



THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



## 4<sup>th</sup> Annual Conference

Wanderers Club

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# Scenario

- I am a trustee of a charitable trust for a deceased colleague
- Other trustees are deceased's brother, another litigation attorney and deceased's spouse
- Deceased's spouse and 4 year old son are beneficiaries
- We raised around R750 000 4 years ago when deceased passed, from old school friends and colleagues
- We wrote a clause into the deed that trustees cannot charge any fees
- Spouse battling to run her business, and money almost all spent

# Problems

- Spouse sees the trust as her bank account
- Tells us she wants “her money”
- Normally mails us saying “I need my money urgently by tomorrow”
- The money is now almost all depleted
- The last 250k was spent to buy her a house [it only funded about 10%], which was registered in her name
- There is now an amount of about R1m about to be paid from the deceased estate of the 4 year old’s grandmother. Clause in the will simply left the money to the trust

- Section 9 of the Trust Property Control Act-”A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another”
- *Tijmstra NO v Blunt-Mackenzie NO and Others* [2002 (1) SA 459 (T)]
- “The common law duty of a trustee in respect of trust property may be equated to that of a tutor towards the property of his ward. He must observe greater care in dealing with trust property than he does with his own, for, while a man may act as he pleases with his own property, he is not at liberty to do so with trust property. The standard of care to be observed is accordingly not that which the ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man, the *bonus et diligens paterfamilias*. “

- “The investment of trust property must accordingly be made with safety and security, and it is not to be placed in anything involving the element of uncertainty or risk. It is a rule of South African law that a person in a fiduciary position is obliged, in dealing with and investing the money of the beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks”
- “A trustee may be removed even if his conduct complained of was bona fide. Mala fides or even misconduct are not necessary requirements for his removal. Whenever trust assets are endangered a trustee should be removed. Some circumstances which justify the removal of a trustee by a Court in terms of s 20(1) of the Trust Property Control Act 57 of 1988 are the following:
- ...Where the trustee treats the trust and its assets as his own, for example by selling the trust assets without the proper approval of the other trustees as required by the trust deed.

- 5. Where the trustee expresses no independent views about matters affecting the trust, but relies entirely upon a dominant co-trustee and approves of his (wrongful) conduct.
- 6. Where the trustee, without objection, allows grave misconduct on the part of a co-trustee in the administration of trust property, and thus exercises no control at all over the trust property. “
- My concerns:
  - We are acting in good faith to help the widow, but that does not assist us-are we really managing the money properly for the beneficiaries in giving the mom whatever she wants?
  - When the 4 year old turns 18, what are we going to say to him when there is no money left to support him?
  - How do we balance mom’s need for income and son’s need for capital growth?

# Conclusion

- I told mom and my other co-trustees that when the estate money comes through, we will take half of it and invest in a long term insurance policy [At least 10 years]. Mom won't be able to dissipate that.
- Mom was not happy. The mail she sent me expressing her unhappiness is good for us trustees!
- I have made her amend her will [off course not enforceable] to state that on her death the house will be bequeathed to the trust
- No perfect answer, as there is simply not enough money, but we must show our independence and that we are trying to preserve some capital. Could become a bigger issue when mom remarries!

