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THE FIDUCIARY INSTITUTE OF SOUTH AFRICA

Summary of the FISA Conference held in Cape Town on 6 September 2012

FISA held its second Annual Conference on 6 September 2012 in Cape Town in the auditorium at the BoE Clocktower in the V&A Waterfront.

The event was attended by more than 120 members and guests, and was addressed by speakers from its membership, academia, and a representative of the Office of the Chief Master of the High Court, the primary regulator in the fiduciary industry.

Ms Angelique Visser, National Chairperson of FISA, opened the Conference and welcomed everyone attending.

Ms Ronel Willams, Legal and Technical Manager at BoE Trust Ltd, spoke about the formalities for the valid signing of a will and the practical problems to comply with these requirements. These requirements are e.g. that the testator must sign the will in the presence of two witnesses who are over 14 years old and mentally capable to testify in court or acknowledge his signature to them, that the witnesses or the drafter of the will may not derive any benefit from the will, that any amendment made on the document must also be signed by the testator and the witnesses, etc. Although the requirements are fairly simple to comply with, courts have to hear applications for condonation of a will where these requirements have not been met in increasing numbers every year. Examples are where spouses sign each other's wills instead of their own, where one spouse makes an amendment to the other spouse's will, where a spouse writes out a will for the other spouse who is terminally ill and where witnesses are also heirs under the will.

Prof Francois du Toit from the University of the Western Cape and Mr James Faber from the University of the Free State covered the provision in the Wills Act, 7 of 1953 (section 2(3)) that provides for a court declaring a will valid despite not complying with the requirements if it was at least signed or drafted by a now deceased person and it is clear to the court that it was his intention that the document must be his will. A number of interesting cases were discussed, including some instances where suicide notes have been accepted as valid wills, where an e-mailed document was accepted although it was not signed and where a will stored on the computer of a person who committed suicide was accepted by the court.

Prof Mohamed Paleker of the University of Cape Town and one of his post-graduate students, Mr Daniel Mackintosh, pointed out a discrepancy in South African case law with regard to maintenance claims. On the one hand, while parents and grandparents have a duty to maintain their children and grandchildren respectively and children also have a claim for maintenance against their deceased parent's estate, no claim by a grandchild against a deceased grandparent's estate has been recognised by the courts. They argue that there is no basis for this distinction and that it flies in the face of section 28 of the Constitution, 1996.

Ms Amanda Catto, a partner at Catto Neethling Wiid Attorneys in Cape Town, then dealt with the practical issues around maintenance claims in deceased estates, including the question whether divorce orders extend beyond the death of the person liable to pay maintenance to a divorced spouse.

Mr Anton Maskowitz from Sanlam Private Investments spoke on Estate Planning in the Dynamic Offshore Environment. He focused on the complexities surrounding trusts in multiple jurisdictions and the taxation pitfalls to be avoided when structuring wealth and estate plans covering more than one country.

Mr Louis van Vuren of Finlac discussed the concept of the so-called "sham" trust and its relationship with what South African courts have called the "Alter Ego" of the previous owner of assets which have been transferred to a trust. A number of cases where the courts have looked through the structure of the trust and took trust assets into consideration in divorce matters were discussed.

Dr Bradley Smith from the University of the Free State spoke on the apparent requirement that some family trusts should have an independent trustee as articulated by the Supreme Court of Appeal in the seminal judgement in the Landbank v Parker case in 2004. He pointed to a possible misunderstanding about this requirement and the circumstances in which it would apply. It was meant to prevent a "debasement" of the trust form in cases where the closeness of family ties leads to a situation where there is no separation of control and enjoyment – an essential condition for a trust to exist. He also asked the question whether a life partner would qualify as a family member for this purpose.

Mr Tienie Cronje from the Office of the Chief Master spoke on developments in the regulator's office with regard to legislative development as well as information technology

which will soon make it possible to follow the administration process of deceased estates and trusts online.

The day was rounded off with a panel discussion in which all speakers participated and the audience had the opportunity to ask questions.

To read or download the presentations, please visit www.fidsa.org.za (top right-hand corner of the home page).

Media – if you would like an interview or article from one of the speakers, please contact Lucy Reyburn at the below details. I can also provide photographs.

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