



## ESTATE PLANNING GUIDE 1: VESTING, SUBSTITUTION & AVOIDING MULTI-LAYERED PROBATE

### Introduction

A recent transaction handled by CM Advocates LLP brought to light a critical yet often misunderstood issue in succession law: when does a beneficiary's interest in an estate actually vest, and what happens if that beneficiary dies before the distribution is complete?

This question has significant implications for high-net-worth individuals, families with cross-border assets, diaspora clients, and real estate investors. At the heart of the issue lies an important legal distinction—between the right to inherit and a vested proprietary interest that can be transmitted or inherited further. Understanding this distinction is not just theoretical; it is key to preserving family wealth, preventing disputes, and ensuring that property passes smoothly from one generation to the next.

#### 1. The Legal Position: Vesting vs Expectation

Under both Kenyan law and English common law, a beneficiary does not automatically acquire ownership of estate assets immediately upon the testator's death. Instead, the deceased's property first vests in the personal representative, as provided under Section 79 of the Law of Succession Act. Beneficiaries therefore hold only a right to due administration—they are entitled to expect distribution, but they do not yet own the specific assets.

A beneficiary's proprietary interest typically crystallizes only after two key steps have been completed: confirmation of the grant and distribution through the executor's formal assent. Until then, their interest remains an expectation rather than ownership.

Key authorities on this point include *Commissioner of Stamp Duties v Livingston* [1965] AC 694, *Sudeley v Attorney-General* [1897] AC 11, *Marshall v Kerr* [1995] 1 AC 148, and *Trouistik Union International v Jane Mbeyu* [1993] eKLR.

#### 2. The Substitution Clause: Ensuring Continuity

A substitution clause is a powerful estate planning tool designed to ensure continuity of inheritance if a beneficiary dies before their share becomes vested. In such a case, the deceased beneficiary's children (or "issue") can inherit directly in their place.

Without this clause, a deceased beneficiary's entitlement may fall into their own estate, creating a new layer of probate, possible foreign resealing requirements, and considerable cost and delay. When properly drafted, a substitution clause allows assets to pass directly to the next generation, keeps the estate intact, and ensures transactions proceed efficiently with a clean legal title.

#### 3. The Hidden Risk: Misunderstanding "Vesting"

Disputes often arise when parties argue that a beneficiary's interest had already vested before administration was complete. In law, however, there is a clear divide between having a right to benefit from an estate and holding a vested proprietary interest. An expectation is simply a future right to benefit after due administration, whereas a vested interest means ownership of a specific asset capable of being transferred or inherited.



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Before the grant is confirmed and distribution made, a beneficiary's interest is not proprietary and cannot be transmitted—it is not part of their own estate. This is a crucial distinction, as it determines whether an additional probate process is required, whether property can be transferred without delay, and whether the title can be considered legally clean.

#### 4. Cross-Border Estates: The Multiplier Effect

When estates or beneficiaries span multiple jurisdictions, such as between the UK and Kenya, the death of a beneficiary before distribution can trigger complex parallel processes, including UK probate and Kenyan resealing procedures. This often results in significant delay, increased costs, tax inefficiencies, and transaction risks.

A well-structured will can, however, anticipate and eliminate these cross-border complications entirely by ensuring clarity on substitution, vesting, and jurisdictional compatibility from the outset.

#### 5. Drafting Lessons: Getting It Right

Effective estate planning begins with precise drafting. Every will should clearly address what happens if a beneficiary dies before their share is distributed. Substitution clauses should specify how such benefits pass, whether by representation (per stirpes) or in equal shares. The document should also make clear when interests actually vest—immediately or only after full administration—to avoid ambiguity.

For cross-border families, compatibility with foreign probate rules and the possibility of resealing grants should be anticipated during drafting. Executors should be explicitly empowered to manage such complexities and carry out administration efficiently. In essence, thoughtful drafting prevents the creation of multiple “mini-estates” that would otherwise require separate probate processes.

#### 6. For Investors and Purchasers: Practical Due Diligence

Anyone acquiring property from an estate must verify crucial details before completion. It is important to confirm whether beneficial interests have fully vested, whether any beneficiary died prior to distribution, and whether a substitution clause affects entitlement. One should also ensure that the chain of title remains uninterrupted.

Failing to check these matters can lead to serious complications—delays in completion, the need for additional probate proceedings, potential legal disputes, or defects in title that may affect resale or financing.

#### 7. Strategic Takeaway

The difference between entitlement and vesting is not simply a technicality; it has real and immediate transactional significance. A well-structured will that clarifies vesting, includes substitution clauses, and addresses cross-border issues can prevent expensive disputes, eliminate redundant probate layers, and preserve the integrity of family wealth. Ultimately, it allows assets to pass seamlessly from one generation to the next.

#### About the WELL Practice

The WELL Practice at CM Advocates LLP—standing for Wealth, Estate, Legacy & Lifestyle—provides integrated advisory services in estate planning and wealth preservation. Our team combines legal precision with commercial strategy to deliver tailored solutions in will drafting, family trust structuring, cross-border estate management, succession and probate advisory, and legacy protection. Our goal is to ensure that the transfer of wealth across generations is not only smooth but also efficient, sustainable, and fully aligned with each client's long-term vision.

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