PERSONAL FINANCE (Independent Newspapers), National
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Fee of 25 percent of trust's interest earnings was an error – law firm

A reader, Ms L, earlier this year complained to Personal Finance that a testamentary trust established on the death of her father in 1998 was subject to unacceptable charges by a Cape Town-based law firm, Millers Incorporated. The only beneficiaries of the HL Will Trust were Ms L and her younger brother. Ms L's father appointed her and lawyer David Gruss, a director of law firm Gruss Katz, as the co-trustees.

Gruss Katz started off by levying fees of seven percent a year on the income earned by the trust, as well as a once-off fee on the distribution of the assets, apparently in accordance with the Administration of Estates Act.

Ms L, a chartered accountant, however, did much of the work, and a 50-percent reduction in the income fee and a lower settlement fee were agreed to.

But there was a problem in December 2006, when Gruss Katz merged with Millers Incorporated. David Gruss was appointed as a consultant at Millers, where he has an office. Ms L was not informed of Gruss's change of status.

Life with Cameron
Bruce Cameron

'AGENT'S FEE'

Millers on occasion places cash held for its trust account clients in a Nedbank Corporate Saver Account. It is a type of umbrella account with sub-accounts for trusts such as the HL Will Trust, each with a separate name and number.

Ms L discovered that Millers received directly from Nedbank a hefty "agent's fee" of 25 percent of the interest earned – this was on top of Millers's fee for administering the trust.

At times, Millers was taking a slice of the interest of almost R6 000 a month for doing nothing. And what was more, the trust was paying VAT on the "agent's fee" that Nedbank was paying Millers.

The main problem is that Millers should have obtained a mandate from the trustees of the HL Will Trust to open the account and to claim any fee, as required in terms of section 78 (2A) of the Attorneys Act and by Nedbank.

The opening paragraph of the Nedbank agreement with agents, such as Millers, reads that the agreement allows the agent (Millers) to invest and administer funds on behalf of a client (the trust) "in terms of a written mandate given by the client to the agent and appointing the agent to act on behalf of the client for purposes contemplated in this agreement".

Ms L says: "I, as trustee, was never made aware of the practice. No mandate was ever signed by the trustees. I had, in fact, asked for a call account to be opened providing the highest rate of interest for the benefit of the beneficiaries.

"The deduction of the Nedbank Corporate Saver fees was not disclosed to me. When I received statements (from Millers) of income and expenses of the trust, only the net interest from the trust account was reflected. I thought the trust was earning the gross interest rate."

Ms L objected, and, after some months, Millers offered to pay her R10 000, without prejudice or admitting anything, to go away. Ms L refused the offer. She says the payment of the fee to Millers by Nedbank was never considered by the trustees and no resolution was taken to approve such a payment.

MILLERS RESPONDS

Personal Finance asked Robert Krautkrämer, a director of Millers, to justify why his company took a cut of the interest due to the HL Will Trust without the approval of the trustees.

Krautkrämer's initial response, in the main, was to withdraw the R10 000 offer to Ms L and to tell me "we must now reserve our rights if anything that was legally privileged and of a private nature is published (in Personal Finance)". This implied threat was obviously meant to frighten off Personal Finance, and he was told it would not.

Krautkrämer wrote back, still not providing any comment, but was aggrieved by what he called my "unwarranted and aggressive response".

There was a further exchange. Krautkrämer then contacted Ms L in March this year and offered to reopen negotiations on a settlement.

A secret settlement was reached recently, and the trust has been paid an amount that is presumably substantially more than the initial offer of R10 000.

Krautkrämer then agreed to answer the questions asked by Personal Finance.

ANSWERS TO OUR QUESTIONS

Krautkrämer admits that attorneys must disclose their charges and obtain a written mandate before investing any funds on behalf of their clients but that in this case a written mandate was not obtained. He claims it was a singular mistake.

Krautkrämer says that before Millers merged with Gruss Katz in December 2006, Gruss Katz had levied an agent's fee of five percent on the interest earned.

Millers's fee, he says, is substantially higher – as much as 25 percent of the interest earned.

Gruss told Personal Finance he was not made aware of the much higher Millers fee and only became aware of it when another former Gruss Katz client complained.

Krautkrämer says the fee "was clearly indicated on our standard mandates, and the client always had the option to negotiate this with us or even to refuse any such fee".

He says that when the two legal practices merged, Gruss had no reason to believe that Millers's fees were higher than what Gruss Katz had been accustomed to charge over the years for this type of account.

Krautkrämer says: "We were similarly unaware that Gruss Katz was accustomed to levy such a low fee, and neither one of us thought about this after our merger, until this incident occurred."

Gruss says when he discovered

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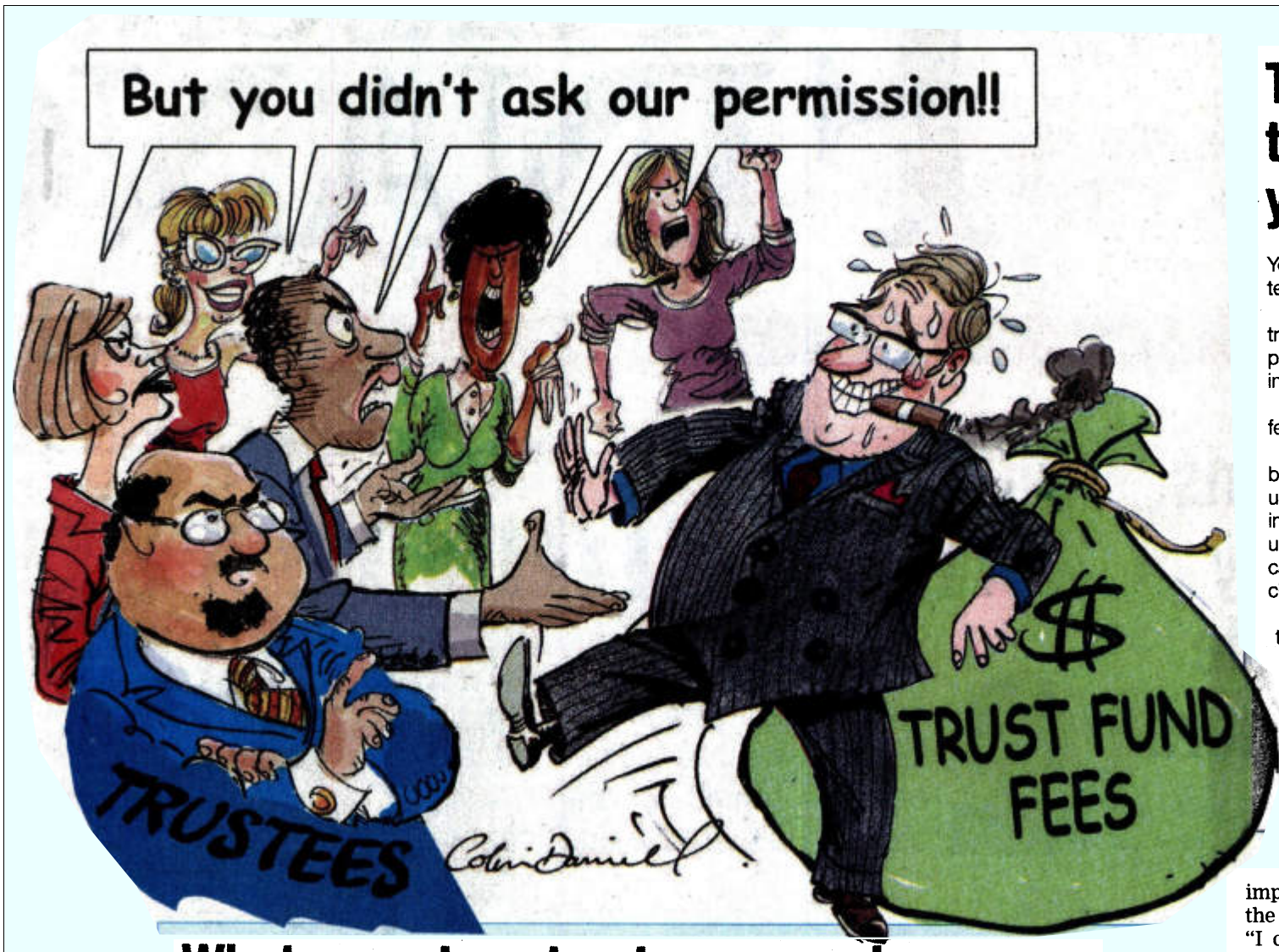

What executors, trustees may charge you

The executors of deceased estates and the administrators or trustees of testamentary trusts are remunerated in different ways, Graham McPherson, an executive member of the Fiduciary Institute of South Africa (Fisa), says.

EXECUTOR'S FEES

The maximum remuneration for executors is set out in regulations under the Administration of Estates Act, but you can negotiate a lower fee, which should be set out in your will, McPherson says.

The maximum tariff as prescribed by government regulation is 3.5 percent (excluding VAT) on gross assets and six percent (excluding VAT) on income collected.

Fisa recommends that you discuss the rate of remuneration with your proposed executor.

The Master of the High Court may agree on the request of an executor to increase or decrease the prescribed maximum fees, depending on the circumstances, McPherson says.

Executor's fees are frequently negotiated, particularly in larger estates where the recommended tariff is inappropriate because of the complexity of the estate.

Normal practice also allows for a postage and petties fee of R150.

TESTAMENTARY TRUSTS

The fees that may be charged by the trustees of a testamentary (or will) trust are not regulated, McPherson says.

"Fisa suggests that clients creating will trusts ask what the particular institution or professional trustee's fees are.

"Industry practitioners charge will trusts in different ways, and the extent of the fees may be influenced by the value of the assets under administration or the nature and complexity of such assets," he says.

The actual fee charged or the amount (percentage) applied may vary from company to company and from professional trustee to trustee, and may include variations on the following generic fees:

◆ A fee on the capital at the inception of the trust and/or on the distribution of income from the trust;

◆ An annual administration fee, which may or may not include the fees charged by the managers of underlying assets if the assets are in unit trusts or portfolio managers if there is a managed share portfolio;

◆ Ad hoc administration fees for specific requirements such as tax; and

◆ Trustees may also negotiate a single annual fee for the administration process, such as meeting tax requirements. This fee would normally be in addition to the normal administration fee.

McPherson says it would be inappropriate, if not impossible, to set out the average fees charged by the industry because of the diverse manner in which trustees charge.

Fees vary, based on the assets managed or investment mandates (such as capital growth versus income distributions), the complexity and mandate of the trust, as well as the anticipated duration of the trust, McPherson says.

It is best for you to explain to a professional trustee the nature of the will trust to be administered, so that the trustee can set out his or her proposed fees, which can then be negotiated, he says.

Testamentary trusts: what you should do

You should never set up a testamentary trust without:

◆ Carefully selecting the trustees and having a back-up plan should a trustee become indisposed in any way;

◆ Negotiating the costs and fees upfront;

◆ Ensuring that your beneficiaries, if they can, understand the cost/fee structure in advance and that they understand the need to check the calculations and actual fees charged on a regular basis;

◆ Appointing more than one trustee – for example, a trusted family member and a professional. In the case in this column, if it had not been for a trustee such as Ms L, who had a vested interest, the tenacity and the skills, Millers would have got away with it.

the rate, he demanded that he be allowed to invest the money of the Gruss Katz clients elsewhere.

Krautkrämer claims the funds were invested with the knowledge and consent of Ms L, but "unfortunately the reduced fee arrangement was not channelled through to our bookkeeping department, and the funds were inadvertently invested subject to our existing standard 'default' fee, which was 25 percent of the interest earned".

The problem is that no mandate was signed by the trustees of the HL Will Trust that allowed Millers to deduct any fee, and, when a mandate is required, there cannot be a "default fee".

Krautkrämer says that the bank statements reflecting the interest rates were sent by Nedbank to Millers every month and these were seen by Gruss, but he "unfortunately never noticed that our fee was higher than what he had agreed to with Ms L.

"When the estate [sic] was finalised and the funds released, Ms L then queried the high fee, which she noticed on the tax certificate."

(Note: Ms L queried the Millers "agent's fee" for the first time on July 22 last year and, after being frustrated on numerous occasions, raised the matter with Personal Finance almost six months later, on February 12 this year. Since then there have also been ongoing interactions on the final settlement and payment.)

Asked why Millers had not simply corrected the "mistake" when Ms L complained, Krautkrämer says he was under the impression that Gruss was aware of the standard fee of 25 percent, and "I could therefore not fathom the unhappiness.

"Because I was not personally involved in the matter since inception, and given my own workload at the time, it took me longer than usual to determine exactly what had happened and why Ms L was unhappy. It eventually surfaced that Ms L's concerns were indeed founded and that the firm had mistakenly deducted a fee that she had not agreed to, as co-trustee, and that the trust had, as a result, been overcharged."

Krautkrämer says when the facts became clear to him that Millers had, in fact, levied too high a fee, Millers entered into negotiations with Ms L and resolved the dispute.

"Indeed, the matter took longer to resolve than was ideal, but unfortunately my workload at the time was extreme to say the least, and I was not able to deal with it sooner. For this reason, we agreed to pay interest."

Krautkrämer says steps have been taken to ensure that "this error" will not happen again.

THREATS

This appalling saga should not have happened, and the time it took Millers to properly investigate and settle the matter, as well as the treatment of Ms L, is totally unacceptable. This is to say nothing of the implied threats, aggressiveness and insults that Krautkrämer has made, used and continues to dish out to Personal Finance.

In his latest missive, Krautkrämer demanded that I apologise to him within about six hours, demanded to see this column before it was published (he saw an earlier draft), and threatened to sue Personal Finance for defamation and to lay a complaint with the Media Council.

I hope he does.