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Death or divorce: Half-share transfers

What is a half-share transfer?

Immovable property is often jointly owned by two co-owners, who each own an undivided 50% share in the property.

However, circumstances and relationships change, necessitating the need to:

- Transfer one co-owner's share to the other, who will become the sole owner; or
- Transfer one co-owner's share to a third party.

As with conventional transfers, the transfer of ownership of a half-share must be effected by a conveyancer and registered in the relevant Deeds Registry.

Specific instances of half-share transfers

Half-share transfers arise in various instances, including through divorce and death.

Divorce

Uncontested divorce:

In an uncontested divorce, the parties conclude a consent paper (also known as a settlement agreement), which regulates the proprietary consequences of the divorce. The consent paper/settlement agreement determines how any immovable property registered in both of their names must be dealt with post-divorce. If one party is awarded the property, the other's half-share must be transferred to the recipient. The parties' marital regime (i.e. whether they are married in or out of community of property) determines how the property is to be divided.

The consent paper/settlement agreement is made an order of court.

Contested divorce (usually marriages in community of property):

If the divorce is contested, in that the parties cannot agree on the division of assets, a court will resolve the various disputes with reference to their marital regime. Either way, the parties must abide by the divorce order, dealing with the division of immovable property.

If one spouse is awarded the other's half-share in the property, the recipient spouse's interest in the property is protected by their personal right acquired in terms of the divorce order. The other spouse cannot alienate their share of the property. If they do not comply with the divorce order, the other may approach the court to compel adherence.

Married out of community of property

If the parties were married out of community, the half-transfer occurs in the conventional way. Like conventional transfers, this requires the payment of advance rates and taxes, advance sectional title levies or homeowners' association levies, if applicable, transfer fees, mortgage

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bond cancellation costs, and mortgage bond re-registration costs, if applicable, to the conveyancer.

These amounts must be paid before the documents can be lodged in the Deeds Registry.

By law, a share in immovable property is undivided and can only be equated to percentages, not a specific portion of the property. The transfer of an undivided share takes the same amount of time as a conventional transfer, provided the parties and shareholding are certain and uncomplicated.

If the divorce order is silent on the division of immovable property, the spouse having ownership of the property will retain ownership. If the property is later sold, the other spouse may need to sign a consent confirming that they have no claim to the property.

Married in community of property

If the couple were married in community of property, the half-share transfer is regulated by section 45*bis* of the Deeds Registries Act ('the Act'). This is an abbreviated route, which takes place by way of application. It specifically caters for marriages in community of property dissolved through divorce or death.

Under section 45*bis* of the Act, the spouse who received the other's half-share must make application to the Registrar of Deeds to endorse the current title deed to reflect the former as the sole owner. The application is lodged with the transfer duty exemption certificate and rates clearance certificate. If the property is a sectional title unit, a levy clearance certificate must be obtained.

If the divorce order provides for the property to be divided in equal shares, both parties must make application to the Registrar of Deeds. They will then both receive undivided shares in the property.

Inheritance

Death of a spouse married in community of property

A spouse is automatically entitled to an undivided half-share of the property.

If they die testate: If the deceased spouse bequeaths their share of the property to the other in terms of a will, transfer will take place in accordance with the section 45(1) endorsement, unless the spouse is not the sole heir. In that case, a conventional transfer will take place.

To effect the transfer, the following must occur:

- The Liquidation & Distribution Account must be advertised for the prescribed period and be free from objections.

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- A certificate certifying that the property must be transferred in accordance with the provisions of the will, a transfer duty exemption, and rates clearance certificate must be lodged, together with the normal transfer documents.
- Prior to lodgement, the conveyancer must obtain levy clearance, if applicable.

All other instances where an individual, including a spouse, inherits a share in a property

Deceased died with a will:

The transfer of a half-share in the property will take place via conventional transfer in line with the contents of the will.

Deceased died without a will:

If the deceased has died without a will, the property will be transferred in terms of the provisions of the Intestate Succession Act. For example: If the deceased is survived by a spouse and descendants, the property will devolve upon the surviving spouse and descendants jointly in certain shares.

Valuations

First and foremost, it is necessary to obtain two estate agents' valuations. A valuator is not required. The valuations must be on an estate agent's letterhead and signed by the estate agent before SARS will accept them. SARS selects the highest amount; if that valuation is higher than the purchase price, that is the amount that transfer duty is payable on.

Transfer duty

Transfer duty is usually payable upon the acquisition of property. Under the Transfer Duty Act, the payment of transfer duty is exempt if a property – or a half-share in the property – is disposed of by one spouse to another in terms of a divorce order, or if the property is inherited. The conveyancer will apply to SARS for an exemption, which is lodged with the other documentation in the Deeds Registry.

Conveyancing fees

Conventional half-share transfers

While transfer duty is exempt, the attorney's fee for attending to the transfer is still payable. For half-share transfers, the attorney's fees are calculated on the market value of the half-share. If the property is valued at R1.5 million, transfer fees are calculated on 50% of the value, i.e. R750 000.00.

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Applications in terms of section 45(1) and 45bis

The conveyancing fees are usually 75% of the tariff as a deed and Power of Attorney are not required.

Dealing with the bond

If there is an existing bond over the property registered in the name of both co-owners, it can be cancelled and a new bond registered in the name of the new sole owner. This involves various costs, including bond cancellation and registration fees, and requires the involvement of two conveyancers.

In the alternative, one debtor/co-mortgagor can be substituted as the sole debtor/mortgagor under the bond. This requires an application to the Registrar of Deeds in terms of section 57 of the Deeds Registries Act. The bondholder (bank) must consent to the application and will check to ensure that the new sole mortgagor can afford the bond repayments before consenting thereto.

The deed will be endorsed to reflect the substitution of the debtor under the bond.

If the individual taking transfer cannot afford the bond, the property may be sold and the proceeds awarded to said individual.