



*Lecturer at the private law department at the University of the Western Cape, Professor François du Toit, spoke about freedom of testation.*

of the trustee except insofar as he as the trust beneficiary is entitled to the trust property.' He stressed that it was vitally important for trustee-spouses to ensure compliance with the core idea of trust so as to minimise risk at divorce.

## Abuse of trust in divorce matters

Attorney and member of the Law Society of South Africa's Gender Equality Committee, Amanda Catto, spoke about a controversial issues that occur in family courts, dealing with abuse of trust in divorce matters. She focused on matters, which include a sham and alter ego in the context of the divorce.

According to Ms Catto, legal practitioners, when dealing with the abuse of trust, have to confine to determining whether the trust is a sham, and if the trust ever existed and considering the beneficiary ownership of the assets held in a trust validly established has vested.

Ms Catto said the concept of alter ego is messy and used interchangeably between the sham concept and the beneficial ownership concept.

## Research on the TPCA

Lecturer in private law at the University of the Western Cape, Dr Latiefa Albertus, spoke about research she conducted on law reform in relation to trusts. She said her research, which was an academic exercise, was to identify aspects of trust law where statutory regulation is not in place.

However, she was required, to analyse the provisions of the TPCA and to make recommendations for legislative reform in this regard.

Her presentation focused on three aspects namely -

- the definition of trustee;
- when a trustee is authorised to act; and
- amendment of a trust in terms of s 13 of the TPCA.

Dr Albertus briefly discussed her research into each of these aspects, the interviews she had with role players in the trust industry and the recommendations she made for reform.

*Kgomotso Ramotsho,  
Kgomotso@derebus.org.za*

## Section 7C discussed

In a session at the FISA conference, chartered accountant and FISA Gauteng Regional Head, Cheryl Howard, discussed s 7C of the 2016 Draft Taxation Laws Amendment Bill. In her presentation Ms Howard said the taxation of trusts had long been on the radar of National Treasury, however, when the Minister of Finance announced in February that the taxation of interest free loans was coming in, it was not what was expected.



*Lecturer of family law and law of Trusts at the department of private law at University of Free State, Prof Bradley Smith discussed separation of control and enjoyment in trusts.*

Ms Howard discussed some issues that had come up at the workshop with the Department of Treasury on 16 August, the week before the conference took place. She added that the department explained the intention of implementing the section and said that there was a serious concern regarding the 'inequality of a result of ownership of assets' as opposed to the 'inequality of income'. She said that Sars was very concerned about the inequality, solely from estate duty and donations tax and kept on the basis that people were hiding their wealth by putting them into trusts and the growth was not being taxed. Ms Howard said that workshop attendees pointed out that income was being taxed, which included, capital gains tax, but the depart-

ment was adamant that this section was needed to fix the problem as far as the wealth side was concerned.

Ms Howard gave a brief explanation of s 7C and said it applied to -

- natural persons where that persons and a trust are connected persons; or
- companies who are connected person in relation to such natural persons or to the trust.

Ms Howard highlighted concerns in regard to s 7C, namely -

- double taxation;
- distributions to beneficiaries;
- retrospectivity;
- offshore trusts;
- the office rate of interest; and
- cash flows.

Ms Howard went on to give further points from the Department of Treasury's point of view:

- The primary motivation in support of the proposed legislation would appear to be the perceived avoidance of estate duty through the use of interest free loans.
- The intention is to include all loans, existing and future. It is, however, recognised that trust structures other than those adopted for the perceived avoidance of estate duty are in place and cognisance will be taken thereof. To this end the exclusion of employee share trusts, public benefit organisations, special trusts and the like is being considered.
- It is not intended to effectively double tax the benefits flowing from trusts funded in this manner. Either the new s 7C or the existing attribution rules will be applied to the case in point, not both.
- Concern on the part of National Treasury that capital gains tax is not a replacement for estate duty and to this end 'growth assets' fall outside the attribution rules. Proposed legislation is a way of addressing this rather than placing reliance on the common law and the debate around the nature of interest free



*Attorney, Amanda Catto, spoke about a controversial issues that occur in family courts.*