; See Badenhorst *et al Silberberg and Schoeman's The Law of Property* 384; Du Bois *et al Wille's Principles of South African Law* 606; Andrews 1993 *Law and Contemporary Problems* 174.

²⁸⁸ *Barnette v Rudman* 1934 AD 203; the usufructuary shall acquire ownership of the fruit. However, only when the fruit has been severed from the soil on which they grow. Rent and interest on the other hand vest in the usufructuary as soon as it becomes due; also see Badenhorst *et al Silberberg and Schoeman's The Law of Property* 384; *Voet* 7 1 28 and *Voet* 7 1 28,30.

²⁸⁹ *Voet* 7 1 15; *Van der Keessel Praelectiones ad Gr* 2 39 2; *Geldenhuis v Commissioner for Inland Revenue* 1947 3 SA 379 (C) 386–387; also see Badenhorst *et al Silberberg and Schoeman's The Law of Property* 384.

²⁹⁰ Du Bois *et al Wille's Principles of South African Law* 606; Van der Merwe and De Waal "*Servitudes*" 585.

²⁹¹ Van der Merwe and De Waal "*Servitudes*" par 585.

²⁹² Badenhorst *et al Silberberg and Schoeman's The Law of Property* 384.

²⁹³ Refer to par 2.4.1.1 of this study for an explanation of the *Cooper* case.

²⁹⁴ Van der Merwe and De Waal "*Servitudes*" par 584; also see Hall *Servitudes* 176; Marneweck *The implications of the use of personal servitudes as estate planning instruments* 12.

²⁹⁵ Example of a *quasi-usufruct* would be shares; also refer to the *Cooper* case par 32 for an explanation of a *quasi-usufruct*.

acquire all income derived from it for themselves. However, the consumable thing must be returned, *in specie*, upon termination.

The general rights of the *usufructuary* provide that the owner of the bare domain is not permitted to interfere in such a way that the rights of the servitude-holder are infringed.²⁹⁶ Furthermore, the owner is not permitted to create any further servitude over the property without the permission of the *usufructuary*.²⁹⁷

The consent of the *usufructuary* has to be obtained with regard to: (1) the sale of the property, (2) registration of a mortgage bond and (3) if the land is to be burdened by a praedial servitude.²⁹⁸ Both the *usufructuary* and the owner must consent to burden the property with a mortgage bond, unless the *usufructuary* waives his preference in favour of a mortgage bond, wherefore such is registered free from the *usufruct*.²⁹⁹

2) *Usus*

As stated above, there is another personal servitude known as a *usus*, which is a lesser right than a *usufruct*.³⁰⁰ A *usus* entitles the servitude holder to use and enjoy the property and fruits of another person's without impairment.³⁰¹ However, the servitude holder's right is limited in the sense that he and his family may use the fruits needed on a daily basis, but cannot sell the fruit or lease the property.³⁰² The remainder of the fruit belongs to the owner.³⁰³

²⁹⁶ Hall *Servitudes* 167.

²⁹⁷ Hall *Servitudes* 167.

²⁹⁸ Refer to 1.3.1.1.2 of this study for an explanation on a *praedial* servitude.

²⁹⁹ Le Roux *et al Explanatory Notes – Course in Notarial Practice* Part 1 Chapter 6 20; also see Meyerowitz *Administration of estate and their taxation* 29-6.

³⁰⁰ Van der Merwe and De Waal "*Servitudes*" par 600; *Vairetti v Zardo NO and Others* (unreported) case number 12423/2007 of 12 April 2010 para 22 (hereinafter the *Vairetti* case).

³⁰¹ Van der Merwe and De Waal "*Servitudes*" par 600.

³⁰² The *Vairetti* case par 23; also see Van der Merwe and De Waal "*Servitudes*" par 605.

³⁰³ Hall *Servitudes* 177; Badenhorst *et al Silberberg and Schoeman's The Law of Property* 341; *Vairetti* case para 22-23.

3) *Habitatio*

The last personal servitude mentioned above is the *habitatio*. The *habitatio* is a right to occupy a certain property.³⁰⁴ Such right includes the right to grant a lease or sublease the specific property to another. The holder of the right of *habitatio* is the person “in charge” and places a burden on the owner of the property. The court held in *Durban City Council v Woodhaven Ltd and Others*³⁰⁵ that “the owner’s rights in regards with a house must yield to the inhabitant’s right of habitation”.

The servitude holder (also known as the *habitor*) and his family have the right to dwell in the property of another without detriment to the substance of the property. In terms of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998, the *habitor* may even institute eviction proceedings against the owner of the property.³⁰⁶

In *Kidson and Another v Jimspeed Enterprises CC and Others*,³⁰⁷ a habitation was registered over the farm. As the servitude was connected to his lifetime³⁰⁸ and recorded against the title deed of the farm, Mr Kidson was enabled to occupy the farmhouse. The Kidson family decided to pack up and leave the farm house due to the fact that the landlord made life unbearable.³⁰⁹

In the absence of the family, the owner sold the farm to Futurama 143 CC, which, in turn, sold it to a family trust. Due to unforeseen circumstances, the Kidson family were forced to leave their current home and move back to the farm. Upon their return they discovered that the house had been demolished.

³⁰⁴ Van der Merwe and De Waal “*Servitudes*” par 605.

³⁰⁵ *Hendriks v Hendriks and Others* 2016 1 SA 511 (SCA) para 10 (hereinafter the *Hendriks* case); also see Badenhorst *et al Silberberg and Schoeman’s The Law of Property* 384.

³⁰⁶ *Hendriks* case; also see Badenhorst *et al Silberberg and Schoeman’s The Law of Property* 384.

³⁰⁷ (38574/08) [2009] ZAGPPHC 30 (20 April 2009) (hereinafter the *Kidson* case).

³⁰⁸ *Kidson* case par 1 footnote 1 states: “Willem Fredrick Kidson shall for his lifetime be entitled to occupy the farm stall on the farm for his own benefit. He shall however be responsible for the maintenance and upkeep of the dwelling with outbuilding. The seller shall however not be entitled to lease the premises to someone else other than for occupation for his immediate family.”

³⁰⁹ *Kidson* case par1.

Consequently, the question posed in the present case was whether the right of occupation was terminated when the house was demolished. The Court held that the true determination of termination should be whether restoration was feasible, because if the structure had been demolished but the land maintains its original capacity to be burdened as in the past, the servitude did not expire.³¹⁰

The court therefore issued an order stating that the Kidsons had the right to exercise their right of habitat for the duration of Mr Kidson's life by rebuilding the house or by using alternative means of residence.³¹¹

Lastly, in contrast to the servitude of *usus*, a *habitatio* has the right to grant a lease or sublease to others.

b) Real security rights

As stated above,³¹² the most common limited real rights are servitudes and real security rights. Real security rights refer to the occurrence in which property is used as an object of credit security.³¹³ In other words, the creditor acquires a limited real right in the property of the debtor as collateral for the payment of the principal debt.

There are different kinds of real securities. The most important distinction is based on the nature of the security object, i.e. the movable or immovable property. Real security rights include, but are not limited to, pledges, mortgages, cession in *securilatam debiti* and security granted by law in respect of the debtor's property to the creditor.³¹⁴

2.6.2 Difference between a personal right and a real right

A personal right always initiates from a relationship between two people. The right binds a particular *persona* and is enforceable between two individuals.³¹⁵ The holder of the right has the right to enjoyment of another's property.

³¹⁰ Scott 2011 *THRHR* 155-169; also see *Kidson* case par 10.

³¹¹ *Kidson* case par 1.

³¹² See section 1.3 of this study.

³¹³ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 384.

³¹⁴ Van der Walt *Introduction to the law of property* 293.

³¹⁵ Le Roux *et al Explanatory Notes – Course in Notarial Practice* Part 1 Chapter 6 3.

There are considerable variations between a real right and a personal right. One of the key functional distinctions between the two rights is that it is only possible to register a real right in the Deeds Registry,³¹⁶ while personal rights can only be registered in extraordinary situations.³¹⁷

In *Lorentz v Melle*,³¹⁸ certain conditions³¹⁹ were created in a contract and registered at the deeds registry by way of a notarial deed. One of the conditions created an obligation to pay a sum of money to another person.³²⁰ According to the appellant, the agreement constituted a praedial servitude and, for that reason, was binding on the successor. The court, however, discussed whether the right to profit constituted a praedial servitude. The court concluded that it was not a praedial, since the use of the servient tenement did not have a permanent attribute to it.

In *Ex parte Geldenhuys*,³²¹ a husband and wife left a piece of land to their children in undivided shares. The will further determined that upon the eldest child reaching majority, the land would be divided in equal shares by way of drawing lots. The child who drew the portion upon which the house was built was obliged to compensate the other children by paying an amount to each of the other siblings. The registrar refused to register the conditions as it did not constitute a real right.³²²

In terms of section 102 of the *Deeds Registries Act*,³²³ a real right is “any right which becomes a real right upon registration”; therefore to constitute a real right in land, such has to be registered.

³¹⁶ Section 63 of the *Deeds Registries Act*

³¹⁷ Van der Merwe *Sakereg* 84.

³¹⁸ 1978 3 SA 1044 (T) (hereinafter the *Lorentz* case).

³¹⁹ The parties to the contract agreed to subdivide a piece of land into three parts. The two owners each become an owner of first and second portion and both remained co-owners of the third portion. In the event that one of the parties begins to develop a township on their part, the other owner will be entitled to half of the profits of such development. See Van der Walt *Introduction to the law of property* 36.

³²⁰ Van der Walt *Introduction to the law of property* 36.

³²¹ 1926 OPD 155 (hereinafter the *Geldenhuys* case); also see Van der Walt *Introduction to the law of property* 35.

³²² Van der Walt *Introduction to the law of property* 35.

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

According to section 63(1) of the *Deeds Registries Act* only potential real rights can be registered in the deeds office, at which instance to create a real right, it needs to be delivered to the holder thereof. Important to note is that registration in the deeds office results as delivery of such.

In terms of the common law, if a personal right does not burden a piece of land, it cannot be registered. A two-fold test has been developed by the courts as to whether a right should be registered or not, which is:³²⁴

- a. the subtraction from dominium test;³²⁵ and
- b. the question whether the parties had the intention³²⁶ that the condition should bind not only the present owner, but also his successors in title.

The common law further recognises three personal servitudes *usufruct*, *usus* and *habitatio*, which are often considered as estate planning tools by testators. A personal servitude is a real right granting the holder thereof, in his personal capacity, the right to do something on the owner's property, or to prevent the owner from exercising some or other ordinary power as the owner thereof.³²⁷ Therefore, if the owner of the property is burdened with such servitude, it is only enforceable against the owner, and the servitude cannot be transferred by the holder. Servitude can come into existence by a will or by agreement between the parties.

As a personal servitude is personal to a person, it is not an asset in a joint estate,³²⁸ it cannot be alienated or bequeathed and "generally lapses on the death of the holder".³²⁹

³²⁴ Le Roux *et al Explanatory Notes – Course in Notarial Practice* Part 1 Chapter 6 7; also see *Denel (Pty) Ltd v Cape Explosives Works Ltd and another; Cape Explosives Works Ltd v Denel (Pty) Ltd and others* (1998) JOL 4198 (T) (hereinafter the *Denel* case); *Pearly Beach Trust v Registrar of Deeds* (1990) 4 All SA 615 (C) (hereinafter the *Pearly Beach* case); the *Lorentz* case 1044.

³²⁵ *Geldenhuis* case – that if a right constitutes a burden on the servient land and are a deduction from the dominium, it is a real right; also see the *Denel*, *Pearly Beach* and the *Lorentz* cases.

³²⁶ *Lorentz* case – the right is a real right if the parties had the intention to bind successors.

³²⁷ Van der Merwe *Notarial Practice* 132; also see *Resnekov v Cohen* 2012 1 SA 314 par 6; Badenhorst *et al Silberberg and Schoeman's The Law of Property* 321.

³²⁸ *Van der Merwe v van Wyk* NO 1921 EDL 298.

³²⁹ Le Roux *et al Explanatory Notes – Course in Notarial Practice* Part 1 Chapter 6 10. S 66 of the *Deeds Registries Act*; also see Hall *Servitudes* 178; for further reading on *usufruct*, *habitatio* and *usus* also see Corbett, Hofmeyr and Kahn *Law of Succession in South Africa* 366.

2.6.3 Other like interest

2.6.3.1 Fiduciary interest

A fiduciary³³⁰ interest arises when a fideicommissum³³¹ is created,³³² which is when a person transfers a property to one person, subject to the stipulation that the property must be transferred to a third person³³³ at the happening of a future event or at a future time.

Holding a fiduciary interest in a property does not mean that one has full ownership of that property. The property is owned by the fiduciary on the condition that, upon the death of the fiduciary, ownership of the property must pass to the *fideicommissary*.³³⁴

The fiduciary shall have a right to the fruits of the property during their lifetime, but may not dispose of the property.³³⁵ In the event that the *fideicommissary* dies before the fiduciary, the fiduciary shall become the sole owner of the property.

2.7 Vested and contingent interest

As pointed out earlier, section 1 of the *Administration of Estates Act* defines property as “any contingent interest in property”. A contingent interest in “property” is an interest

³³⁰ The main principles pertaining to fiduciary and *fideicommissary* interests were set out by the court in the *British South Africa Company v Bulawayo Municipality* 1919 AD 84 (hereinafter *the British case*) 95. The court stated that “a direction to an heir to hand over the inheritance to another upon the happening of a condition is sufficient to constitute a fideicommissum; if and when the condition happens the final beneficiary acquires a real right in the inheritance.”; also see *Douglasdale Dairy & others v Bragge & another* 2018 ZASCA 68.

³³¹ Fideicommissum means granting property to a person subject to the condition that he or she surrenders the same either in whole or in part, either immediately or after a certain time, and either simply or conditionally, to a third party (*Grotius Introduction* 2.20.1; *Voet Comm* 36.1.6); also see Claassen’s Dictionary of Legal Words and Phrases in Lexis Library.

³³² A fideicommissum is normally created by way of a last will and testament, can also be constituted by the deed. For further insights on fideicommissum see *Havemann’s Assignee v Havemann’s Executor* 1927 AD 476.

³³³ See *Davis Estate Planning* 2-10; also see the *British case* as well as Meyerowitz *Administration of Estates and Their Taxation* par 27.6.

³³⁴ Stiglingh 978.

³³⁵ Meyerowitz *Administration of Estates and Their Taxation* par 27.6; also see Stiglingh *SILKE: South African Income Tax* 978. For the different types of *fideicommissa* see Jamneck *The Law of Succession in South Africa* 172.

that is dependent upon a possible occurrence in the future.³³⁶ In other words, it is an interest that can only vest in the heir after certain conditions have been fulfilled.

The above seems simple enough; however, it is not. A contingent interest is not transmissible. For an interest to become transmissible it has to be "vested".³³⁷ The term "vested" can have different meanings, depending on the context in which it is used.³³⁸ If the word "vested" is used in relation to succession rights, it means that what is fixed and certain, is different from what is contingent.

In *CIR v Sive's Estate*,³³⁹ it was held that a beneficiary's contingent right had no value. In other words, if the deceased had no "vested" right to the interest, there was no interest and would not form part of their estate.³⁴⁰ In *Wessels v De Jager*,³⁴¹ the court confirmed that a beneficiary does not obtain a vested right upon the death of the testator. A beneficiary only obtains the right to adiate or repudiate a bequest. In *Kellerman v Van Vuuren*³⁴² it was held that vesting of rights take place upon the death of the deceased, however, should the beneficiary repudiate it would be as if it has never belonged to him. Therefore, the beneficiary only obtains a vested interest upon the adiation of his/her inheritance. Should the beneficiary repudiate then there is no vested interest and would therefore not form part of his/her estate.

In the *Jewish Colonial* case,³⁴³ Judge Watermeyer explained that the word "vest" is used to differentiate between what is certain and what is conditional. Watermeyer³⁴⁴ also pointed out that the word "contingent" as opposed to "vested" is to describe the conditional nature of someone's title to a right. "Vesting" will depend on the intention of

³³⁶ Corbett, Hofmeyr and Kahn *Law of Succession in South Africa* 149.

³³⁷ Corbett, Hofmeyr and Kahn *Law of Succession in South Africa* 147.

³³⁸ *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 (hereinafter *Jewish Colonial* case) 175; also see Jamneck *The Law of Succession in South Africa* 144-146; Corbett, Hofmeyr and Kahn *Law of Succession* 149.

³³⁹ 1955 1 SA 249 (A) (hereinafter the *Sive's* case).

³⁴⁰ Davis *Estate Planning* 2-9; also see Corbett, Hofmeyr and Kahn *Law of Succession in South Africa* 147.

³⁴¹ 2000 4 SA 924 (SCA) (hereinafter the *Wessels* case)

³⁴² 1994 4 SA 336 (T) (hereinafter the *Kellerman's* case)

³⁴³ Hereinafter *Jewish Colonial* case 175.

³⁴⁴ *Durban City Council v Association of Buildings Societies* 1942 AD 27 (hereinafter *Durban* case) 33.

the testator.³⁴⁵ A beneficiary's "vested" right does not necessarily mean that the right to enjoy or exercise the right already exists.³⁴⁶ The right only becomes vested upon adiation.

There are various scholarly opinions relating to the vesting of a right to property, especially when it comes to a beneficiary who is at the point of being sequestrated. According to Corbett,³⁴⁷ if the beneficiary is sequestrated before he/she adiated or repudiated, the right of election passes to the trustees. Sonnekus³⁴⁸ states that *delatio* takes place upon the death of the deceased and that *dies cedit* takes place at that moment. Furthermore, Sonnekus³⁴⁹ is of the opinion that an insolvent individual has limited contractual capacity and for that reason cannot repudiate. Jamneck³⁵⁰ on the other hand is of the opinion that an insolvent person has the right to repudiate or adiate an inheritance and that this right does not pass to the trustees. The Supreme Court of Appeal finally gave clarity on this matter in the *Wessels* case,³⁵¹ namely that the choice of adiating or repudiating an inheritance remains with the insolvent beneficiary and not his/her trustees. Limited contractual capacity does accordingly not mean that the insolvent individual has no rights at all.

Based on the above it is clear that the definition of property in the *Administration of Estates Act* is not only confusing for estate administrators but is creating problems in other legal areas. Contingent interest means the beneficiary merely has competence to adiate or repudiate his/her inheritance. Only upon adiation will the property vest in the beneficiary.

2.8 Conclusion

The focus of this chapter was on the concept of "property". Academics have tried to define the concept of "property" with their different theories. Some believe that the

³⁴⁵ *Wasserman v Sackstein* 1980 2 SA 536 (O) 540; also see *Webb v Davis* 1998 2 SA 975 (SCA) 981.

³⁴⁶ *Jewish Colonial* case 175-176; *Konyn v Viedge Bros (Pty) Ltd* 1961 2 SA 816 (E) 823; Jamneck *The Law of Succession in South Africa* 144.

³⁴⁷ Corbett *et al The Law of Succession in South Africa* (2001) 18 -19.

³⁴⁸ Sonnekus 2000 *TSAR* 793.

³⁴⁹ Sonnekus 2000 *TSAR* 793.

³⁵⁰ Jamneck *The Law of Succession in South Africa*; for further reading also see Gildenhuys 2020 *PER* 2-39. For a critical discussion of the *dominium* or ownership of a deceased estate at the moment of the deceased's death, see Jamneck 2020 *LitNet Akademies* 1061-1098.

³⁵¹ *Wessels* case para 1-9.

theories created more confusion. However, the author has learnt that it depends on the context in which the word "property" is used.

An analysis of the legal concept of "property" followed. From this analysis it became clear that there is no real consensus about the concept of property. Furthermore, it became clear that the recognition of "property" in the private law varied from the constitutional law. The Constitutional Court found that it is practically impossible to define "property".

This discussion was followed by the classification and characteristics of "property". From this analysis it is clear that an individual's assets do not only consist of corporeal property, but includes incorporeal as well as a bundle of rights and interests.

The differentiation of rights in or to "property" followed. The importance of differentiation between a real right and a personal right was discussed. Furthermore, the differentiation led to different theories, of which none was a suitable method. In addition, the South African courts developed their own approach known as the "subtraction from the dominium test".

Furthermore, it became clear that a contingent interest is a mere expectation and that it is not transmissible. The contingent interest will only become transmissible once the interest has vested in the beneficiary. The beneficiary has competence to adiate or repudiate his/her inheritance. Once the beneficiary adiated then only it will vest in the beneficiary. Consequently, the next chapter will discuss the allocation of "property" in a deceased estate.

3 Allocation of “property” in deceased estates

3.1 Introduction

The administration of a deceased estate is a process in which all the “property” held by the deceased on date of death is collected and distributed after the liabilities have been paid.

This administration process is regulated by the *Administration of Estates Act* and the Master of the High Court oversees the entire process. The Act mentions “property” in various sections and these will be mentioned below.

3.2 The word “property” appearing in sections of the Administration of Estates Act

As stated above, the *Administration of Estates Act* regulates the administration process of the estate of a deceased person. Section 7 provides that relatives and or friends³⁵² should report the estate of the deceased person who died within the Republic leaving any “property” or any document purporting a will within 14 days to the Master of the High Court.

Section 9 of the *Administration Act* provides that, if any person dies within the Republic or an ordinarily resident dies outside the Republic, leaving any property, the nearest relative shall within fourteen days after date of death compile an inventory and submit same to the master.

Both the aforesaid sections focus on the property which belonged to the deceased at date of death.

Section 27(1) refers to the inventory to be compiled by the executor. Upon receipt of the letters of executorship, the executor has to compile an inventory of all the property in

³⁵² Surviving spouse or the person who had control of the premises at which the death occurred; also see section 7(1)(a)-(b) of the *Administration of Estates Act*.

the estate. One will note that the legislator moved property that belonged to the deceased to property that belonged to the estate.

Furthermore, in section 35(3) the legislator refers to an interim account reflecting all the debts as well as all the "property" still unrealised, with a reason as to why the debt and or unrealised "property" has not been collected as yet.

Section 43(1) refers to movable property due to minor children as per the liquidation and distribution account. And finally, section 44(1) deals with movable property to which an unborn or minor child is entitled to subject to a *usufruct*, fiduciary or any other like interest.

It is clear from the aforementioned that the term "property" continues to appear throughout the *Administration of Estates Act*, which means property plays an important role when it comes to the administration process of a deceased estate. The administration process not only deal with collecting the assets, but it deals with the distribution of the deceased person's assets. The administration process, including the inventory and liquidation account, will be briefly discussed to point out the importance of what constitute movable property in a deceased estate.

3.3 Administration process

The administration process of a deceased estate can become a complicated process.

According to Victor and King,³⁵³ the administration process fulfils a deceased person's liabilities, while at the same time transferring the deceased person's available property to the nominated beneficiaries by way of testate or intestate succession. De Waal and Schoeman-Malan³⁵⁴ had a similar approach by stating that the administration process is a process by which the deceased person's liabilities are being settled and the residue is awarded and transferred to the beneficiaries, either by way of the last will and testament or by way of intestate succession.

³⁵³ Victor and King *Law and Estate Planning* 256

³⁵⁴ De Waal and Schoeman-Malan *Law of Succession* 238.

In *Lockhat's Estate v North British and Mercantile Insurance*³⁵⁵ the court held that it was the executor's duty to obtain possession of the property the deceased person held, including rights of action. The court further held that it was the executor's duty to realise such property as may be necessary to settle the debt and to distribute the residue.³⁵⁶

The administration process starts upon the receipt of the appointment letter.³⁵⁷ As soon as the appointment letter has been issued, the deceased estate vests in the executor.³⁵⁸ In addition, section 26(1) of the *Administration of Estates Act* states that, immediately after the letters of executorship has been issued, the executor(s) shall take full custody or control of all the property, books and documents. It appears that the *Administration of Estates Act* separates books and documents from "property", which in itself create confusion.

Davis, Beneke and Jooste³⁵⁹ analysed section 26(1) and submitted that the phrase "an executor shall take into his custody or under his control all the property, books and documents ..." meant that the executor must take possession of all the property of the deceased person.³⁶⁰ The *Lockhat* case confirmed this view by stating that the executor's duty is "to obtain possession of the estate assets of the deceased ..."³⁶¹

³⁵⁵ 1959 3 SA 295 (hereinafter *Lockhat's case*) 302.

³⁵⁶ *Lockhat case* 302.

³⁵⁷ Letters of executorship or the letter of authority; also see section 18(3) and section 13 of the *Administration of Estates Act*.

³⁵⁸ Section 14 of the *Administration of Estates Act*; Also see Meyerowitz *Administration of Estates and Their Taxation* 12-24.

³⁵⁹ Davis, Beneke and Jooste *Estate Planning* 4-4.

³⁶⁰ Davis, Beneke and Jooste *Estate Planning* 4-4.

³⁶¹ *Lockhat case* 302.

3.4 Inventory

The *Administration of Estates Act* makes provision for two inventories, namely the preliminary inventory³⁶² and the executor's inventory.³⁶³ An inventory is a legal list reflecting all the property held by the deceased prior to death³⁶⁴ as well as by the estate after date of death.³⁶⁵ In addition, the *Administration of Estates Act* provides that, if anyone intentionally makes a false inventory, he or she is guilty of an offence and liable on conviction to a fine or imprisonment.³⁶⁶

As mentioned above,³⁶⁷ section 9³⁶⁸ stipulates that an inventory should be submitted within a period of fourteen days after death. The relatives or family members, therefore, have to specify the "property" that the deceased held at date of death within this period. In the case of immovable property, it is simple to make this inventory as the *Administration of Estates Act* provides a thorough definition of immovable property.³⁶⁹ However, the *Administration of Estates Act* does not contain a definition for movable property, resulting in problems when it comes to the classification of movable property and the making of the inventory.

The author will focus on the inventory, seeing that the inventory is the first form to be submitted to the Master reflecting the "property" of the deceased person. The inventory is divided into three groups, namely immovable property, movable property and claims in favour of the estate. Each of these sections will be discussed below.

³⁶² Section 9(1)(a) of *the Administration of Estates Act*. In practice, values are inserted in the preliminary inventory although the *Administration of Estates Act* does not require same to be inserted. Property with a face value such as bank accounts, fixed deposits, etc. may be included, but there is no obligation to insert the value of the movable and immovable property. In other words, on the preliminary inventory estimated values will suffice.

³⁶³ Section 27(1)(a) of *the Administration of Estates Act*. The executor's inventory should be submitted to the master within 30 days after the letters of executorship has been issued. Subsequently, the executor should submit an amended inventory whenever he comes to know of property in the estate. If the Master has reason to believe that the property has been deflated or inflated, he may, at the estate's expense, order that the property be appraised.

³⁶⁴ Section 9(1) of the *Administration of Estates Act*.

³⁶⁵ Section 27(1) of the *Administration of Estates Act*.

³⁶⁶ Section 102(1)(b) of *the Administration of Estates Act*.

³⁶⁷ See section 3.2 of this study.

³⁶⁸ Section 9(1) of the *Administration of Estates Act*.

³⁶⁹ As previously mention, s 1 of *the Administration of Estates Act* defines "immovable property" as land and every real right in land or minerals which is registrable in any office in the Republic.

3.4.1 Immovable property

If one thinks of immovable property, the first thing that comes to mind is a piece of land. However, section 1 of the *Administration of Estates Act* defines “immovable property” as land and every real right in land or minerals which is registrable in any office in the Republic. Considering the latter, two separate rights are mentioned in the *Administration of Estates Act*, namely the right of ownership and the right of use.

Furthermore, section 9(3) of the *Administration of Estates Act* states that, whoever completes the inventory, shall include all immovable property registered in the name of the deceased. It goes further by stating that the applicant shall complete any interest the deceased held in such property at date of death.³⁷⁰

In light of the above, it is clear that estate “property” can be classified as immovable if it can be defined as land or a real right in land or minerals that is registrable in the deeds registry.

With regard to a piece of land, a short description, normally taken from the title deed or a rates and taxes account, should be inserted under the immovable property section. The short description will include the extent (i.e. size) of the property and deeds office number, as well as the date of the title deed.³⁷¹ If, however, the individual completing the inventory does not have the title deed at hand, the property can be identified by its name or street number. In the event where the deceased held an undivided share, the undivided share should also be noted on the inventory.³⁷²

It is, however, important to remember that the first inventory is only preliminary and should be amended as soon as the executor has been appointed.³⁷³ In practice the amended inventory is normally submitted with the first and final liquidation and distribution account.

³⁷⁰ Section 9 of the *Administration of Estates Act*.

³⁷¹ Meyerowitz *Administration of Estates and Their Taxation* 6–2.

³⁷² Meyerowitz *Administration of Estates and Their Taxation* 6–2.

³⁷³ Section 27(1) of the *Administration of Estates Act*.

3.4.2 Movable property

The most important classification of property is between movable and immovable property. One would think that movable property should be self-explanatory; yet it appears not to be the case and that even the courts find it difficult to classify, especially when incorporeal property is involved.³⁷⁴

In the *Cavanage* case, as well as in *Pietermaritzburg Corporation v South African Breweries*,³⁷⁵ the court found that a liquor licence does not form part of immovable property and will thus be regarded as movable property. In *De Chazal de Charmarel's Estate v Tongaat Group Ltd*,³⁷⁶ on the other hand, the court ruled that sugar cane quotas are immovable property, as it is allotted to the immovable property. In *Samuel v Pagadia and others*,³⁷⁷ the court, however, ruled that the sugar cane quota does not constitute a *jus in rem* and should accordingly be classified as movable property.³⁷⁸ However, this movable property cannot exist without the consideration of the land and are therefore regarded as an incorporeal thing.

The classification of incorporeal as either movable or immovable property has been criticised as being irrational, as incorporeal cannot be moved.³⁷⁹ Unfortunately, as stated above, the *Administration of Estates Act* does not define "movable property", and as a result one has to refer to the definition of "property". The fact that there is no definition for "movable property", as well as the short and sweet definition of "property" creates problems when it comes to the classification of incorporeal things.

In *National Bargaining Council for the Road Freight and Logistics Industry/Meondo Trading 222 CC*,³⁸⁰ the court held that the Cambridge Dictionary³⁸¹ defines "movable property" as personal property that one can take with one, excluding land. The court

³⁷⁴ Mcpherson *An enquiry into the accommodation of rights and permits to minerals awarded in terms of the Mineral and Petroleum Resources Development Act 28 of 2002, in the administration of a deceased estate* 6; also see Silberberg and Schoeman's *et al The Law of Property* 43.

³⁷⁵ 1911 AD 501 (hereinafter *Pietermaritzburg* case).

³⁷⁶ 1972 1 SA 710 (D) (hereinafter *Charmarel's* case).

³⁷⁷ [1963] 3 All SA 214 (D) (*Pagadia* case).

³⁷⁸ Silberberg and Schoeman's *et al The Law of Property* 43.

³⁷⁹ Silberberg and Schoeman's *et al The Law of Property* 43.

³⁸⁰ (2020) 2 BALR 185 (CCMA) (hereinafter the *National Bargaining* case).

³⁸¹ Cambridge <https://dictionary.cambridge.org/dictionary/english/movable-property>.

further stated that movable property therefore must be property capable of ownership. On the other hand, the *Insolvency Act*³⁸² defines “movable property” as every kind of property, right and/or interest which is not immovable property.

According to Meyerowitz,³⁸³ movable property includes all corporeal movables, such as household items, furniture, vehicles, clothes, jewellery, stocks (basically anything that is not classified as immovable), as well as incorporeal movables.³⁸⁴

In addition, the cash found in the possession of the deceased falls under movables, while the cash in the bank falls under claims in favour of the estate, which brings us to the last section of the inventory.

3.4.3 Claims in favour of the estate

According to Meyerowitz,³⁸⁵ a claim in favour of the estate is all the claims the deceased had against other people. Kernick³⁸⁶ concurred with Meyerowitz and provided examples of claims in favour of the estate, which include bank accounts, fixed deposits, saving accounts and insurance policies.³⁸⁷

In the event of a partnership of which the deceased was a member, all movable property will be reflected in the claims in favour of the estate section, while the immovable property will be reflected in the immovable property section.

³⁸² Section 1 of the *Insolvency Act* 24 of 1936.

³⁸³ Meyerowitz *Administration of Estates and Their Taxation* 6–5.

³⁸⁴ Meyerowitz *Administration of Estates and Their Taxation* 6–5.

³⁸⁵ Meyerowitz *Administration of Estates and Their Taxation* 6–7.

³⁸⁶ Kernick *Administration of Estates and the Drafting of Wills* 14; also see McPherson *An enquiry into the accommodation of rights and permits to minerals awarded in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 in the administration of a deceased estate* 5.

³⁸⁷ Meyerowitz *Administration of Estates and Their Taxation* 6–7.

3.5 Final liquidation and distribution account

The liquidation and distribution account (hereafter the L&D account)³⁸⁸ is the final account to be submitted to the Master. The liquidation and distribution account is divided into eight parts, namely assets, liabilities, recapitulation statement, distribution account, income after death, fiduciary assets, estate duty schedule and the executor's certificate. In terms of *Regulation 5*,³⁸⁹ the liquidation and distribution account shall be specified under subheadings. For the purpose of this thesis a brief overview of immovable property will be discussed followed by a discussion of movables and claims in favour of the estate.

3.5.1 "Property" forming part of the estate

3.5.1.1 Immovable property

In terms of *Regulation 5(c)(i)*, immovable property forming part of the estate should be described in accordance with the title deed, which includes the title deed number, as well as the date on the title deed.³⁹⁰ In the event of an amended description to the title deed, such amended description should also be reflected.

Furthermore, the account should reflect how the immovable property will be dealt with, in other words, whether it will be sold or transferred. In the event where the immovable property was sold prior to death, but not yet transferred to the new owners, the immovable property will be accounted for in the L&D account. However, it is important to note that the estate will have a claim against the purchaser, while the purchaser, on the other hand, will have a claim against the estate.³⁹¹

In addition, where the deceased sold the property under instalments, the same will apply as mentioned above. The only difference is that the purchaser will be under no obligation

³⁸⁸ There might be estates where the heading cannot state First and Final Liquidation account. The First Liquidation account, is an interim account only reflecting part of the estate. Another type of account is the First Supplementary Account which reflects another set of property that was discovered after the First account had been submitted. In addition, the Amended Account is a substitution to the previous First and Final account. For further reading see Bouwer *Die Beredderingsproses van Bestorwe Boedels* 481; also see Wiechers and Vorster *Administration of Estates* 10-5.

³⁸⁹ Administration of Estates: Regulations published under GN 473 in GG of 24 March 1972.

³⁹⁰ Meyerowitz *Administration of Estates and Their Taxation* 15-10; also see Botha *et al South African Financial Planning Handbook* 872.

³⁹¹ Meyerowitz *Administration of Estates and Their Taxation* 15-10.

to hasten the instalments, unless the agreement made provision that the account should be settled upon death.³⁹²

Furthermore, where the deceased owned a property over which a *usufruct* was registered, the property should reflect in the liquidation and distribution account minus the value of the interest calculated according to the *usufruct* valuation method.

3.5.1.2 Movables

People accumulate a variety of “property” during their lifetime.³⁹³ All of the “property” collected form part of the individual’s estate. Due to modern society and the constant change in different kinds of “property”,³⁹⁴ it would be impossible to address all the different types of “property” that may be included in a deceased estate. For this reason, the author will concentrate on “property” of an ordinary individual who attempts to provide for him/herself.³⁹⁵

3.5.1.2.1 Household contents

Household contents of an average person normally consist of furniture, paintings, jewellery, etc. When it comes to the value of these items, there are many factors to take into consideration³⁹⁶ and executors often make the mistake of just placing an estimated value, or even a nil value, on such items in the L&D account.

However, some furniture and art pieces (for example) could be worth a substantial amount. For this reason, it is advisable to obtain a valuation, especially if the deceased person was an art collector and/or a collector of antique furniture. Each deceased estate is unique in its own way. In other words, circumstances will dictate whether it would be necessary to obtain a valuation, or not.³⁹⁷ In an average estate, the Master may allow discretionary proof in the form of independent valuations. In most of the “average”

³⁹² Meyerowitz *Administration of Estates and Their Taxation* 15-10.

³⁹³ Wiechers and Vorster *Administration of Estates* 7-3.

³⁹⁴ Refer to sections 2.4 and 2.5 above.

³⁹⁵ Wiechers and Vorster *Administration of Estates* 7-3.

³⁹⁶ This is a consideration especially when dealing with for instance antique furniture. By “many factors” the author means one needs to establish whether the deceased person was an antique collector, what the age of the pieces is and whether it has international value.

³⁹⁷ Wiechers and Vorster *Administration of Estates* 7-7.

estates, the furniture may not even have a value due to depreciation and due to the fact that it is "worthless" second-hand furniture. Art pieces can also be perceived to be "worthless". However, there may (for instance) be an original Jumali Fresco Tempuro painting worth R1 211 497,41 in the deceased estate.³⁹⁸

Jewellery is another movable property that may often be left out of the estate due to the perception that it has no value. The reason for leaving out these types of movable property is that it would harm no-one.³⁹⁹ This statement could, however, not be further from the truth. People often invest in jewellery to overcome inflation. For example, Mr Poggenpoel, an "average" person inherited R800 000 from his grandmother. He decided to buy a few pieces of Cartier jewellery,⁴⁰⁰ instead of investing the money. When he drew up his will, he forgot to mention that he had pieces of Cartier jewellery. Mr Poggenpoel's estate appears to be "average" to the executor. As a result, valuable pieces were not valued and did not reflect in the L&D account, as the executor was not aware of the value of the pieces.

Clearly, such "property" must be accounted for in the L&D account, as concealment could lead to prejudice.⁴⁰¹ In many cases, the omission of "property" such as jewellery leads to family feuds. Beneficiaries may be resentful and appalled by the recipients of the jewellery. Innocent omissions may have ramifications. Therefore, if the jewellery is not sold, it must be valued by a competent person, such as a jeweller or an art dealer.⁴⁰² Before deciding how to deal with "property" such as jewellery, the feelings of the family should be taken into account.

³⁹⁸ JAMALI *Large Original Fresco Tempera Painting Abstract Portrait Signed Artwork* / eBay.

³⁹⁹ Wiechers and Vorster *Administration of Estates* 7-7.

⁴⁰⁰ Cartier jewellery appreciates over time. This type of jewellery is combined with a brand name and high-quality craftsmanship. Meaning a Cartier piece can be more valuable in the future; also see The Loupe 2015 <https://www.truefacet.com/guide/jewelry-pays/>.

⁴⁰¹ Meyerowitz *Administration of Estates and Their Taxation* 15-16; also see Wiechers and Vorster *Administration of Estates* 7-7.

⁴⁰² Meyerowitz *Administration of Estates and Their Taxation* 15-16.

3.5.1.2.2 Motor vehicles

Motor vehicles are entered in the L&D account with a brief description of the vehicle. Normally the registration number, the year and the model will be reflected in the L&D account.

If the motor vehicle was sold by the deceased person during his lifetime, but for one or another reason is still registered in the deceased person's name, the "property" must be accounted for in the L&D account.⁴⁰³

Furthermore, if a couple is married out of community of property, the motor vehicle will only form part of the deceased estate if it was registered in the deceased person's name.⁴⁰⁴

3.5.1.2.3 Cattle and other animals

In the case of a deceased farmer's estate, all the animals will need to be adequately described, including the quantity of each group.⁴⁰⁵ This means that the number of cattle, goats or other animals has to be adequately described in the L&D account. In the event where the animals were sold by the executor, the gross sale price would be reflected in the L&D account and the cost price would reflect under liabilities in the L&D account.⁴⁰⁶

In the event that the animals were not sold, a sworn valuation will have to be presented to the Master, especially where the estate is big enough for estate duty and capital gains tax to be applicable.⁴⁰⁷

⁴⁰³ Meyerowitz *Administration of Estates and Their Taxation* 15-14.

⁴⁰⁴ Wiechers and Vorster *Administration of Estates* 7-7.

⁴⁰⁵ Stiglingh SILKE: *South African Income Tax* 872; also see Wiechers and Vorster *Administration of Estates* 7-7.

⁴⁰⁶ Meyerowitz *Administration of Estates and Their Taxation* 15-16.

⁴⁰⁷ Wiechers and Vorster *Administration of Estates* 7-7; also see Meyerowitz *Administration of Estates and Their Taxation* 15-16.

3.5.1.2.4 Salary and leave pay

Upon the death of an employee, his or her salary does not just fall away. The employer will issue the final payslip to the executor, reflecting the last salary as well as any accumulated leave pay.⁴⁰⁸

Furthermore, the employer will issue an IRP5 or an IT3A certificate reflecting the amount earned prior to death. The IRP5 or IT3A is an important document, as all the income earned prior to the deceased's death will be taxable as part of the deceased estate.⁴⁰⁹

3.5.1.2.5 Insurance policies

A life insurance policy is a contract between the insurance company and the insured.⁴¹⁰ Upon the insured's death, a lump-sum payment will be paid either to the nominated beneficiary/beneficiaries or the deceased estate. There are various factors to take into consideration when determining whether a life policy forms part of a deceased estate.⁴¹¹ Whether an insurance policy forms part of the estate will all depend on whether there is a nominated beneficiary. In the event where the policy is payable to the deceased and the policy was on his life, the full proceeds of the policy will form part of the estate and will reflect in the L&D account.⁴¹²

In addition, in the case of policies ceded as security for a loan, the full amount of the policy will reflect in the L&D account and the loan will reflect as a liability.⁴¹³ The reason for this is that the policy itself is still "property" in the estate and the creditors' claims must be accepted by the executor.⁴¹⁴

⁴⁰⁸ Meyerowitz *Administration of Estates and Their Taxation* 15-16.

⁴⁰⁹ Stiglingh *SILKE: South African Income Tax* 968; also see ss 1, 6(2)(b), 6(4) of the *ITA*.

⁴¹⁰ Botes and Kloppers 2018 *African Journal of International and Comparative Law* 130.

⁴¹¹ Anon 2021 <https://www.fidelity.com/life-insurance/life-insurance-planning/what-is-life-insurance>.

⁴¹² Meyerowitz *Administration of Estates and Their Taxation* 15-16.

⁴¹³ Meyerowitz *Administration of Estates and Their Taxation* 15-16.

⁴¹⁴ The cession merely gives the creditor a preference claim; also see *Rixom v Mashonaland Building Loan & Agency Co Ltd* 1938 SR 207; *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235, *Bank of Lisbon and SA Ltd v The Master* 1987 1 SA 276 (A); *Retmil Financial Services (Pty) Ltd v Sanlam Life Insurance Company Ltd and Others* 2013 3 All SA 337 (WCC).

In *PPS Insurance Company Ltd and Others v Mkhabela*,⁴¹⁵ Ms Sebata was the owner of a life policy. She nominated her mother as the beneficiary of the policy. Furthermore, the policy made provision to change or cancel the nomination at any time. On 26 May 2007, the mother passed away. Subsequently, Ms Sebata died on 12 August 2007, without nominating another beneficiary.⁴¹⁶ The executor of the mother's estate claimed the proceeds of the policy. The court of first instance dismissed the claim and directed that the proceeds should be paid to Ms Sebata's estate.⁴¹⁷ The learned judge held that the nomination ceased to exist the moment Ms Mkhabela died. Consequently, the policy vested in Ms Sebata's estate.

The full court held a different view. It held that, upon the acceptance of nomination as a beneficiary, a binding agreement came into effect. Furthermore, the court held that the executor of Ms Mkhabela's estate was entitled to accept the benefit of the policy.⁴¹⁸ While the Supreme Court of Appeal⁴¹⁹ agreed with the full court, it held that it had erred in considering that the beneficiary's acceptance had some legal significance. Consequently, the SCA found that Ms Mkhabela's estate had no claim to the proceeds of the policy and that the proceeds should pass to the policy holder's estate.

Where a policy on the life of the deceased has been taken out to settle a debt and the terms of the policy indicate that the policy is not merely in *securitatem debiti*, the policy is not "property" in the estate of the deceased and will not be reflected in the FLD account.⁴²⁰

In *Naidoo v Discovery Life Limited & Others*⁴²¹ the facts of the case were that the couple were married in community of property. The deceased applied for a joint life assurance policy with Discovery Life Limited. Mrs Naidoo was the nominated beneficiary. The policy provided for a change of beneficiaries, but it also provided that the nominated

⁴¹⁵ 2012 3 SA 292 (SCA) 191 (hereinafter the *PPS* case).

⁴¹⁶ *PPS* case par 2.

⁴¹⁷ *PPS* case par 3.

⁴¹⁸ *PPS* case par 4.

⁴¹⁹ Hereinafter the SCA.

⁴²⁰ Meyerowitz *Administration of Estates and Their Taxation* 15-18; also see *Flint v Die Meester* 1978 3 SA 1079 (O); *Grobler v Oosthuizen* 2009 5 SA 500 (SCA).

⁴²¹ 202/2017 ZASCA 88 (hereinafter the *Naidoo* case).

beneficiaries were not entitled to any benefits during the lifetime of the principle insured life (which in this case was the deceased).⁴²²

In short, the policy had no monetary value until date of death. In October 2011 the deceased requested a change of beneficiaries in writing. The beneficiaries were changed from his wife to his parents, brother, and sister.⁴²³ At date of death, the nominated beneficiaries accepted the benefits of the policy,⁴²⁴ and the proceeds were subsequently paid out to them. The issue with the above was that the couple was married in community of property.⁴²⁵

Section 11(1) of the *Matrimonial Property Act*⁴²⁶ repealed the common law marital power that included the right of a husband to alienate assets forming part of the joint estate to prejudice the wife.⁴²⁷ Equal powers of the spouses were introduced by section 14 of the *MPA*,⁴²⁸ subject to mutual consent for the alienation of assets in the joint estate in terms of section 15(2)(a) of the *MPA*.⁴²⁹ This includes insurance policies.

It is argued that transactions where spousal consent is required, should not be interpreted in isolation, but it should be viewed holistically.⁴³⁰

The issue at hand is whether the insurance policy was part of the joint estate. Taking the facts of the *Naidoo* case into consideration, the proceeds were paid when Mr Naidoo passed away, meaning it was a risk-only policy. A risk-only policy only pays out at date of death.⁴³¹ The rights of a policy holder will depend on the policy itself. The only rights

⁴²² *Naidoo* case par 3.

⁴²³ *Naidoo* case par 5.

⁴²⁴ *Naidoo* case par 6.

⁴²⁵ Section 15(2)(c) of the *MPA* states that a spouse shall not without written consent from the other spouse "Alienate, cede or pledge any shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or any similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate..."

⁴²⁶ Hereinafter the *MPA*.

⁴²⁷ Veldsman and Ker *De Rebus* 2018 <http://www.derebus.org.za/joint-estates-clarification-on-the-alienation-of-assets/>.

⁴²⁸ Section 14 of the *MPA*.

⁴²⁹ Veldsman and Ker 2018 <http://www.derebus.org.za/joint-estates-clarification-on-the-alienation-of-assets/>.

⁴³⁰ Ngele 2018 [https://www.hoganlovells.com/en/publications/what-is-yours-is-mine-and-what-is-mine-is-mine#:~:text=In%20Naidoo%20v%20Discovery%20Life,Property%20Act%2C1984%20\(MPA\)](https://www.hoganlovells.com/en/publications/what-is-yours-is-mine-and-what-is-mine-is-mine#:~:text=In%20Naidoo%20v%20Discovery%20Life,Property%20Act%2C1984%20(MPA).).

⁴³¹ *Naidoo* case par 10.

the insured had was to nominate beneficiaries, change nominated beneficiaries, cede the policy or terminate the policy.⁴³²

3.5.1.2.6 Goodwill

Goodwill is also regarded as “property”. Goodwill has been described as “the totality of attributes that lure or entice clients or potential clients to support a particular business.”⁴³³ In the event where a business is sold, it will be included as “property” and will be reflected in the sale price.⁴³⁴ If, however, the business is awarded to heirs or legatee, it will have to be assessed by a chartered accountant. The chartered accountant will calculate the goodwill and issue a letter stating the goodwill’s worth. Such valuation should indicate the basis on which the valuation is made.

3.5.1.2.7 Firearms

Firearms are one of the “properties” that will form part of a deceased estate. However, due to a myriad of legislative provisions regulating firearms, it is not “property” that can easily be dealt with and simply transferred to heirs or legatees. When dealing with firearms, the executor will have to request a competency certificate from the heir or legatee in terms of the relevant legislation.⁴³⁵ The executor of an estate should have sound knowledge of the *Firearms Control Act*⁴³⁶ and its regulations. Regulation 103 deals with the disposal of a firearm in deceased estates.⁴³⁷

3.5.1.2.8 Shares and stock

Stocks and shares should be sufficiently identified. One should be able to differentiate between listed and unlisted shares.⁴³⁸ Normally the accountant will calculate the total value of the shares, and that value will be included in the L&D account.

⁴³² Nagan 2018 https://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2018/Legal_Update_12-2018_Case_law_update_fund_matters-Sept2018.pdf.

⁴³³ *Moroka Swallows Football Club Ltd v The Birds Football Club* 1987 2 SA 511 (W) 519.

⁴³⁴ Meyerowitz *Administration of Estates and Their Taxation* 15-21.

⁴³⁵ See s 9 of the *Firearms Control Act* 60 of 2000.

⁴³⁶ 60 of 2000.

⁴³⁷ Regulation 2004 No. R. 2004 *Firearms Control Act*, 2000

⁴³⁸ Wiechers and Vorster *Administration of Estates* 7-7; also see Meyerowitz *Administration of Estates and Their Taxation* 15-14.

3.5.1.3 Claims in favour of the estate

As mentioned above,⁴³⁹ cash found in the possession of the deceased will fall under movable “property”, whereas cash in a bank account will fall under claims in favour of the estate.

Fixed deposits will fall under claims in favour of the estate. In the event of a cash shortfall, it may be necessary to cash such an investment before the maturity date. Penalties may be raised by the specific bank where the fixed deposit was held.⁴⁴⁰

It is also important to remember that, when dealing with bank accounts, only the portion up to date of death will be reflected under the claims in favour of the estate. The interest earned after date of death will form part of the income and expenditure account.⁴⁴¹

3.6 Impact of incorrect allocations

Allocating and classifying “property” in a deceased estate can become problematic considering the fact that movable “property” is not defined in the *Administration of Estates Act*. It is the executor’s⁴⁴² duty to collect all the “property” the deceased held at time of death.⁴⁴³

Furthermore, as pointed out above, it is the executor’s duty to establish the liquidity in the estate.⁴⁴⁴ In other words, it is the executor’s duty to obtain possession of the “property”, settle the liabilities and establish what the residue to be distributed between the nominated beneficiaries, is. The problems arise where the executor is uncertain as to how the “property” should be allocated. These uncertainties may result to incorrect allocations which could have detrimental consequences.

⁴³⁹ See section 4.2.2 of this study.

⁴⁴⁰ Wiechers and Vorster *Administration of Estates* 7-15.

⁴⁴¹ Wiechers and Vorster *Administration of Estates* 7-15.

⁴⁴² The executor is the nominated person dealing with the estate; Also see section 14(1) of *the Administration of Estates Act*.

⁴⁴³ Section 26 of the *Administration of Estates Act*.

⁴⁴⁴ See section 3.2 of this study.

In order to illustrate the potential impact incorrect allocations may have on a deceased estate and its beneficiaries, the author will look at a few examples.

3.6.1 *Types of marriages and marital regimes*

There are various forms of marriages in South-African law, such as customary marriages, Hindu or Islamic marriages, civil unions and civil marriages. These various forms also have multiple forms of marital regimes and each form of marital regime has a different effect on the estate of an individual.⁴⁴⁵

Since the author is only trying to point out potential impacts on incorrect allocations, only civil marriages will be discussed.

3.6.1.1 Civil marriage

A marriage entered into in terms of the *MPA*⁴⁴⁶ is called a civil marriage. There are three types of marital regimes in civil marriages and each will be discussed separately.⁴⁴⁷

3.6.1.1.1 Married out of community of property without the accrual system

An ante-nuptial contract is concluded to exclude community of property and profit and loss, and the accrual system (see below) is not included. Each spouse will have full right of disposal over their own property. This is also known as “what is yours, is yours and what’s mine is mine” regime.⁴⁴⁸

The spouses are not limited in dealing with their own property, provided they do not prejudice the other spouse.⁴⁴⁹

⁴⁴⁵ Joubert 2015 https://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2015/Legal_Update_5-2015_Different_marital_regimes_and_the_impact_on_retirement_funds_March2015.pdf.

⁴⁴⁶ A Civil Union may have the same consequences but for these purposes will not be discussed.

⁴⁴⁷ Joubert 2015 https://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2015/Legal_Update_5-2015_Different_marital_regimes_and_the_impact_on_retirement_funds_March2015.pdf.

⁴⁴⁸ Joubert 2015 https://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2015/Legal_Update_5-2015_Different_marital_regimes_and_the_impact_on_retirement_funds_March2015.pdf.

⁴⁴⁹ Bregman 2014 <https://www.bregmans.co.za/marriage-out-of-community-of-property-with-the-accrualsystem/#:~:text=The%20accrual%20system%20is%20a,conducive%20to%20harmonious%20marriage%20relationship.&text=It%20offers%20protection%20during%20the,spouse%20has%20an%20equal%20share.>

Section 4 of the *MPA* states that the accrual of the estate of a spouse is the amount by which the net value of their estate at the dissolution of the marriage (either by way of a divorce or by death) exceeds the net value of their estate at commencement of the marriage. Even though the *MPA* does not define the net value of the estate, certain assets are excluded from the accrual, namely inheritance, donations or legacies accrued to a spouse during the subsistence of the marriage.⁴⁵⁰ If, however, the couple agreed in their ante-nuptial contract that such accruals will form part of their estates, then it will be included.⁴⁵¹

Section 4(ii) of the *MPA* provides that an asset that has been excluded in terms of the accrual system will not form part of the estate. If the life policy was specifically excluded in the ante-nuptial contract, it will accordingly not form part of an estate or accrual calculations.

3.6.1.1.2 Married out of community of property with accrual

To ensure a fair share of the estate on termination of a marriage, one will conclude a marriage out of community of property but with inclusion of the accrual system. This type of marriage is the most common choice in modern society.⁴⁵² Once such a marriage comes to an end, one needs to determine the separate value of each spouse's estate. The spouse with the larger accrual must compensate the one with the smaller accrual with half of the difference between the two accruals.⁴⁵³

In other words, the accrual is only calculated upon the dissolution of the marriage. Dissolution can either be by way of a divorce or by death. Therefore, the spouses do not acquire a real right in each other's property prior to dissolution. The spouse with the smallest accrual will only have a contingent interest in terms of the accrual.⁴⁵⁴ For the accrual to become vested, the marriage must be dissolved.

⁴⁵⁰ Section 5(1) of the *MPA*; Also see Meyerowitz *Administration of Estates and Their Taxation* 15-48.

⁴⁵¹ Meyerowitz *Administration of Estates and Their Taxation* 15-48.

⁴⁵² Joubert 2015 https://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2015/Legal_Update_5-2015_Different_marital_regimes_and_the_impact_on_retirement_funds_March2015.pdf.

⁴⁵³ Joubert 2015 https://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2015/Legal_Update_5-2015_Different_marital_regimes_and_the_impact_on_retirement_funds_March2015.pdf.

⁴⁵⁴ Section 3(1) of the *MPA*.

The problem with married out of community of property (whether it is with or without the accrual) is where the couple purchased a property together. The property will be registered in both their names. Should one of the spouses pass away, only half of the property will be reflected in the L&D account.

To point out the impact of incorrect allocation, an example will be used. Johan and Sarah are married out of community of property. They bought a house to the value of R5 000 000,00 together. In the event of death, only half of the value should be included in the L&D account. The executor's fee on R2 500 000 will amount to R87 500,⁴⁵⁵ excluding VAT. The Master's fee⁴⁵⁶ will be R4 800.⁴⁵⁷ Should the executor, however, mistakenly include the full value of the property, the executor's fee will be inflated by double the amount. The Master's fee will be capped at R7 000.⁴⁵⁸ Due to a small technical error like this the estate's value will be inflated by R89 700 in total.⁴⁵⁹

It can be argued that the Master examines the account⁴⁶⁰ and that a small technical error like this will not slip through. It may be the case, but one needs to bear in mind that the clerk at the Master of the High Court is only human and one of these technical errors may slip through.

3.6.1.2 Married in community of property

When this regime applies, the separate estates of the parties become one estate. All the assets and liabilities before and after marriage form part of the joint estate. Each spouse consequently owns an undivided share in the joint estate.⁴⁶¹

⁴⁵⁵ The current prescribed executors fee is 3.5% excluding vat. See in this regard s 51 of the *Administration of Estates Act*. $R2\ 500\ 000 \times 3.5\% = R87\ 500$.

⁴⁵⁶ Bezuidenhout 2017 https://www.justice.gov.za/master/m_docs/2017-03_CHM-directive.pdf.

⁴⁵⁷ First R400 000 is R600, and for each completed R100 000 which exceed the R400 000 is a further R200. See in this regard Bezuidenhout 2017 https://www.justice.gov.za/master/m_docs/2017-03_CHM-directive.pdf. Maximum is R7 000; $(R2\ 500\ 000 - R400\ 000) / R100\ 000 = 21$, $21 \times R200 = R4\ 200$, $R4\ 200 + R600 = R4\ 800$.

⁴⁵⁸ Bezuidenhout 2017 https://www.justice.gov.za/master/m_docs/2017-03_CHM-directive.pdf. Maximum is R7 000.

⁴⁵⁹ $R87\ 500$ (extra executors fee) + $R2\ 200$ (extra Master fees) = $R89\ 700$.

⁴⁶⁰ Section 35(4) of the *Administration of Estates Act*.

⁴⁶¹ Joubert 2015 https://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2015/Legal_Update_5-2015_Different_marital_regimes_and_the_impact_on_retirement_funds_March2015.pdf.

Should one of the spouses pass away, the entire joint estate will be administered. All the assets and liabilities will reflect in the L&D account. The executor's fee and Master's fees will be calculated on the total value of the assets in the estate. Before distribution, half of the estate will be deducted in terms of the *MPA*.⁴⁶²

An example will again be used to point out the impact of incorrect allocation. Mark and Mandy were married in community of property. Their joint estate amounted to R5 million. The joint estate consisted of immovable property of R3 500 000 (registered in Mark's name, as he purchased the property before the couple got married), Mandy's vehicle to the value of R300 000, Mark's vehicle to the value of R500 000, house content to the value of R700 000 (Mandy only contributed R100 000 towards the house contents). Mandy passed away and bequeathed all her assets to her mother.

Should only Mandy's assets be included in the L&D, the total value of the estate would be R400 000. The executor's fee on the R400 000 would amount to R14 000,⁴⁶³ excluding VAT, and the Master's fees would be R600.⁴⁶⁴ No estate duty or capital gains tax would be applicable.

In actual fact, however, the full value of the joint estate should be included in the L&D. In other words, the total assets would amount to R5 million. The executor's fee on the R5 million would be R175 000, excluding VAT, and the Master's fees would amount to R7 000. Capital gains tax and estate duty would depend on the bequest.

The general rule when it comes to spouses married in community of property, is prohibiting a spouse married in community of property to alienate an asset in the joint estate without the written consent of the other spouse. However, when it comes to a life policy with a nominated beneficiary there is an exception to the general rule.⁴⁶⁵ A life

⁴⁶² Section 15 of the *MPA*.

⁴⁶³ R400 000 x 3.5% = R14 000.

⁴⁶⁴ Chief Master Directive 3 of 2017, Increase of Master fees. https://www.justice.gov.za/master/m_docs/2017-03_CHM-directive.pdf, First R400 000 is R600.

⁴⁶⁵ Section 15(2)(c) an exception to the general rule is prohibiting a spouse married in community of property to alienate an asset in the joint estate without the written consent of the other spouse; also see *Naidoo case* par 16. These assets include insurance policies, debentures, shares, stock, mortgage bonds etc.

policy with a nominated beneficiary does not necessarily form part of the joint estate.⁴⁶⁶ In the *Naidoo* case, the court examined the *MPA*,⁴⁶⁷ where a spouse married in community of property may perform legal acts, binding the joint estate without the consent of the other spouse.⁴⁶⁸ The SCA held in the *Naidoo* case, that if the “property” cannot be regarded as forming part of the joint estate, section 15(2)(c) of the *MPA* will not be applicable, and as a result the spouse may deal with the “property” as they please.⁴⁶⁹ In other words, the right of a policy-holder in a risk-only policy is simply a right and will thus not form part of the “property” in the joint estate.

3.6.2 RSA retail bonds

An RSA retail bond is an investment with the South African Government.⁴⁷⁰ These types of investments earn fixed or inflation-linked interest over a period of time.⁴⁷¹

An RSA retail bond gives investors flexibility, as the investor can decide whether traditional bonds are compensating them for inflation risk or not.⁴⁷² These types of bonds were introduced to encourage savings, in other words, the RSA retail bond holder acquires and holds the “property” as an income producing “property”.⁴⁷³

Prior to October 2018, the investor had an option to nominate a beneficiary. Upon death the investment would payout directly to the beneficiary, bypassing the estate.⁴⁷⁴ By the nomination of a beneficiary, confusion was created.

⁴⁶⁶ See the *Naidoo case* in par 3.5.1.2.5 of this study.

⁴⁶⁷ Section 15(1).

⁴⁶⁸ *Naidoo case* par 15.

⁴⁶⁹ *Naidoo case* par 18.

⁴⁷⁰ Botha *et al South African Financial Planning Handbook* 517; also see South African Government date unknown <https://www.gov.za/faq/money-matters/how-do-i-invest-rsa-retail-savings-bonds#:~:text=An%20RSA%20Retail%20Savings%20Bond,Savings%20Bonds%20are%20available%20as%3A&text=Different%20interest%20rates%20apply%20to%20each%20of%20the%20maturities%20in%20the%20series>.

⁴⁷¹ Botha *et al South African Financial Planning Handbook* 517; also see South African Government date unknown <https://www.gov.za/faq/money-matters/how-do-i-invest-rsa-retail-savings-bonds#:~:text=An%20RSA%20Retail%20Savings%20Bond,Savings%20Bonds%20are%20available%20as%3A&text=Different%20interest%20rates%20apply%20to%20each%20of%20the%20maturities%20in%20the%20series>.

⁴⁷² Botha *et al South African Financial Planning Handbook* 51.7

⁴⁷³ Haupt *Notes on South African Income Tax* 45.

⁴⁷⁴ Staff Reporter 2018 <https://www.iol.co.za/personal-finance/savings-bonds-will-no-longer-bypass-your-estate-16653549>.

A beneficiary fund has the express purpose of receiving funds in terms of section 37C of the *Pension Fund Act*⁴⁷⁵ upon the death of a member of retirement funds and managing the administration, investment and payment of these types of funds to beneficiaries.⁴⁷⁶

It was, however, announced that, as from 1 October 2018, there would no longer be the option to nominate a beneficiary and that the proceeds would payout directly into the deceased estate.⁴⁷⁷

According to Gordon,⁴⁷⁸ the nomination of beneficiaries and the proceeds paid out directly to the beneficiaries, were inconsistent with the law of succession, namely the distribution of "property" to a deceased estate. Due to this inconsistency, investments were not included in estates prior to October 2018.

Section 25 of the *ITA* deals with the deceased estate and the beneficiaries.⁴⁷⁹ According to this section, the deceased estate must account for all the income and gains and losses until the L&D becomes final.⁴⁸⁰ Taking into account that the nominated beneficiaries, under a RSA retail bond are paid directly, it is the author's opinion that the nomination of beneficiaries on an investment creates havoc. The executor does not have control of the assets and the assets are not reflected in the L&D account, as the investment pays directly to the beneficiaries. Interest earned after date of death cannot be taxed, as the investment is not reflected in the L&D account. In other words tax could have been evaded in the past due to the nomination to beneficiaries. Not only income tax but estate duty as well.

To reflect the impact, the author will make use of an example. Jane Poggenpoel (33 years old) invested R230 000 in a RSA retail bond. Seven years later Jane passed away. The

⁴⁷⁵ 24 of 1956

⁴⁷⁶ Botha *et al South African Financial Planning Handbook* 918.

⁴⁷⁷ Staff Reporter 2018 <https://www.iol.co.za/personal-finance/savings-bonds-will-no-longer-bypass-your-estate-16653549>.

⁴⁷⁸ Staff Reporter 2018 <https://www.iol.co.za/personal-finance/savings-bonds-will-no-longer-bypass-your-estate-16653549>.

⁴⁷⁹ De Villiers 2017 https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2017Submissions/29_9_2017_SAIT_comments_-_Dr.pdf.

⁴⁸⁰ De Villiers 2017 https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2017Submissions/29_9_2017_SAIT_comments_-_Dr.pdf.

executor enquired regarding the proceeds of the investment. However, he was informed that the investment was paid directly to the beneficiary. In the seven years the investment grew from R230 000 to R500 000. Interest earned in the tax year when Jane passed away, amounted to R47 000. Other than the investment, Jane only had a vehicle to the value of R60 000.

The impact, if the investment is not included, would be as follows:

- The estate would be reported as an 18(3) estate.⁴⁸¹
- When the estate is reported as an 18(3) estate, there will be no Master fees due and no advertisement costs will be paid.⁴⁸² Furthermore, there will be no L&D account.
- There will be little to no executor fee, as an 18(3) estate may be administered by a representative.
- Interest rebate will be R23 800⁴⁸³. In other words, Jane's executor/representative will have to declare the balance between the rebate and the interest earned. However, because it is an 18(3) estate, the Master does not require a set of documents to obtain a filing slip and as a result the executor/representative may neglect to inform SARS of the particular estate, resulting in a loss of revenue for SARS.

If the investment is included in the estate, the impact will be as follows:

- a) The estate value would be above the section 18(3) value of R250 000. As a result, letters of executorship will be issued. A letter of executorship is issued where the estate is above R250 000.

⁴⁸¹ Referring to s 18(3) of the *Administration of Estates Act*, namely an estate with a value R250 000.00. Section 18(3) of the *Administration of Estates Act* states that: "If the value of an estate does not exceed the amount determined by the Minister by notice in the Gazette, the Master may dispense with the appointment of an executor and give directions as to the manner in which any such estate shall be liquidated and distributed."

⁴⁸² Meyerowitz *Administration of Estates and Their Taxation* 9-14.

⁴⁸³ Sars 2021 <https://www.sars.gov.za/Tax-Rates/Income-Tax/Pages/Interest-and-Dividends.aspx>.

- b) In terms of sections 29 and 35 of the *Administration of Estates Act*, advertisements will have to be placed and the costs as mentioned above should be paid.
- c) The executor's fee will be R10 150 and Master's fees of R600 will be due.

The above is just a small impact, as the estate was small. Imagine where there is an estate where the total value of the estate is R7 000 000, and R1 000 000 has been invested with RSA retail bond. Not only would it have an impact on the Master's fees, but the executor's fee, estate duty and possible capital gains tax would be negatively impacted.

In practice, the author has encountered a similar problem. SARS had to do research whether the investment should form part of a specific estate or not. SARS could not respond and stated that they were not sure whether it formed part of the specific estate or not. SARS referred the author to the *EDA* as a guideline. The Master on this specific case was unsure as well and stated that it would not form part of the specific estate, as the executor did not deal with the investment.

The Master's reasoning does not make sense, as a couple married in community of property is calculated on the full value of both spouses. The executor does not deal with the surviving spouse's "property"; yet it is included in the account. The RSA retail bond scenario could have been avoided if the *Administration of Estates Act* contained a proper definition of "property".

3.7 Conclusion

The focus of this chapter was the allocation of "property" in a deceased estate. The administration process is regulated by the *Administration of Estates Act*, and for this reason it is imperative to have a clear and understandable definition of "property" that has to be included when dealing with a deceased estate.

This part of the study found that the *Administration of Estates Act* contains a definition of immovable property and an insufficient definition of "property". Furthermore, the *Administration of Estates Act* does not define "movable property", which creates a challenge when dealing with a deceased estate.

The author briefly explained the administration process. It is the executor's duty to distribute the residue after the obligations and liabilities have been settled.

The appearance of the word "property" throughout the *Administration of Estates Act* was subsequently highlighted. In addition, it was pointed out that the *Administration of Estates Act* requires the executor to submit a list of "property" held by the deceased, namely the inventory and the L&D. Both these documents are sub-divided into three sections, namely immovable property, movable property and claims in favour of the estate.

The author went further and explained the impact of incorrect allocations. By incorrect allocations the estate is either inflated or deflated with executor fees and master fees. Furthermore, incorrect allocation could have an impact on estate duty and CGT. These incorrect allocations happen as a direct result of an insufficient definition of "property". It is important to have a clear and understandable definition of "property" in the *Administration of Estates Act* to avoid these uncertainties and incorrect allocations.

4 Different legislative definitions of the concept "property"

4.1 Introduction

As indicated above, the administration of a deceased estate can become challenging because the *Administration of Estates Act* does not contain a proper definition of "property", and even more so when taking into consideration the different definitions of the term "property" in various other pieces of legislation. The definition of "property" as defined in the applicable legislation⁴⁸⁴ relevant to deceased estates will be briefly discussed below.

4.2 Definition of "property" in the Estate Duty Act

Estate duty was introduced in South Africa by means of the *EDA* which came into force on 1 April 1955. Estate duty is levied on the worldwide property and deemed property of an ordinarily South African resident.⁴⁸⁵ Non-residents will also be liable for estate duty if they own property in South Africa.

4.2.1 Property

As previously quoted in chapter 1 of this study, "property" is defined in terms of section 3 of the *EDA* as:

any right in or to property, movable or immovable, corporeal or incorporeal, and includes-

(a) any fiduciary, *usufructuary* or other like interest in property (including a right to an annuity charged upon property) held by the deceased immediately prior to his death;

(b) any right to an annuity (other than a right to an annuity charged upon any property) enjoyed by the deceased immediately prior to his death which accrued to some other person on the death of the deceased, ...

⁴⁸⁴ See section 1.1 of the study, where the following pieces of legislation were identified, namely, *EDA*, *ITA* and *TDA*.

⁴⁸⁵ In terms of s 2(2) of the *EDA* estate duty shall be charged upon the dutiable amount of the estate calculated in accordance with the provisions of the *EDA*; also see SARS 2020 <https://www.sars.gov.za/TaxTypes/EstateDuty/Pages/default.aspx>.

Based on the above definition of “property”, it is clear that section 3(2) of the *EDA* defines “property” in a comprehensive manner. In order to obtain a better understanding, the author will sub-divide the definition of “property”⁴⁸⁶ into three parts, namely:

(a) any right in or to property;

(b) any fiduciary, *usufructuary* or other like interest in property;

(c) any right to an annuity.

Each of these respective parts will be subsequently outlined.

4.2.1.1 “Any right in or to property, movable or immovable, corporeal or incorporeal”

The first part of the definition defines property as “any right in or to property, movable or immovable, corporeal or incorporeal ...”⁴⁸⁷ This part of the definition includes all types of property⁴⁸⁸, irrespective of where it is situated.⁴⁸⁹ As a result, estate duty may be imposed on the property of individuals who were neither South African citizens, nor domiciled or ordinary residents⁴⁹⁰ of the country at date of death.⁴⁹¹ In addition, it includes property within and outside of South Africa, provided that the deceased was an “ordinary resident”.⁴⁹² A non-resident, at the time of his/her death, would only be liable for estate duty on the South African properties.⁴⁹³

⁴⁸⁶ As set out in s 3(2) of the *EDA*.

⁴⁸⁷ As set out in s 3(2) of the *EDA*.

⁴⁸⁸ For the meaning of all types of property see section 2.4 of this study.

⁴⁸⁹ Meyerowitz *Administration of Estates and Their Taxation* par 27.4; also see Stiglingh SILKE: *South African Income Tax* 978.

⁴⁹⁰ The South African tax law does not define the concept “ordinary resident”. As a result, cases such as *Cohen v CIR* 1946 AD 174, 13 SATC 362 (hereinafter the *Cohen* case) and *CIR v Kuttel* 1992 3 SA 242 (A) (hereinafter the *Kuttel* case) must be referred to for guidance. In the *Cohen* case the court held that the “ordinary residence” would be the country one would return to after one’s wanderings. In the *Kuttel* case the court held that an “ordinary residence” is where one has one’s usual or principal residence, that is, what one can describe as one’s home.

⁴⁹¹ Davis *Estate Planning* 2-7; also see s 3(2) (a)-(i) of the *EDA*, including and excluding property; Meyerowitz *Administration of Estates and Their Taxation* par 27.21.

⁴⁹² Section 3(2)(c) of the *EDA*.

⁴⁹³ Stiglingh SILKE: *South African Income Tax* 978.

Furthermore, for property to form part of a deceased estate, the property must have “vested”⁴⁹⁴ or belonged to the deceased person.⁴⁹⁵

4.2.1.2 “Any fiduciary, *usufructuary* or other like interest in property”

The second part of the definition includes any fiduciary,⁴⁹⁶ *usufructuary*⁴⁹⁷ or other similar interest in property.⁴⁹⁸ “Other “like interest” (i.e. similar interests) includes interests such as grazing rights, *habitation*,⁴⁹⁹ *usus*⁵⁰⁰ or a right to income⁵⁰¹ under a trust that has ceased upon death, to name but a few.⁵⁰²

In addition, the words “held immediately prior to his death” are presumed to mean up to the time of the deceased death. That is, if the limited interest⁵⁰³ ceased prior to the deceased death, it would not form part of property in the estate.⁵⁰⁴

It is clear that the date of death is important, as the interest must have been held prior to death. Therefore, if the deceased had no “vested” right⁵⁰⁵ to the interest, it cannot be assumed that the deceased held any limited interest at date of death.

Furthermore, a fiduciary or a *usufructuary* interest held by a spouse who had been married in community of property to the deceased will not form part of the community estate; only the fruits collected shall form part of the estate.

⁴⁹⁴ For the meaning of “vested” see section 2.7 of this study.

⁴⁹⁵ In the *Wessels* case it was held that the beneficiary has no right or interest in the property of the deceased until the beneficiary adiate. In other words, if a beneficiary dies before he adiated, the inheritance will not form part of his estate for estate duty purposes. See also see Meyerowitz *Administration of Estates and Their Taxation* par 27.21.

⁴⁹⁶ For the meaning of “fiduciary” see section 2.6.3.1 of this study.

⁴⁹⁷ For the meaning of “*usufructuary*” see section 2.6.1.2 (a)(ii)(1) of this study.

⁴⁹⁸ Haupt *Notes on South African Income Tax* 864; Also see Meyerowitz *Administration of Estates and Their Taxation* par 27.6.

⁴⁹⁹ For a brief explanation of a *habitation* see section 2.6.1.2 (a)(ii)(3) of this study.

⁵⁰⁰ For a brief explanation of a *usus* see section 2.6.1.2 (a)(ii)(2) of this study.

⁵⁰¹ As well as the right to occupy the trust property; also see *CIR v Lazarus Estate* 21 SATC 379, Estate *Bourke v SIR* 41 SATC 131.

⁵⁰² Meyerowitz *Administration of Estates and Their Taxation* par 27.21; also see Stiglingh *SILKE: South African Income Tax* 978.

⁵⁰³ See section 2.6.1.2 of this study.

⁵⁰⁴ Meyerowitz *Administration of Estates and Their Taxation* par 27.6.

⁵⁰⁵ See section 2.7 for an explanation on vested and contingent rights.

4.2.1.3 Any right to an annuity

In section 3 of the *EDA*, two types of annuities are included in the definition of “property”, namely a right to an annuity charged upon property⁵⁰⁶ and any right to an annuity.⁵⁰⁷

An annuity is not defined by the *EDA*, but its characteristics are fixed annual payments, even if they are divided into instalments, repetitive payments, charged against property or the duty of some individual and not merely payments at will.⁵⁰⁸ The two types of annuities will be briefly discussed.

4.2.1.3.1 Annuity charged upon property

Section 3(2)(a) of the *EDA* classifies these kinds of annuities with a fiduciary, *usufructuary* or like interest. Meyerowitz⁵⁰⁹ submitted that it could indeed be referred to as a “like interest”.⁵¹⁰

The phrase “charged upon property” implies that there is some particular property or fund from which the annuity is payable.⁵¹¹ An annuity where someone is expected to pay rent derived from immovable property would be a simple example.⁵¹² If the deceased was the recipient of such annuity, certain rules would apply when calculating the value of the annuity. The valuation calculation differs from that of a fiduciary or *usufructuary* interest.⁵¹³

In *CIR v Estate Hobson*⁵¹⁴ the testator donated a piece of land to his sons; subject to the condition that the donee paid an annuity.⁵¹⁵ The condition was embodied in the deed registry, which was subsequently amended by an agreement between the donor and the

⁵⁰⁶ Section 3(2)(a) of the *EDA*.

⁵⁰⁷ Section 3(2)(b) of the *EDA*.

⁵⁰⁸ Meyerowitz *Administration of Estates and Their Taxation* par 27.7; also see Stiglingh *SILKE: South African Income Tax* 985, Davis Estate Planning 2-8.

⁵⁰⁹ Meyerowitz *Administration of Estates and Their Taxation* par 27.8.

⁵¹⁰ *CIR v Estate Hobson* 1933 CPD 386; also see Meyerowitz *Administration of Estates and Their Taxation* par 27.8.

⁵¹¹ Meyerowitz *Administration of Estates and Their Taxation* par 27.8; also see Davis *Estate Planning Lexis Library* par 2.3.2.3.

⁵¹² Stiglingh *SILKE: South African Income Tax* 985, Davis Estate Planning 2-8.

⁵¹³ Meyerowitz *Administration of Estates and Their Taxation* par 27.8.

⁵¹⁴ 1933 CPD 386 (hereinafter the *Hobson* case).

⁵¹⁵ *Hobson* case 387.

donee. The amendment provided that the obligation of the transferee should extend to his successors in the ownership of the piece of land. In this case the court held that an annuity was charged upon property.⁵¹⁶

In the case of *Nel NO v CIR*,⁵¹⁷ the donations were similar to those in the *Hobson* case, except for the additional provision stating that the annuity should be binding on the donee's successors. Here the court held that the obligation was a personal one and not an annuity charged upon property.⁵¹⁸

As stated above,⁵¹⁹ only real rights may be registered at the deeds registry. Meyerowitz⁵²⁰ argued that the obligation to pay an amount, even though the obligation is supposed to be enforced on the owner qua owner, is not a real right and therefore does not extend to the land. In other words, there must be a burden on a piece of land to be a real right, whereas the obligation to pay an amount of money is not a burden, but merely an obligation, thus creating a personal right.

4.2.1.3.2 Any right to an annuity

The difference between the right to an annuity charged on property and every other right to an annuity lies in the fact that, in the former case, it is sufficient that the annuity was owned by the deceased prior to his death in order to constitute "property", while in the latter case it must not only have been enjoyed by the deceased prior to his death, but must also be accrued upon his death by some other person.⁵²¹

An annuity which does not pass to another person upon the death of the deceased will not constitute property in the estate and will thus not be dutiable.⁵²²

⁵¹⁶ *Hobson* case 395; also see Meyerowitz *Administration of Estates and Their Taxation* par 27.8; Davis *Estate Planning* 2-13; Stiglingh *SILKE: South African Income Tax* 986.

⁵¹⁷ 1960 1 SA 227 (AD).

⁵¹⁸ *Nel NO v CIR* 1960 (1) SA 227 (AD), Meyerowitz *Administration of Estates and Their Taxation* par 27.8; Davis *Estate Planning* 2-13; Stiglingh *SILKE: South African Income Tax* 986.

⁵¹⁹ Refer to section 2.6.2 of this study.

⁵²⁰ Meyerowitz *Administration of Estates and Their Taxation* par 27.8.

⁵²¹ Meyerowitz *Administration of Estates and Their Taxation* par 27.9; also see s 3(2)(b) of the *EDA*.

⁵²² Davis *Estate Planning* 2-14; also see Meyerowitz *Administration of Estates and Their Taxation* par 27.9; Stiglingh *SILKE: South African Income Tax* 986.

4.3 Definition of "asset" in the Income Tax Act

In October 2001, capital gains tax (previously abbreviated to CGT) was introduced into the *ITA*. CGT is not a separate tax and will be included in the taxable income of the taxpayer. In short, CGT is income tax paid on the gain made by the taxpayer.

The *ITA*⁵²³ refers to "property" as an "asset", as follows: An asset includes:

property of whatever nature, whether movable or immovable, corporeal or incorporeal, excluding any currency, but including any coin made mainly from gold or platinum; and
(b) a right or interest of whatever nature to or in such property ...

The definition of "property" mentioned above is wide enough to cover virtually any asset. Furthermore, rights which can be converted into money or rights which can be disposed of are also considered to be assets for CGT purposes.⁵²⁴

In addition, the definition excludes currency, but includes any coin made mainly from gold or platinum. In other words, donating cash will not trigger CGT, as cash is not an asset in terms of the above definition.⁵²⁵ However, a Kruger Rand is considered an asset, as it is a coin made mainly from gold.

As a result, CGT may be imposed on the property of individuals who were neither citizens of South Africa, nor domiciled or ordinary residents⁵²⁶ of the country at date of death. In addition, it includes property within or outside of South Africa.

Furthermore, the definition refers to right or interest of whatever nature to or in such property. This portion of the definition complicates CGT in South Africa, as both real and personal rights are regarded as property for CGT purposes.

⁵²³ *Eight Schedule* of the *ITA*, s 1.

⁵²⁴ SARS 2020 <https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-CGT-G01%20-%20Comprehensive%20Guide%20to%20Capital%20Gains%20Tax.pdf> 44.

⁵²⁵ SARS 2020 <https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-CGT-G01%20-%20Comprehensive%20Guide%20to%20Capital%20Gains%20Tax.pdf> 44.

⁵²⁶ See section 4.2.1.1 above for the meaning of an "ordinary resident".

4.4 Definition of "property" in the Transfer Duty Act

The *TDA* was promulgated in 1949 and came into effect in 1950,⁵²⁷ making transfer duty the oldest tax payable in South Africa.

Section 1 of the *TDA* defines "property" as:

Land and fixtures, and includes real rights in land, rights to minerals, a share or interest in a "residential property company" or a share in a share-block company.⁵²⁸ It also includes a share or member's interest in a company, if that company and all of its subsidiary companies would be a residential property company if all such companies were regarded as a single entity.

There are two principle tax events that give rise to transfer duty liability. One of the events is the purchase of a property, which will not be dealt within the scope of this thesis and the other is the renunciation of an interest in, or restriction upon, the use or disposal of property.⁵²⁹ The latter part will subsequently be discussed.

4.4.1 Land and fixtures

The first part of the definition refers to land and fixtures, which acquires the status of immovable property.⁵³⁰ Land is mostly made up of soil, its geological elements, such as minerals, and everything attached to the soil. The relation to land and fixtures is based on the well-established theory that whatever is permanently attached to the land, constitutes part of the land and therefore acquires immovable property status.⁵³¹

A sectional title unit also qualifies as "land". Furthermore, a company that operates a share block scheme has rights to the use of immovable property or interest in immovable property. Prior to 2002, these rights were not recognised for transfer duty purposes. As a result, it was legally possible to transfer property without incurring the duty.⁵³² Since

⁵²⁷ SARS 2017 <https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TD-G01%20-%20Transfer%20Duty%20Guide.pdf> 23.

⁵²⁸ SARS 2017 <https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TD-G01%20-%20Transfer%20Duty%20Guide.pdf> 23.

⁵²⁹ SARS Transfer Duty Guide 8; also see Botha *et al South African Financial Planning Handbook* 761.

⁵³⁰ Refer to section 2.4.1.1 of this study for an explanation of immovable property.

⁵³¹ SARS 2017 <https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TD-G01%20-%20Transfer%20Duty%20Guide.pdf> 23; also see Stiglingh *SILKE: South African Income Tax* 1011,

⁵³² Prior to 2002 it was possible to register a property in a company. The company shares were then sold and thus avoiding transfer duty; also see Botha *South African Financial Planning Handbook* 763.

the amendment, share block schemes and sectional rights fall within the definition of property, as it is a right to use the immovable property.

Basically, any real right⁵³³ in property will be regarded as property for the purpose of transfer duty. According to SARS, the right to use or the right to occupy a fixed property is subject to transfer duty.⁵³⁴

4.5 Definition of "property" in the Administration of Estates Act

In the *Administration of Estates Act* 24 of 1913 "property" was defined in section 2 as:

Property shall include rights and every kind of property, movable or immovable, in possession, expectancy or contingency ...

The above definition is more extensive than the definition of "property" in the *Administration of Estates Act* of 1965, which defines (as previously mentioned) "property" as "any contingent interest in property."

As mentioned above,⁵³⁵ a contingent interest is a competence and not a legal right to claim inheritance. For the inheritance to become vested the beneficiary needs to adiate.

To complicate matters further, the word "vested" can have different meanings depending on the context in which it is used. In the *Sive's* case the court held that a contingent interest has no value unless it is "vested".

In the *Jewish Colonial* case it was held that the word "vested" is used to differentiate between conditional and what is certain.

In the event of a trust, a "vested" right is where the trustees administer the capital or income on behalf of a specific beneficiary.⁵³⁶ Where the beneficiary in a trust has a contingent right, it means that it is a discretionary trust and that the beneficiary may or

⁵³³ Refer to chapter 2 par 2.6.1 for an explanation of a real right.

⁵³⁴ Haupt *Notes on South African Income Tax* 964.

⁵³⁵ See chapter 2 par 2.7 of this study.

⁵³⁶ Haupt *Notes on South African Income Tax* 803; also see Botha *et al South African Financial Planning Handbook* 855.

may not receive income or capital from the trust.⁵³⁷ In other words, from a deceased estate perspective, if the beneficiary has a contingent right, it is merely an expectation, whereas if it is a vested right, the executor administers the “property” until the final distribution.

4.6 Conclusion

In chapter 3⁵³⁸ the author pointed out that the term “property” continues to appear throughout the *Administration of Estates Act*. This chapter explored other legislation applicable to deceased estates – specifically the definition of “property” in each. It would seem that the *EDA* contains the most comprehensive definition of “property” as it includes and excludes property in the definition. Not only does it give an author a clear view but in practice it is one of the definitions used to define property, especially movable property, in a deceased estate.

⁵³⁷ Haupt *Notes on South African Income Tax* 803; also see Botha *et al South African Financial Planning Handbook* 855.

⁵³⁸ See section 3.2 of this study.

5 Conclusion and recommendations

5.1 Conclusion

The primary aim of the study was to determine whether the current omission of a definition of “movable property” in the *Administration of Estates Act* is problematic and, if so (and with reference to related legislation), how can this situation be addressed?

To address the research question adequately, it was necessary to address the concept of “property” and the administration process. The concept of “property” is not as simple as one would think it is.

It was found that “property” does not only consist of immovable and movable property, but a bundle of rights and interests are also regarded as property.⁵³⁹ Furthermore, for a number of years, academics have tried to define “property” with different theories.⁵⁴⁰ These theories seem to have only created more confusion.⁵⁴¹

The author concluded that one should look at the wider meaning of the context in which the word “property” is used.⁵⁴² In other words, the word “property” should not be isolated. For this reason, it was important to differentiate between the characteristics and classification of “property” and as a result, it became evident that there is no real consensus about the concept of “property”.⁵⁴³

In addition, the “property” forming part of the estate was analysed. It was found that the most important classification of property is between movable and immovable property.⁵⁴⁴ It was submitted that movable property is self-explanatory, yet the courts find it difficult to classify,⁵⁴⁵ as indicated in the *Cavanage* and *Charmarel’s* cases.

The discussion was followed by an analysis of the word “property”, more specifically, the constant appearance of the word “property” in the *Administration of Estates Act*, as well

⁵³⁹ See section 2.8 of this study.

⁵⁴⁰ See section 2.2.1 of this study.

⁵⁴¹ See section 2.2.1.2 of this study.

⁵⁴² See section 2.3 of this study.

⁵⁴³ See section 2.3 of this study.

⁵⁴⁴ See section 3.3.2 of this study.

⁵⁴⁵ See section 3.4.2 of this study.

as in legislation connected to a deceased estate.⁵⁴⁶ Following this discussion, it became clear that the most comprehensive definition of “property” is the *EDA* and that the *Administration of Estates Act 24 of 1913* had a more comprehensive definition than the current *Administration of Estates Act*.

Furthermore, it would appear as if defining “property” as any contingent interest may seem wide enough. In the author’s opinion the definition is so wide that in actual fact any contingent interest that the beneficiary adiates, forms part of the estate. This would mean that life insurance policies with nominated beneficiaries would also form part of the estate. In a modern society the definition is outdated and un-descriptive, especially when the *Administration of Estates Act* does not define movable property. It is clear from the above that movable property plays an important role in the administration of estates and for that reason the definition should be amended to provide legal certainty as to what constitute movable property in a deceased estate.

5.2 Recommendations

The intention of this study was to assess to what extent the un-descriptive and outdated definition of “property” in the *Administration of Estates Act* should be amended to provide legal certainty as to what constitute movable property in a deceased estate.. This study brought several shortcomings to light. The *Administration of Estates Act* does not define “movable property”, and the current definition of “property” is short, un-descriptive and outdated.

It is submitted that the definition of “property” should be amended to not only include, but also to exclude certain “property”.

Firstly, the *Administration of Estates Act* should be amended to include a definition of movable property. As stated above, the *Administration of Estates Act* does not define movable property and even though it appears to be self-explanatory, the courts find it difficult to classify.

⁵⁴⁶ See section 4 of this study.

Secondly, to amend the definition of “property” to include any kind of property, including any right in or to property, movable and immovable property, corporeal or incorporeal, fiduciary, *usufructuary* and other similar interests in property. Furthermore, to exclude pension funds, provident funds and annuities paid directly to the beneficiaries. Such amended definition of “property” for purposes of section 1 of the *Administration of Estates Act*, could be formulated as follows:

“In this Act, unless the context otherwise indicates- ... ‘property’ means any right in or to property, movable or immovable, corporeal or incorporeal, and includes- (a) any fiduciary, *usufructuary* or other like interest in property (including a right to an annuity charged upon property) held by the deceased immediately prior to his death; and (b) any right to an annuity (other than a right to an annuity charged upon any property) enjoyed by the deceased immediately prior to his death which accrued to some other person on the death of the deceased; and (c) any investment irrespective whether there is a nominated beneficiary or not.⁵⁴⁷ The following is excluded from the meaning of ‘property’, namely annuities, pension funds, provident funds or any policy with a nominated beneficiary.”

⁵⁴⁷ See in this regard the discussion of the RSA Retail bond.

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