

Long tradition of positive trust comment

Fiduciary Matters

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There are many arguments for the continued use of trusts and many reasons why the trust is still a useful estate planning tool. This is likely to remain the case despite the eventual outcome of the taxation of trusts, as is attested to by the long tradition of positive comment and feedback in the academic literature on trusts.

It seems appropriate to begin with two interesting quotes made early last century, one made by a famous English professor and the other by a French jurist.

In a paper written between 1901 and 1903 Professor Maitland wrote:

"The idea of a trust is so familiar to us all that we never wonder at it. And yet surely we ought to wonder. If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea."

In an article published in the Yale Law Journal (1927), Pierre le Paulle wrote:

"Trusts have now pervaded all fields of social institutions in common law countries. They are like those extraordinary drugs curing at the same time toothache, sprained ankles, and baldness sold by peddlers on the Paris boulevards; they solve equally well family troubles, business difficulties, religious and charitable problems. What amazes the sceptical civilian is that they do really solve them!"

Being an English law concept in a Roman-Dutch law environment, the South African trust has had an interesting development over the past 100 years and is now firmly rooted in our legal system. With its unique characteristics and peculiar nature the trust became an interesting topic and many authors, practitioners, academics and judges have made various observations and predictions about the trust, its usefulness and its future.

In the first South African court case on the validity of a trust (Estate Kemp v McDonald's Trustee 1914 CPD 1084), Solomon JA explained (at 507-508) that –

"the constitution of trusts and the appointment of trustees are matters of common occurrence in South Africa at present day [...] The idea is now so firmly rooted in our practice, that it would be quite impossible to eradicate it or to seek to abolish the use of the expression trustee, nor indeed is there anything in our law which is inconsistent with the conception."

With regard to the development of trusts in South Africa, Hahlo (1952:349) wrote –

"When it comes to trusts in our law, even the most elementary proposition cannot be regarded as settled [...] It will take the work of several generations of Judges and text writers before the law of trust reaches maturity."

Walter Pollak (1956:180) wrote that –

"The trust, the greatest achievement in the field of jurisprudence performed by Englishmen, has long found a welcome home in South Africa. The reasons are not far to seek. As a device for making dispositions of property it is more flexible a tool than any of our Roman-Dutch instruments. It is not surprising that men of property and their legal advisors have seized upon this device and have put it to many uses."

In 1983 the South African Law Commission published a preliminary report on trust law. In paragraph 1-10 of the report, the Commission pointed out that in South Africa the development of trust law has taken place sporadically through court judgements, and that this evolutionary process is continuing to adapt the basic trust idea of English law to South African legal principles. In practice particularly, trust law is still very much in a developmental stage. The Law Commission expressed no reservation about the trust's right to existence in South African law. In fact, they highlighted the popularity, flexibility and usefulness of the trust. This report confirmed that the trust is a permanent fixture and dismissed any doubts which still existed in this regard.

Recent opinions

According to Olivier et al. "the trust is here to stay" and "is one of the most efficient of all the forms of enterprises available to someone wishing to arrange his assets and financial affairs in order to provide in the best way possible for his needs and those of his family during his lifetime and after his death. The inherent flexibility of the trust institution makes it eminently suitable for addressing various problems and for being applied in numerous ways."

Abrie et al., focus on the inter vivos trust and write that –

"The trust inter vivos is therefore the most popular type of trust used in practice to facilitate planning. In fact, it is no exaggeration to say that it plays a dominant role in estate and financial planning"

Geach and Yeats write that –

"A trust is a very useful device [...] Apart from estate planning uses, a trust can effectively protect assets from

a beneficiary's personal creditors and indiscretions. A trust can also be used for business purposes, instead of the use of a company, close corporation or partnership."

Honiball and Olivier write that –

"A trust, especially a discretionary inter vivos trust, is a popular vehicle for estate planning purposes because the trust assets are regarded as separate from those of the founder/settlor as well as from those of an individual beneficiary."

Victor and King write that –

"Trusts are very useful estate and financial planning tools, and the fact that they combine fiscal benefits with the non-tax benefits of custodianship and asset protection have made them increasingly popular."

It seems that the general opinion during the previous century was that trusts were useful, that they had found a place in South African law and that

they had a future going forward and that present-day authors who write on trusts and estate planning still believe that trusts are very useful, efficient and popular vehicles for estate planning and other purposes.

For a full list of references visit www.moneymarketing.co.za

This article was written by Trinette Hartley, a FISA member and Fiduciary Specialist at Glacier Financial Solutions.

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