

Independent trustee..... **DISCLAIMER**



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A complete stranger?

*** Maybe**

*** Maybe not**

FISA has an NB role to play





ON THE WAY HOME

FROM DIVORCE COURT



Business partners...



Family fights...







**Creditors have better
memories than debtors.**

Benjamin Franklin





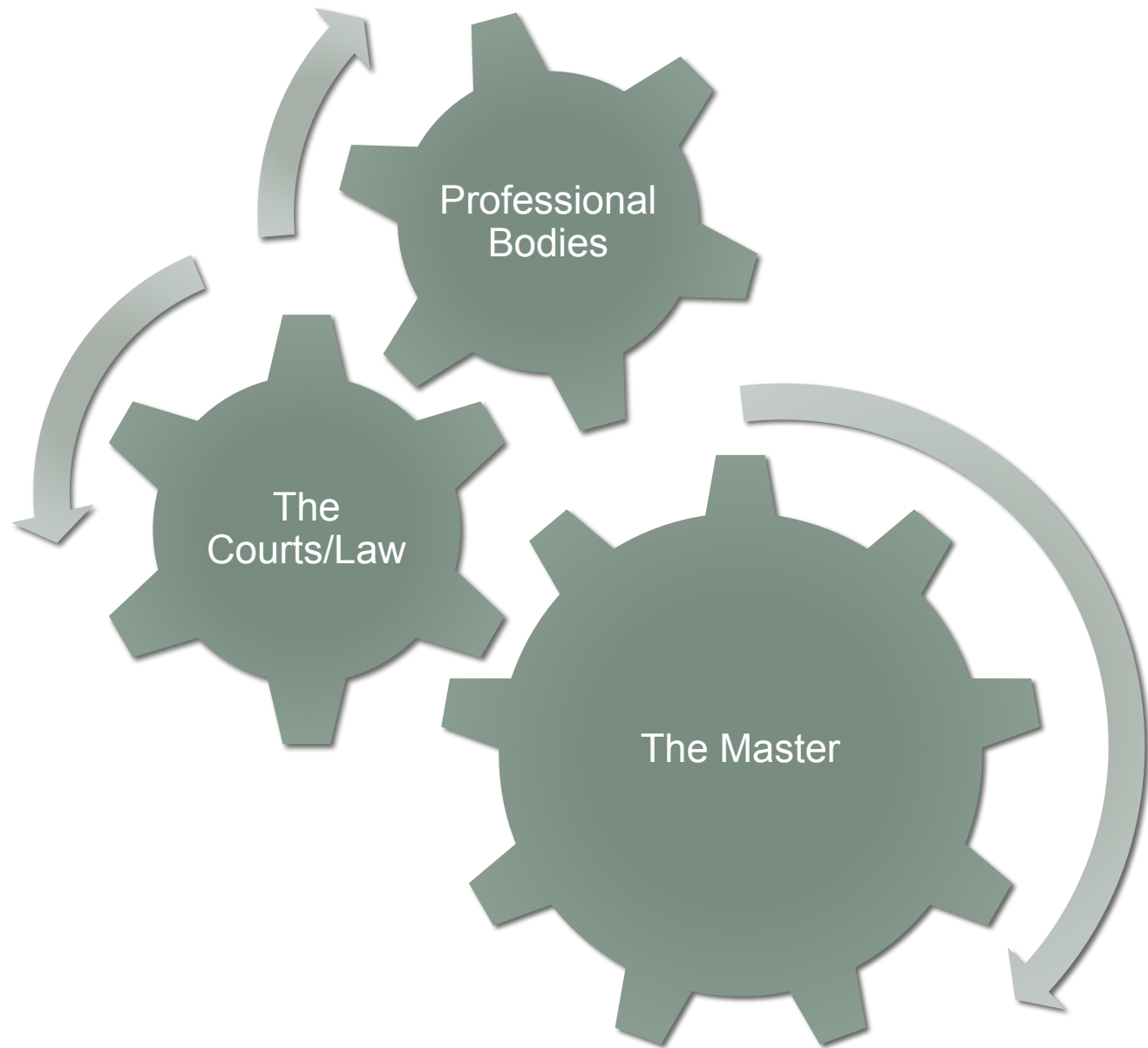
“Can be known to the family as long as you are an independent outsider” ????????

Sometimes the best part of my job is that the chair swivels.

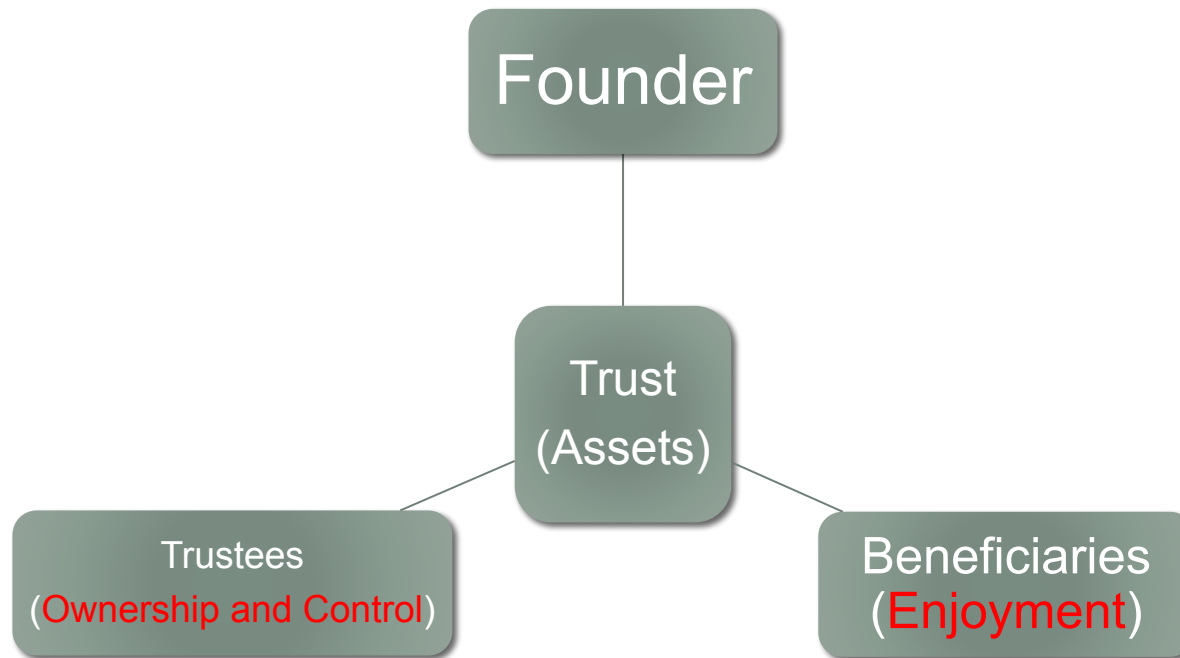


Founder intention?





The challenge – structure and execution



Land Bank v Parker – separation of control and enjoyment of trust assets
core idea of a trust – trustee independence “indispensable requisite of office”

The appointment of an independent trustee can go a far way in demonstrating the intention of the estate planner to achieve the separation of *ownership* from *control*.

Objectives of trustees

- To **protect** value
- To **grow** value
- To meet the **needs of beneficiaries**

CONFLICT!

Conflict of interest between **personal interest to maximise revenue** and duty as trustee to **preserve and grow capital** [Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W)].

Since the Court may remove a trustee who places their own interests above those of the trust beneficiaries (Mofokeng v Master of the North Gauteng High Court case of 2013), it is prudent for a trustee *not* to accept trusteeship if there is the risk of an actual or potential **conflict of interest** between their personal interests and those of the trust.

All trustees have the same fiduciary duty to look after trust assets in the beneficiaries' best interests, in a legal manner



What is expected of a trustee?

- A Trustee has to act “*bona fide*” or in **good faith** in managing the affairs of the trust.
- Trustees are to **act with the care, diligence and skill, which can reasonably be expected of a person who manages the affairs of others** (Section 9(1) of the Trust Property Control Act).
- This is a far reaching, onerous provision and the **onus will be on the trustee** to prove that he/she acted as such, in the event that he/she is accused of maladministration.
- **No trust instrument can exempt a trustee from this liability.** If the trust instrument contains such a clause, it may invalidate the entire trust instrument and cause the trust to cease to exist.

What is expected of a trustee?

(cont.)

- **Diligence** = rigour, meticulousness, carefulness, thoroughness, attentiveness.
- Skill = **More than good faith.**
- Trustees must use **greater care** in handling trust property than they might in dealing with their own property.
- Trustees must exercise an **independent discretion**. It is fundamental that trustees avoid self-serving decisions and partiality.
- Trustees must take all reasonable steps to ensure that the **interests of the trust** and **beneficiaries** are protected at all times.
- Trustees must avoid **conflicts of interest**.

Does a trustee have any excuse?

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- Trustee has knowledge and understands the law of trust? Yes No
- Trustee is aware of the fiduciary duties and responsibilities? Yes No
- By accepting the position of trustee, you are exposing yourself to civil and criminal actions in terms of section 9 of the Trust Property Control Act, 1988 (Act 57 of 1988) Yes No
- By accepting the position of trustee, you are exposing yourself to removal action by the Master for failure to comply with any lawful request of the Master including a request to account in terms of section 16 of the Trust Property Control Act, 1998 (Act 57 Act of 1998) Yes No
- Trustee will exercise direct special personal control to maintain accurate trust records Yes No

Trustee independence – ALL trustees

1. The trustee is to be afforded the capacity to act independently
2. The relevant trustee must exercise this capacity.

- Badenhorst case
- PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union case of 2008 –
 - Trustees were found to be acting in *breach* of their fiduciary duties (an onerous, *legal obligation* – a duty of loyalty and care – of a person managing property or money belonging to another person to act in the *best interests* of such a person) to do the best they could for the beneficiaries, by rather choosing to follow the union's (who appointed them) policy and instruction, rather than to exercise their independent judgement and act in the best interests of the beneficiaries.

Parker case

- An “**independent outsider**” – ensure that there is adequate separation of control from enjoyment
- Not necessarily a professional person such as attorney or accountant

BUT

Proper realisation of responsibilities of trusteeship – ensure that:

- Trust functions properly
 - Provisions of trust deed are observed
 - Conduct of trustees who do not observe trust deed is scrutinised and checked
- Failure to observe these duties = **breach of trust**

Parker case

- Often trusts are trusts in name only with an essential principle of trust law, namely the independence of trustees, neglected (also *Tijmstra v Blunt-Mackenzie NO 2002 1 SA 459 (T)*)
- Master should, in carrying out his statutory functions, ensure that there is adequate separation between control and enjoyment of trust assets
- Can be done if INDEPENDENT OUTSIDER is appointed where:
 1. Trustees are all beneficiaries; and
 2. Beneficiaries are all related to one another
 3. For every 'family' trust

Master's Directive Mar 2017

- Appointment of an independent trustee for *all* NEW trusts which are defined as “*family business trusts*”. BUT now also when trustee amendments are made!
- This is typically a trust set up for the protection of family assets:
 - Trustees are all beneficiaries; *and*
 - The beneficiaries are all related; and
 - Trustees are empowered in terms of the *trust instrument* to enter into transactions which create *debt* in the trust.

Master's Directive Mar 2017

- The independent trustee could be:
 - Person or an entity;
 - *With no family **relation** or **connection**, blood or otherwise*, to the *trustees, beneficiaries or founder* of the trust;
 - Who is also *not* a beneficiary of the trust.
- Relation = How 2 or more people are connected
- Connection = Relationship in which a person or thing is linked or associated with something else
- Can the Income Tax Act – ‘Connected Person’ rules assist?
- (Parker case) Proper realisation of responsibilities of trusteeship – ensure that:
 - Trust functions properly
 - Provisions of trust deed are observed
 - Not necessarily a professional person such as attorney or accountant

Master's Directive Mar 2017

May be professional accountant, admitted attorney, an advocate who is affiliated to the relevant professional body or association, trust companies, boards of executors or fiduciary practitioners who are members of FISA and may even be chosen from the ranks of business associates – BUT duty bound to report irregularities! Non-Compliance with Laws and Regulations (NOCLAR)

- Competent to **scrutinise and check** the conduct of the other appointed trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the trust instrument
- **Knowledgeable** about the law of trusts – not conclude or approve transactions that may prove to be invalid
- Has business knowledge and experience of the **business field** in which the trust operates
- Should realise that failure to observe duties of independent trustee may risk action for **breach of trust**

The Master of the High Court may, in certain circumstances, *dispense* with the appointment of an independent trustee and make use of one of the following alternatives:

- Forego the appointment after receiving representations from the founder showing **good cause** to dispense with the appointment
- Request **security**
- Request that financial statements be **annually audited** and that the auditor be instructed to inform the Master of the High Court when potential harm to creditors is likely to take place

Independent trustee – Sworn Affidavit

- The Master of the High Court requires the independent trustee to sign the following Sworn Affidavit upon their appointment:
- *“As independent trustee I declare and undertake the following:
...
4. That I have **no family relation or connection, blood or other**, to any of the existing or proposed Trustees, beneficiaries or founder of the trust.
5. That I am **competent** to scrutinize and check the conduct of the other appointed trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the Trust instrument.
6. I have no reason to conclude or approve transactions that may prove to be invalid, because I am **knowledgeable in the law of trusts”**.*

You provide the service for free???

Nothing in life is for free...

- Our law affords the contingent beneficiary the right to protect his or her interest against **mal-administration** by the trustee [Gross v Pentz 1996 (4) SA 617 (A)].
- Trustees held **personally liable** - *“Going behind the trust form, on the other hand, entails accepting that the trust exists, but disregarding for given purposes the ordinary consequences of its existence. This might entail holding the **trustees personally liable** for an obligation ostensibly undertaken in their capacity as trustees”* [Van Zyl NNO & Another v Kaye NO 2014 (4) SA 452 (WCC)]

Are you the minority?

- No assurance that the trustees will act independently to achieve a separation between control and enjoyment of trust assets.
- Uneven number of trustees – you and husband and wife. Out-vote you if you do not agree with the husband and wife team (van der Merwe NO and Others v Hydraberg Hydraulics CC and Others, van der Merwe NO and Others v Bosman and Others case of 2010).
- Risk for you if two family members do not act for the benefit of **all beneficiaries** of the trust, but rather for their own.
- Expose the trust if the Court can prove that your appointment was just “**window dressing**” and that your vote does not “really” count.
- The Courts frown upon this practice and expect an independent trustee to be **involved in decisions** relating to the trust.
- Need **majority** independent trustees?
- A ‘**silent**’, ‘**sleeping**’, ‘**absent**’, or ‘**puppet**’ trustee will not be tolerated. In the Slip Knot Investments 777 (Pty) Ltd v du Toit case of 2011

Financial Planning Institute (FPI)

No formal communication regarding CFP's acting as independent trustee and advisor

BUT

FPI Code of Conduct:

'Objectivity requires intellectual honesty and impartiality. Regardless of the services delivered or the capacity in which a FPI member functions, objectivity requires members to identify and manage conflicts of interest and exercise sound professional judgment.'

Guidance note - being objective means demonstrating the ability to evaluate information and circumstances without letting one's own emotions or competing priorities (such as compensation) cloud judgment.

Objectivity - rendering advice or making recommendations based on thorough research and subsequent knowledge and understanding of the client's needs, sound analysis of products and optimally matching clients' needs with the products best suited to them.

Conflict of interest?

Are you truly independent if you are receiving two forms of compensation for two different roles in a trust?

Legal Practice Council (LPC)

LPC has not provided guidelines when it comes to acting as an independent trustee on a trust

BUT

Legal Practitioner acting as an independent trustee - whether it be in a personal or professional capacity - will need to adhere to the **Legal Practice Act** and more specifically the **Code of Conduct**.

- The Code of Conduct makes it clear that Legal Practitioners must at all times act with **integrity, honesty** and in **the best interests of their client (THE TRUST!!!)**, **subject** to their duty to court, the interests of justice, observance of the law and maintenance of the **ethical standards** prescribed by the Code of Conduct.
- Refrain from doing anything in a manner **prohibited by law** or by the Code of Conduct – Section 9(1) of TPCA???
- Therefore held to a **much higher standard** than a normal individual in the same position.
- Why would you risk getting removed from the roll because you were doing your shady neighbor a favor?

SAICA Code of Professional Conduct (2020) (And IRBA)

Principles:

Integrity – to act in an honest way when interacting with others

Objectivity – to be free of bias, avoiding conflicts of interests and undue pressures and influence affecting professional judgements

Professional competence and due care – to ensure work is done properly with the required skills and knowledge. This means keeping abreast of current practice, legislation and technical and professional requirements and standards, and care must be applied to work at all times

Confidentiality – to respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, not disclose any such information to third parties without proper and specific authority unless there is a legal or professional right or ethical duty to disclose, nor use the information for the **personal advantage** of the chartered accountant or any other third parties, and

Professional behaviour – to always abide by laws and regulations and to avoid any conduct that would bring the profession into disrepute - Section 9(1) of TPCA???

SAICA Code of Professional Conduct (2020) – Categories of threats

- **Self-interest threat** – the judgements being made are inappropriately influenced by financial or other interests
- **Self-review threat** – may not appropriately evaluate the results of a previous judgement made, or that of their staff
- **Advocacy threat** – the danger of promoting the work or position of a client or employer to the extent that the accountant's own objectivity is compromised
- **Familiarity threat** – long and close relationships give rise to sympathy and may impair objectivity
- **Intimidation threat** – objectivity is compromised due to actual or perceived pressure to unduly influence the professional accountant

SAICA Code of Professional Conduct (2020)

- Section 210 – **Conflicts** of interest
 - 2 or more parties in conflict
 - Professional accountant and trust interests – which hat are you wearing?
- Section 230 – Acting with sufficient **expertise**
 - Sufficient training and expertise
 - Not misleading client
- Section 270 – **Pressure** to breach the fundamental principles
 - Pressure to influence preparation or presentation of information:
 - Pressure to report misleading financial results to meet investor, analyst or lender expectations.
 - Pressure related to non-compliance with laws and regulations:
 - Pressure to structure a transaction to evade tax.

South African Institute of Professional Accountants (SAIPA)

Accounting Officer for a trust:

Technical Committee of SAIPA recommends that Trustees obtain only the services of **competent** and **qualified** persons to assist them with their **stringent administration duties** imposed in terms of the trust deed, in terms of the common law and in terms of the Trust Property Control Act.

Technical Committee of SAIPA recommends that the **trustees** should seriously consider the appointment of an appropriately qualified person to report on the financial affairs of the trust. In the view of the Technical Committee, qualified persons would include only those professional accountants that are members of an **accountancy body** and who are in possession of a **specialisation qualification in the administration of Trusts.**

SAIBA

Similar to SAICA and rest

You can feel it in your gut!

