

Keep your eyes open when you appoint executors and trustees

An area that generates a steady stream of reader complaints to Personal Finance is the administration of trusts – particularly testamentary trusts that are set up on the death of the benefactor – and the estates of people who have died.

It seems that some people see trust and estate administration as a way to make a quick profit.

The problems include:

- ◆ High and unjustifiable fees. Many people are led to believe the only cost of winding up a deceased estate is the executor's fee of 3.5 per cent (excluding VAT) of the gross value of your estate. But there are other ways an executor can charge fees. And with testamentary trusts, there are no regulated fees.

- ◆ Delays in finalising estates – generating even more in fees.

- ◆ The lack of full disclosure – for example, not declaring all the fees.

- ◆ Poor administration. The actual job of administering the trust or estate is given to an unqualified clerk who simply does not have a clue what to do.

And underlying all this is that the administration of trusts and deceased estates falls under the regulatory eye of the Masters of the High Court. The Masters, it seems, do not do sufficient checking on what goes on.

If you have dependant children, an important consideration when drafting a will is to decide what will happen if you and your spouse die simultaneously. You need to take



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account of two issues: guardianship for your children and ensuring their future financial security.

When it comes to ensuring the financial security of minor children or incapacitated adult dependants, many people opt to establish a testamentary, or will, trust.

A testamentary trust is set up in terms of your will on your death to manage money left to dependants and to ensure that they receive a satisfactory income.

A trust requires the appointment of trustees to do the work.

Many people appoint relatives and professionals, such as the family lawyer or accountant, as independent trustees or as executors of their estates to stop family squabbles over money. Others use financial institutions, such as banks and trust companies.

WHO SHOULD DO WHAT

A number of people have a responsibility to ensure the proper winding up of your estate and/or the administration of a testamentary trust. They are:

- ◆ **Yourself, when you draft the will.** You need to be very specific about what you want done with your assets after all debts and taxes have been paid. The issues you need to consider, and which you should address, in a separate contract if necessary, include:
 - The appointment of an executor or executors of your estate. The options include: a professional, who is preferably a member of the Fiduciary Institute of South Africa (Fisa); a professional and a relative; or a relative who should appoint a professional.

- ◆ Appointing a professional who belongs to Fisa will give you greater peace of mind, because Fisa is a self-regulating body for professionals who administer trusts and estates. The body has a code of conduct and takes disciplinary measures against members who contravene the code. Fisa also has a structure to address complaints against members. You can contact Fisa as follows: phone: 082 449 2569; fax: 011 480 3784; or email: secretariat@fidsa.org.za. You can lodge complaints on the Fisa website: <http://fidsa.org.za>

- ◆ The appointment of trustees of a testamentary trust. Again, you should consider appointing a Fisa-member trusted professional or an institution plus a relative, who may

or may not be a beneficiary.

- The replacement of executors and trustees. Everyone is mortal, and institutions such as law firms can merge with others or close down. To cover such eventualities, you need to stipulate a plan B.

- The duties of the executors and trustees. For example, if investments are to be made, who will decide on the investment mandate and who will manage the money. Some executors immediately start to liquidate assets even when markets conditions are not optimal. Try to appoint an astute investment person as a co-executor.

- Time-frames for the winding up of your estate or trust.

- Costs. All charges should be negotiated and specified precisely in writing as part of the appointment of the executors and trustees. Reference to things such as unspecified fee scales should raise warnings.

Remember, costs reduce what your dependants will receive.

- ◆ **Executors.** A fiduciary duty is placed on executors to act with the utmost good faith, proper care and diligence. This means that they have to act in the best interests of your estate and that they cannot, for example, make secret profits at the expense of your estate, such as receiving payments for placing the assets in a particular investment. It also means that they must expeditiously wind up the affairs of an estate, limit costs and place assets in the hands of beneficiaries.

Executors must comply with various laws, particularly the Administration of Estates Act.

- ◆ **Trustees.** As with executors, trustees have a fiduciary duty, which means they must act in the best interests of the trust in accordance with the trust deed and various laws, particularly the Trust



Probate system would speed things up, says Fisa

The Fiduciary Institute of South Africa (Fisa) wants to speed up the administration and winding up of estates by introducing a complaints-driven process, known as probate, to replace the current approval process.

Discussions between Fisa and the office of the Master of the High Court, which is responsible for approving the winding up of estates, on introducing a new system had been progressing well until September 2007, when the Chief Master in the Department of Justice and Constitutional Development resigned.

John Gibson, the chairman of Fisa, says it is imperative that discussions resume.

He says a probate system would go some way to reducing the workload in the Master's offices.

Fisa is proposing that the Chief Master issue a directive that his office will not in effect check the final accounts of an estate once they have been advertised free of objection except when:

- ◆ There is reason to believe that the estate is insolvent;

- ◆ There is an absentee beneficiary, minor beneficiaries or vulnerable beneficiaries, such as illiterate people, beneficiaries who lack full capacity, or unborn heirs who may become entitled to benefits and for whom provision has not been made in a trust for the administration of benefits;

- ◆ There is reason to believe that estate duty is payable; and

- ◆ There are circumstances which compel the Master to follow up on further requirements.

The Master may still at any time enforce compliance by an executor, Gibson says.

Property Control Act.

- ◆ **Beneficiaries.** Beneficiaries of both trusts and estates should look out for their own interests. They have every right to challenge decisions made by the executors or trustees, and to demand full disclosure of costs and how the estate or trust is being administered. As a beneficiary, you have various avenues of complaint. These include:

- Fisa;

- The Master of the High Court, who can dismiss and appoint new executors and trustees;

- The Law Society, if a lawyer is involved; and

- The courts.

The best way to protect your estate in the best interests of your beneficiaries is you cover everything when you draw up your will.

NEXT WEEK: AN EXAMPLE OF WHAT CAN GO WRONG

