

REAL ESTATE ALERT

24 MAY 2022



INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

My spouse has died: What happens to our home?

Losing one's spouse can be, besides a sad time, a confusing and stressful time. Wondering about what will happen to your home should be the least of your worries while you are grieving.



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My spouse has died: What happens to our home?

Losing one's spouse can be, besides a sad time, a confusing and stressful time. Wondering about what will happen to your home should be the least of your worries while you are grieving.

Understanding a few of the terms that are bandied around can go a long way in helping to avoid confusion. Terms to take note of are:

- **Testate** – this means that a person has made a will, which should stipulate to whom the property should be transferred or if it is to be sold.
- **Intestate** – this means that a person died without making a will.
- **Deceased estate** – this means the estate of the deceased person and encompasses all the assets and liabilities of the deceased, including any property registered in their name.
- **Executor** – this is the person appointed by the Master of the High Court (Master) to administer the deceased estate, to settle all liabilities if possible, to divide the assets among the heirs and to transfer the property from the deceased to the person who is entitled to it. The Master will issue Letters of Executorship to the executor as the authorisation by which the executor can perform their duties.

- **Heir** – this is the person who inherits the estate, or what remains of the estate, after all debts have been paid and legatees have been paid out.
- **Legatee** – this is the person to whom the deceased bequeathed movable or immovable property or even money.
- **Joint estate** – when parties are married in community of property they are regarded as having a joint estate.

The Master of the High Court will issue the Letters of Executorship once all the preliminary documents and information have been given to the Master, including a copy of the will if one was made. We will not discuss the Master's requirements in this article.

Once the Letters of Executorship have been issued, the property can now be dealt with.

WHERE THE DECEASED SPOUSE DIED TESTATE

In community of property

In terms of the Matrimonial Property Act 88 of 1984, you and your spouse own the property jointly by virtue of your marriage in community of property.

On the death of your spouse you are automatically entitled to an undivided half share in the property by virtue of your marriage.

Should your deceased spouse have bequeathed his/her share of the estate to you, you will then be entitled to take transfer of the deceased's half of the property.

- The transfer of the half share in the property can be done in one of two ways, namely by way of a section 45(1) endorsement or by way of a formal transfer. The choice of method to transfer the share to you is decided by the conveyancer.

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- A section 45(1) endorsement is an endorsement against the existing title deed of the property to the effect that you are entitled to deal with the property as if you had taken formal transfer of your deceased spouse's half share.
- With a formal transfer a separate title deed for the half share is issued in your name. You will then hold the property under two title deeds, a half share by virtue of the existing title deed and a half share by virtue of the new title deed.
- The transfer of the half share, whether by way of a section 45(1) endorsement or formal transfer, will be subject to any conditions in your deceased spouse's will, for example, should you remarry in community of property, the share transferred to you from your deceased spouse will not form part of the new estate to which you are party.
- A rates clearance certificate from the local authority will need to be obtained and so it is important to keep up to date with the payments of the rates and taxes and water and electricity charges to the local authority.
- A levy clearance certificate (in the case of a sectional title unit) and homeowners clearance certificate, if applicable, will also need to be obtained.
- A transfer duty exemption certificate will need to be obtained from the South African Revenue Service (SARS). The transfer of the half share to you, either by a section 45(1) endorsement or formal transfer, is exempt from transfer duty in terms of section 9(1)(e)(i) of the Transfer Duty Act 40 of 1949 (Transfer Duty Act).
- Any bonds registered over the property will need to be cancelled.

Should your deceased spouse not have bequeathed their share in the property to you, then you will only be entitled to deal with the half share in the property that you are entitled to by virtue of your marriage in community of property. Your deceased spouse's half share will then need to be transferred to the legatee by way of a formal transfer.

Out of community of property

Should you and your deceased spouse each own a 50% share in the property and your deceased spouse has bequeathed his/her 50% share in the property to you, you will then be entitled to take transfer of their 50% share in the property.

- The transfer of the 50% share can only be done by way of a formal transfer.
- A section 45(1) endorsement is only available if the property is an asset in a joint estate.

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- The transfer of the 50% share will be subject to any conditions in your deceased spouse's will for example, should you remarry in community of property, the 50% share transferred to you from your deceased spouse will not form part of the new estate to which you are a party.
- A rates clearance certificate from the local authority will need to be obtained.
- A levy clearance certificate (in the case of a sectional title unit) or homeowners clearance certificate, if applicable, will also need to be obtained.
- A transfer duty exemption certificate will need to be obtained from SARS. The transfer of the 50% share to you is exempt from transfer duty in terms of section 9(1)(e)(i) of the Transfer Duty Act.
- Any bonds registered over the property will need to be cancelled.

Should your deceased spouse own the entire property and have bequeathed the property to you, you will be entitled to take transfer of the entire property by way of a formal transfer. The requisite clearance certificate/s, the transfer duty exemption certificate will need to be obtained and all existing bonds will need to be cancelled.

Should your deceased spouse have bequeathed the property to another, the executor will then transfer the property to that other person.

Sometimes a deceased spouse will have bequeathed the property to their children subject to a usufruct in favour of the surviving spouse. This means that the children take transfer of the property but the surviving spouse is entitled to live in the property until their death or until the time specified by the deceased spouse has elapsed.

If the deceased spouse instructed in their will that the property must be sold, the executor is authorised to sell the property and transfer the property to a third person.

WHERE A DECEASED SPOUSE HAS DIED INTESTATE

If your spouse has died without making a valid will, the property will be transferred in terms of the provisions of the Intestate Succession Act 81 of 1987 (Act), which states that:

- If the deceased is survived by a spouse and no descendants, then the surviving spouse is the sole heir and the property devolves in terms of section 1(1)(a) of the Act.
- If the deceased is survived by descendants only, then the descendants are the sole heirs and the property devolves in terms of section 1(1)(b) of the Act.
- If the deceased is survived by a spouse and descendants, the property will devolve upon the surviving spouse and descendants jointly in specific shares in terms of sections 1(1)(c)(i) and 1(1)(c)(ii) of the Act, as the case may be.

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HOW DOES THIS APPLY TO THE DIFFERENT MATRIMONIAL REGIMES?

In community of property

On the death of your spouse you are automatically entitled to an undivided half of the property by virtue of your marriage in community of property in terms of the Matrimonial Property Act 88 of 1984.

Your spouse's share will be transferred in accordance the provisions of the Act.

- If you are the sole heir, the transfer of the half share in the property can be done in two ways; by way of a section 45(1) endorsement or by way of a formal transfer, as discussed above in the paragraph dealing with testate succession.
- If you are not the sole heir, the transfer of the half of the property will be done by way of formal transfer to you and the other heirs.
- A next-of-kin affidavit, certified by the Master of the High Court will need to be obtained.

- A rates clearance certificate from the local authority will need to be obtained.
- A levy clearance certificate (in the case of a sectional title unit) or homeowners clearance certificate, if applicable, will also need to be obtained.
- A transfer duty exemption certificate will need to be obtained from SARS. The transfer of the half share is exempt from transfer duty in terms of section 9(1)(e)(i) of the Transfer Duty Act.
- Any bonds registered over the property will need to be cancelled.

Out of community of property

Should you and your deceased spouse each own a 50% share in the property, your deceased spouse's 50% share in the property will be transferred in accordance the provisions of the Act.

- The transfer of the 50% share in the property can only be done by way of a formal transfer.
- If you are the sole heir, the 50% share in the property will be transferred to you.

- If you are not the sole heir, the 50% share in the property will be transferred to you and the heirs.
- A next-of-kin affidavit, certified by the Master of the High Court will need to be obtained.
- A rates clearance certificate from the local authority will need to be obtained, so it is important keep up to date with the payments of the rates and taxes and water and electricity charges to the local authority.
- A levy clearance certificate (in the case of a sectional title unit) or homeowners clearance certificate, if applicable, will also need to be obtained.
- A transfer duty exemption certificate will need to be obtained from SARS. The transfer of the 50% share is exempt from transfer in terms of section 9(1)(e)(i) of the Transfer Duty Act.
- Any bonds registered over the property will need to be cancelled.

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Should your deceased spouse own the property in its entirety, the property will be transferred in terms of the provisions of the Act to you and the descendants, if any, by way of a formal transfer. A next-of-kin affidavit will need to be obtained as well as the requisite clearance certificates and transfer duty exemption certificate. Any bonds registered over the property will need to be cancelled.

Customary marriages

With effect from 20 September 2010, the Act has been amended by the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 to provide that from 20 September 2010 the estate of any person who died intestate will devolve in accordance with the Act but subject to customary law.

Terms to take note of:

- **Customary law** – means the customs and practices observed amongst the indigenous African people of South Africa and which form part of their culture.
- **Descendant** – this is a person who is not a descendant in terms of the Act but includes a person whom the deceased accepted as their own child in accordance with customary law.
- **House** – means, amongst other things, the property, rights and status which arise out of the customary marriage of a woman.
- **Spouse** – includes a partner in a customary marriage that is recognised in terms of section 2 of the Recognition of Customary Marriages Act 120 of 1988.

The property of the deceased person subject to customary law will be transferred as follows:

- If the deceased is survived by a spouse and no descendants, then the surviving spouse is the sole heir and the property devolves in terms of section 1(1)(a) of the Act. If there is more than one spouse or woman* the property is transferred equally to all the spouses or women.
- If the deceased is survived by descendants only, then the descendants are the sole heirs and the property devolves in terms of section 1(1)(b) of the Act.

* "Woman" as referenced in the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 means:

- a woman, other than the spouse of the deceased, with whom the deceased person entered into a union in accordance with customary law for the purpose of providing children for his spouse's house; and
- a woman who was married to the deceased in accordance with customary law for the purpose of providing children for the deceased's spouse.

These women are descendants of the deceased and are also deemed to be "spouses".

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- If the deceased is survived by a spouse/s (and/or women) and descendants, the property will devolve upon the surviving spouse/s (and/or women) and descendants jointly in specific shares in terms of sections 1(1)(c)(i) and 1(1)(c)(ii) of the Act, as the case may be.

As in the case of a marriage out of community of property:

- The property will be transferred by way of a formal transfer.
- A next-of-kin affidavit, certified by the Master of the High Court will need to be obtained.
- A rates clearance certificate from the local authority will need to be obtained.
- A levy clearance certificate (in the case of a sectional title unit) and/or homeowners clearance certificate, if applicable, will also need to be obtained.
- A transfer duty exemption certificate will need to be obtained from SARS. The transfer is exempt from transfer duty in terms of section 9(1)(e)(i) of the Transfer Duty Act.

- Any bonds registered over the property will need to be cancelled.

Muslim marriages

Presently, South African law does not recognise Islamic marriages.

The Constitutional Court decided in *Daniels v Campbell NO and Others* [2004] (5) SA 331 (CC) and *Fatima Gabie Hassam v Johan Hermanus Jacobs NO and Others* [2009] ZACC 19 that where persons are married according to Muslim rites they are to be considered as spouses for the purposes of inheriting in terms of intestate succession.

The property will accordingly be transferred in terms of the Act.

Long-term relationships

Until recently, if you were a partner in an opposite sex long-term relationship, you could not inherit in terms of the Act.

On 31 December 2021, the Constitutional Court held in *Bwanya v Master of the High Court, Cape Town and Others* [2021] ZACC 51 that section 1(1) of the Act is unconstitutional and invalid insofar as it excludes the partner in an opposite sex long-term relationship.

The Constitutional Court has referred the Act to Parliament to amend the definition of "spouse" to include a "partner in a permanent life partnership in which the partners had undertaken reciprocal duties of support". The Act has at date of publication of this article not yet been amended.

The best way to avoid confusion and uncertainty is to make a will stipulating who inherits the property and other assets.

We have not discussed each scenario in detail, nor have we covered all possible scenarios, but have elected to give an overview of how property is dealt with and some of the requirements for surviving spouses and life partners. The conveyancer attending to the respective transfer will explain the process in more detail.

NATASHA FLETCHER



The Conveyancing Process

Purchaser makes an offer to purchase property from a seller...

SELLER ACCEPTS THE OFFER

Bank approves application

Purchaser applies for bond finance (if necessary)

Seller instructs the transfer attorney (seller's choice). The agreement is then sent by agent or seller to the transferring attorney.

Bank sends bond instructions to bond attorney which is appointed on their panel of attorneys

BOND ATTORNEY

- Instruction received and acknowledged
- Purchaser contacted (Initial letter sent; FICA and supporting documents requested)
- If bond is subject to any special conditions, purchaser is made aware so that they may be fulfilled timeously
- Draft deed and guarantee requirements requested from transfer attorney
- Receive draft deed and guarantee requirements
- Insurance certificate requested from Body Corporate (if applicable)
- Documents drafted and purchaser signs the documents
- Guarantees can only be issued once the purchaser has signed. Guarantees received and sent to the transfer attorneys, (possible delay if life insurance and homeowners insurance is not approved by the bank)
- Signed documents, FICA and supporting documents are sent to the bank for approval and request for proceed to lodge
- Instruction to proceed granted

- Request rates clearance and levy figures from the municipality and HOA and/or Body Corporate
- Documents drafted for signature
- Purchaser and seller sign documents
- Payment of costs by purchaser
- Send draft deed of transfer to bond attorney (purchaser to sign with bond attorney) and send guarantee requirements to bond attorney
- Receive guarantee/s from bond attorney (only once purchaser has signed with bond attorney)
- Send guarantee to bond cancellation attorney
- Pay costs received from purchaser for SARS transfer duty
- Pay clearance figure amounts to municipality and HOA and/or Body Corporate
- Receive transfer duty receipt from SARS and clearance certificates from municipality and HOA and/or Body Corporate

TRANSFERRING ATTORNEY

Confirmation of receipt of instruction sent to seller, purchaser and agent. Request FICA and supporting documents from seller and purchaser as well as the bond account details from the seller and bond Finance approval from the purchaser.

Request bond cancellation

BOND CANCELLATION ATTORNEYS

- Receive Instruction to cancel the bond from the bank
- Request cancellation figures and the original title deed
- Forward copy of the title deed to the transfer attorneys and request a guarantee to cover the outstanding balance
- Guarantee received
- Costs to be paid by the seller for the cancellation of the bond
- Consent to cancellation is drawn up and signed

Lodgement at the deeds office

Lodgement at the deeds office

Lodgement at the deeds office

The transfer, bond and cancellation lodgements are linked and all three processes are lodged simultaneously at the deeds office.



Deeds office process



Lodgement by all simul (attorneys linked to the matter) the transfer attorney, bond attorney and bond cancellation attorney must all link their documents and lodge together on the same day.



Documents are then examined by 3 examiners (junior to senior examiners). The duration is dependent on backlog at the deeds office, the size of the batch and complexity of the matter lodged.



If the documents are in order the examiner places the documents on PREP – meaning they are ready to register within 2-5 days. There may be notes for small corrections which need to be made first, this may take a day or two. All attorneys must "put forward" their documents on the same day in order to register the batch together.



ALTERNATIVE: If one document in the batch is not in order, it may cause the entire batch to be rejected. The documents are returned to the attorneys and must be corrected before they may be re-lodged again – Deeds Office Process to start over.



Once the documents are put forward they should register the next business day.



Registration of the transfer, bond and bond cancellation takes place simultaneously.

OUR TEAM

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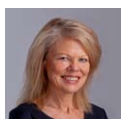
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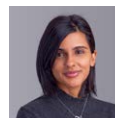
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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