

Beneficiaries can't hire and fire trustees as they please



ALL ABOUT TRUSTS

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MOST FAMILY trusts are created with good intentions, while the family lives in harmony. Very seldom does the creator or founder of a trust consider or anticipate the possibility that family members may have disagreements, which may even result in major hostility.

A potential aggravating factor is when there is a divorce, and relationships break down. Emotions run high and family members take sides. Then questions are asked: Why am I not a trustee? Why am I not a beneficiary? How can I remove a trustee? How can I remove a beneficiary? Can I sue a trustee?

When these questions are asked, it is often too late to rectify any “flaws” in how the trust has been set up, and to add and remove trustees and beneficiaries.

There have been many court cases where applicants sought the removal of trustees for various reasons, although often not for sound, justifiable reasons.

In one, a father built up the assets in trust for his family and he did most of the work. The son had access to the trust’s bank account and helped himself to the funds. When the father reprimanded him, he applied to the court for his father’s removal as trustee. His actions coincided with his parents’ pending divorce, so he sided with the mother. All of a sudden, the son, as beneficiary, was unhappy with the way the father conducted himself as trustee and accused him of things that he had done wrong in the past. Were it not for these events, he would probably not have taken this course of action.

The court found that the father was instrumental in substantially growing the trust’s assets, that he played an important role in the management of the trust assets, and that his removal could negatively impact the trust assets. The court also found that the son did not have sound reasons justifying the removal of his father as trustee and took issue with the fact that issues about the father’s past behaviour were raised only after the conflict arose.

WHAT IS THE LEGAL POSITION?

Trustees are the decision-makers of a trust. Trustees have a duty and obligation always to act in the best interests of the trust and its beneficiaries. In executing their duties, they have to consider the law and the trust deed.

Trustees act in a fiduciary capacity (a legal responsibility of a person who manages property or money belonging to another person).

If a trustee does not act in the best interests of the beneficiaries and does not agree to resign on the request of a beneficiary or co-trustee, the other trustees and beneficiaries first have to consider the provisions of the trust deed, which may describe the process to be followed to remove an unfit trustee. Only if the trust deed is silent on the removal steps, further options should be considered.

A trustee may be removed in terms of section 20 of the Trust Property Control Act by the court on application of the Master of the High Court, or an interested person, if the court is satisfied such removal will be in the interests of the trust and its beneficiaries. This is a discretionary power of the court. Litigation is expensive and can be protracted, so it is preferable other options, such as mediation or an application to the Master, are made to remove a trustee on specific grounds in terms of section 20(2) of the Act.

An application to court that a trustee did not perform his or her required duties is complicated and may be hard to prove. One has to prove that the trustee does not act in the best interests of the beneficiaries, such as not responding to reasonable communication, not attending trustee meetings after receiving sufficient notice, or fails to co-operate to manage the trust assets effectively. The onus of proof will be on the person making the allegations to prove that the trustee’s actions

constitute a lack of care, diligence and skill in terms of the provisions of section 9(1) of the Act.

A trustee may also be removed in terms of section 23 of the Act by the court on application of a person who feels aggrieved by the appointment of such person by the Master. This is a wide power the court has. The Act does not spell out the grounds for the removal of a trustee.

The court has the inherent power to remove a trustee from office in common law (the body of law developed by judges and courts). The general common-law principle that has crystallised over time is that a trustee can be removed from office if his or her continuation in office prevents the proper administration of the trust or is detrimental to beneficiaries.

CONCLUSION

Trustees are legally vested with the administration of the trust assets and they must manage the assets and liabilities of the trust in terms of the provisions of the trust deed and the law, and not necessarily in a manner that pleases the beneficiaries. The court usually requires a raised standard of misconduct to remove a trustee, especially if the trustee is the founder, or is appointed by the founder. The court will remove a trustee in cases of his or her positive misconduct where such trustee had abused his or her trust.

The court will not rely on every mistake or neglect of duty by a trustee to remove him or her, but his or her conduct must be such that it endangered trust property or that it showed a lack of honesty or of his or her ability to execute his or her duties.

In terms of our common law a trustee may be removed where the non-removal of a trustee would prevent the trust from being properly administered, or where the continuance of the trustee in office would be detrimental to the welfare of the beneficiaries as a whole, not to one disgruntled beneficiary.

The court has to be certain that the removal of a trustee will be in the interest of the trust and the beneficiaries. A beneficiary’s unhappiness with a trustee, and even inefficiency of the trustee, is not enough for a court to remove a trustee. More is required.

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