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Fiduciary Matters

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The need for a professional trustee

The financial services industry in South Africa has undergone serious change over the last few years with legislation being passed to regulate all aspects of this industry. Financial planning became common in the 1980s and at that time seemed to be a straightforward exercise for practitioners. With the legislative changes the arena has now become highly specialised, with specialists in each area of the fiduciary industry needed, to give the client what is required, namely, good, sound and unbiased advice, based on best practice.

One of the financial planning tools used over the years has been the inter vivos trust, that is a trust created during the lifetime of the founder to hold growth assets.

Trusts have little government intervention and consequently many have been administered in a very casual manner. It was common practice back then to appoint the founder and his/her spouse as the trustees of the trust and the couple generally continued to manage the trust assets as their own.

However, over time, aggrieved parties have instituted actions where such casual administration has caused loss or damages. Several cases have been brought before the courts dealing specifically with the composition of trustees, particularly where they are closely related.

As a result, the Master of

the High Court, with whom all trusts must be registered before they are valid and such the custodian of all trust matters, has determined that where only husband and wife have been nominated as trustees, a further appointment of a third, independent trustee will be called for.

This independent trustee could be a member of the Fiduciary Institute of Southern Africa (FISA) or an attorney, accountant, or a professional acceptable to the Master.

A trustee, similar to a company director, must be fully conversant with the role,

duties and obligations of the position.

The essence of the role of a trustee has been articulated as follows:

"The starting point is the duty of trustees to exercise their powers, in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. This duty of the trustees towards their beneficiaries is paramount. They must, of course, obey the law, but subject to that, they must put the interests of their beneficiaries first." - Sir Robert Megarry in Cowan v Scargill ([1984] 2 All ER (Ch. D))

The duties of a trustee include:

- Knowing and understanding the contents of the trust instrument appointing him/her;
- Having an in-depth knowledge of all relevant law governing trustees, which includes, but is not limited to the Trust Property Act 57 of 1988, Immovable Property Act 94 of 1965, Income Tax Act 58 of 1962, Estate Duty Act 45 of 1955, Matrimonial Property Act 66 of 1984, Marriage Act 25 of 1961, Civil Union Act 17 of 2006, Customary Marriages Act 120 of 1998, and Divorce Act 70 of 1979;
- Having a working knowledge of the law of contract, property, domicile etc;
- Being familiar with prudent investment vehicles, both on and offshore;
- Having knowledge of Foreign Exchange Control Regulations;
- Having knowledge of the Financial Services Board (FSB) and its reporting requirements;
- Being aware of the Domestic Partnerships Bill, gazetted on 14 January 2008;
- Keeping accurate and detailed minutes of trustee meetings, proper resolutions and comprehensive records;
- Acting with due care and utmost diligence;
- Acting only in the best interests of the trust;
- Acting impartially and independently.

It is clear that the office of trustee is not to be taken lightly. An inter vivos trust, properly created with competent trustees, is still an important estate planning tool. The environment is certainly more complex than it was in the past, so all the more reason to seek professional advice and administration.

This article was written by David Knott, FPSA®, FISA member and director, Private Client Trust. The Fiduciary Institute of Southern Africa (FISA) is a non-profit organisation that represents fiduciary practitioners and sets high minimum standards for the industry to protect the public's interests. FISA is the only professional body focusing solely on fiduciary

practitioners in Southern Africa. Membership is drawn from trust companies and banks, as well as the legal, accounting and financial planning professions. Activities of FISA members include but are not restricted to estate planning, the drafting of wills, administration of trusts and estates, beneficiary funds, tax and financial advice and the management of valued assets. FISA has close to 750 individual members, who collectively manage in excess of R280 billion. They draft several thousand wills each year and administer around 50 percent of deceased estates reported to the Master's Office.

FISA helps to make processes smoother for members and the public, particularly through its good working relationship with the Master's Office and SARS.

Equally important, a trustee may not:

- Act contrary to the contents of the trust deed;
- Act without his/her appointment being accepted by the relevant office of the Master of the High Court;
- Act strictly in anything but the best interests of the trust;
- Disregard the rights of any beneficiary;
- Fail to ascertain the rights and obligations that his/her office entails;
- Endanger or expose to risk, any or all of the trust assets;
- Inter-mingle any of the trust assets with assets belonging to the personal estate of the trustee(s);
- Treat any trust property as that of his/her own;
- Fail to maintain comprehensive records of all matters relevant to the smooth running of the trust;
- Withhold decisions taken from the other trustees and beneficiaries;
- Rely on, or be subservient, to any dominant co-trustee;
- Receive any secret benefit from the trust;
- Observe anything other than utmost good faith and integrity;
- Act without the necessary agreement of his/her co-trustees.