

Money Matters

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Selection and appointment of trustees

Trusts

The selection of trustees is perhaps the most difficult decision an individual will face when establishing an *inter vivos* trust.

These individuals will, after all, have considerable control over the assets you have divested to the trust. This decision is all the more difficult when you consider the broad spectrum from which trustees can be drawn, ranging from trust companies, banks, family members and friends, to professionals such as chartered accountants attorneys and regulated financial advisors. Trustees are responsible for the administration, investment and distribution of trust property. These responsibilities are defined, for the best part, by the powers given to the trustee in terms of the trust deed, and duties imposed on the trustee in terms of the Trust Property Control Act, the trust deed and the common law. While the extent of these powers and duties is wide-ranging, the role of the trustee is primarily to act in a fiduciary capacity and apply the care, diligence and skill one would expect of an individual who regularly administers the affairs of others.

Appointment of trustees

Trustees are generally appointed in terms of the trust deed. This may provide for the appointment of a trustee by:

- the founder;
- the beneficiaries;
- the power of assumption. The trust deed may give the trustee

the power to assume additional trustees to hold office with them;

- the power of subrogation. The trust deed may give the trustees the power to resign while at the same time appoint their successor;
- a third party specifically tasked as such.

In certain circumstances a trustee may be appointed:

- by order of court;
- by the Master of the High Court

However, before the trustee can effectively assume office and transact as provided for in the trust deed, certain formalities must be complied with:

- the appointment must be lawful;
- the person nominated to be a trustee must accept the appointment;
- the person nominated to be a trustee must not be disqualified from accepting the appointment;
- the Master of the High Court must provide written authorisation of the appointment. Before this can be done, the person nominated to be trustee must either provide security to the satisfaction of the Master for the due and faithful performance of their duties as trustee, or be exempted from doing so by the Master or the trust deed itself.

Why an independent trustee?

An independent trustee is a person

or corporate body with no direct or indirect involvement with the trust, the founder or beneficiaries other than in the performance of their duties as trustee. The need for independent trustees is based on the requirement that for a trust to be validly constituted, control and bare ownership of the trust property must vest in the trustees.

The founder cannot treat the trust property as if it was his own. Secondly, good corporate governance requires the appointment of independent trustees that are not connected to the founder or beneficiaries.

Trustees must be free from the pressures and undue influence that may emanate from those that have a financial interest in the trust if they are to discharge their duties as required by law.

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Whom do you choose ?

Identifying the key attributes you would like in the body of trustees (both independent and connected) may help the selection process. These could include:

- *Professional knowledge and experience*

People drawn from the accounting and legal professions will have many of the hard skills required by a trustee.

While not required to have all the answers professional trustees must know when to seek external advice, so that timely decisions can be made.

- *Personal qualities and skills*

Honesty, integrity and fairness are a few of the qualities needed by someone who will assume a fiduciary responsibility. Communication skills, the ability to balance competing interests and the differing needs of all stakeholders in the trust are also important.

- *Personal relationship*

Insight into the history and background of the trust may be called for.

How the body of trustees deals with the competing interests and the differing needs of the stakeholders may to a large degree be informed by a prior relationship with the founder and the beneficiaries. Independence may play no role in this instance.

- *Time*

Where the trusteeship is carried out on a part-time basis there is always the risk that insufficient time is devoted to the affairs of the trust.

- *Continuity*

Corporate entities such as trust companies and banks and their "institutional memory" may help span the change over from one generation to the next.¹

These short guidelines will hopefully make the trustee selection process easier.

References

E Cameron with M De Waal, B Wunsh, P Solomon & E Kahn Honore's South African Law Of Trusts 5th Edition 2002W Geach with J Yeats Trusts Law and Practice 2007

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This column was written by FISA exco member Cheryl Howard of Cheryl Howard & Associates.

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