MANAGING THE RELATIONSHIP BETWEEN THE EXECUTOR AND THE FAMILY OF THE DECEASED

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WHO WOULD WANT TO BE AN EXECUTOR IN THIS CLIMATE?

Is being the Executor in an estate really what it used to be?

Having to deal with the Master;

Having to deal with SARS;

Having to deal with the Deeds Office;

Dealing with municipalities;

AND having to deal with the family.

As Executors are we not also being social workers, mediators and “punching bags”?

In practice, all the old family feuds and nuances come to the fore once the testator or testatrix is deceased. With the “oil on the troubled water” gone, the family tsunami is about to hit.

Today the Executors position is much more onerous and being between a desperate beneficiary and “easy cash” is no longer all it was cracked up to be.

HISTORICALY – the "good old days"

I recall when I started out in the fiduciary field, being an Executor was SO EASY
You could pop into the Master's Office and discuss a matter with an examiner or assistant Master face to face and discuss issue.
An estate could be reported without even a death certificate, that is why the Death Notice form for the Master, still has the questions:

(a) Was the signatory present at the deceased's death? .....
(b) If the answer to the previous question is no, did the signatory identify the deceased after his death?

There was no FICA

There was no CGT

There was no requirement to be a tax practitioner

There was no dealing directly with SARS

Banking institutions and investment houses gave you COBs and info simply on the presentation of a death certificate and your credentials.

Families were like children in the old days, "seen but not heard. Executors were ROYALTY and FEARED

EXECUTOR = SOCIAL WORKER = REFEREE = SOLOMON

Why is it that the family feud, disagreement from when they were 5- and 6-year-old, ALWAYS comes up at the time of death of a parent?

Why is it “never the money or the value” but the “principle” that is so important?

Why is it that beneficiaries become so very desperate for funds from the estate as soon as possible to solve their financial crisis and after you as the executor at every turn to expedite advances etc, but if mom or dad were still alive, they would not be due any funds and how would they get themselves out of the mess then?

In practice, I have seen children and family in estates disagree, fight, feud and fall out over the smallest and incredibly insignificant things, and usually, because “Johnny or Sam” was always the favorite or prodigal.

In one case, in front of the surviving spouse, the children fought over who would get the ashes. Despite the fact that the spouse was traumatised by the death of her partner, as she was not “their mother” they could decide.

In another old hearing aids were the issue as in who got them and why. Do not be mistaken, these were well to do wealthy people of means, not desperate for funds, but just wanted their final day of revenge or reckoning to come for their “evil sibling”.

BEWARE ACCEPTING THAT APPOINTMENT AS EXECUTOR

The Executor as a professional, whether directly, or as nominee of a company has become VERY onerous.

Remember that a “family” Executor does not have the same issues. How many times have we seen the Master’s Office insist that where a will directs that a family member be appointed as sole Executor, that they be assisted by an agent or professional in the industry?

Where you are a Co-Executor with 1 or more family members, it can become even more tricky and dangerous.

BEWARE THE CONFLICT OF INTEREST TRAP FOR YOU AND FOR YOUR CO-EXECUTORS

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CONFLICT OF INTEREST – WHAT DOES IN MEAN?

Oxford definitions

A situation in which the concerns or aims of two different parties are incompatible, or a situation in which a person is in a position to derive personal benefit from actions or decisions made in their official capacity.

Good old Google and Wikipedia

What is a conflict of interest simple definition?

- A conflict of interest occurs **when an individual's personal interests – family, friendships, financial, or social factors – could compromise his or her judgment, decisions, or actions in the workplace.**

WHAT IS THE LEGAL DEFINITION OF CONFLICT OF INTEREST?

- https://dictionary.law.com

conflict of interest. n. **a situation in which a person has a duty to more than one person or organization, but cannot do justice to the actual or potentially adverse interests of both parties.**

- https://www.americanbar.org

Even where there is no direct adverseness, a conflict of interest exists if there is **a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action** for the client will be materially limited as a result of the lawyer's other responsibilities or interests.

WHAT DOES FAVOURITE RESOURCE SAY?

- MEYEROWITZ on the Administration of Estates and Taxation – MEYTAX PUBLISHERS CC (PG11-3) on the removal of an Executor if conflict arises

"Where an executor's private interests' conflict with those of the estate, he may be removed from office."

Further… *"if application is made for removal of an executor on the ground that he has a claim against the estate which is disputed by the heirs it is not necessary for the court to go into the validity of the claim, as a question as to who is right or wrong is irrelevant.(Grobbelaar v Grobbelaar 1959 (4) SA719 (A).The Executor finds himself in the impossible position on the one hand of having to fight for his claim as a creditor and on the other hand having as executor to defend the estate against the claim; he cannot remain impartial. Under the repealed Act the court was given the power to remove or suspend an Executor from office, and this power was used to suspend an Executor from office until the conflict of interest had been resolved(Act 24 of 1913s 99) . The omission of this power to suspend in the present Act prevents, it is submitted, the court from merely suspending the Executor where there is a conflict of interest; the executor must be removed."*
This omission Meyerowitz suggested was unfortunate, "and may result in the unnecessary removal of an Executor merely because heirs or other interested parties dispute his claim, even if the dispute turns out to be unfounded."

THE MOST RECENT CASE

Brimble-Hannath v Hannath and others[2021] ZAWCHC 102

- Parties

  Applicant Mrs. S A Brimble-Hannath

  And

  First Respondent E L Hannath
  Second Respondent C L Fisher
  Third Respondent BDO Business Services (PTY) Ltd – company specializing in provision of consulting and advisory services
  Fourth Respondent Master of the High Court

MORE ON THE PARTIES

- Applicant Mrs. S A Brimble-Hannath was the surviving spouse of the deceased and not the mother of the first and second respondent.
- First Respondent E L Hannath was the deceased's daughter by previous marriage, and also the appointed executor in the estate and the trustee of the trust to which the testator left the bulk of his estate and a beneficiary of that trust **(many hats to wear!!)**
- The Second Respondent C L Fisher was the deceased's daughter by previous marriage, and also the appointed executor in the estate and the trustee of the trust to which the testator left the bulk of his estate and a beneficiary of that trust **(many hats to wear!!)**
- The Third Respondent BDO Business Services (PTY) Ltd – company specializing in provision of consulting and advisory services and was appointed by First and Second Respondent as their agent to assist with the administration of the deceased's estate.

CRUX OF THE MATTER?

- Conflict of interest of course.
- Surviving spouse wanted to claim maintenance from the estate in terms of the Maintenance of Surviving Spouses Act, 27 of 1990
- Children of deceased wanted to protect the interests of the trust of which they were beneficiaries
- Two competing interest here? Thus, it would seem a conflict?
- The conflict of interest is placed at the feet of the 2 daughters due to the “many hats” they are wearing as executor, trustee and beneficiary.
- How can they be impartial? Remember Meyerowitz made the comment? “he cannot remain impartial”

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DOES THIS STORY SOUND FAMILIAR?

- I bet in practice that most of us have seen a similar set of facts come up in many of our practices when traying to advise testators and families on the “second family scenario”.
- In most cases we do our best to avoid “in laws becoming outlaws” and step mom or dad being left out in the cold and cut off, or “first family” children being cut out and the “new younger” family running off with the last of the crown jewels.
- How to keep youngest new “laat lammetjies” educated till the end and THEN splitting the remaining baubles

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BACK TO THE MATTER AND CASE AT HAND

- Justice Binns-Ward as an opening to his judgement stated:

“this is a case that should never have come before the court if only the parties on both sides had dealt with the issue more constructively than they did.

It is unfortunate that it has because the matter concerns the winding up of an estate of relatively modest value, which, to the disadvantage of everyone concerned, will be materially eroded by the cost of litigation”

ALLEGATIONS OF CONFLICT OF INTEREST MADE

- The first and second respondent lodged a claim against the estate in their capacities as trustees of the trust in the sum of R4mil ,which they stated the deceased borrowed from the trust to purchase the very same Noordhoek property. As Executors they accepted the claim made against the estate by themselves as trustees (with another),and the claim was recorded in the Liquidation and Distribution Account.

- The applicant questioned the existence of the claim and complained that the respondents denied her access to the trust records to investigate whether the original loan was made.

- The applicant stated that the trust claim would have eaten into the “finite pie” available in the estate, and thus wipe out any chance of her being able to receive her maintenance claim.

- If both claims were accepted, it would make the estate insolvent

SO!! The paw paw hit the proverbial fan, and not even if the pie was a King Pie, would there be enough for all!!

COUNSEL FOR THE RESPONDENTS ARGUED

1. He questioned the applicant's bona fides.
2. He emphasised her failure to respond to the request to substantiate her claim for maintenance on affidavit and her inability to support her suspicions about the genuineness of the trust's loan account claim against the deceased estate.
3. He argued that the applicant had been unable to make any cogent allegations that the executrixes' conduct had been demonstrably improper in any respect.
4. He drew attention to various authorities in which the actual conduct of the trustees or executors had been examined for the purposes of deciding whether it was desirable for them to remain in office.
5. Implicit in the exercise, as I understood the argument, was the submission that **a conflict of interest should not give cause per se for an executor's removal**, but only conduct by the executor in demonstrable breach of his or her fiduciary duty. He also submitted that the court's primary concern in exercising its discretion in terms of s 54(1)(a)(v) of the Administration of Estates Act should be the welfare of the deceased estate and its efficient administration.

CASES AND POINTS RAISED IN THE MATTER

- **Applicants attorney (3rd attorney she engaged) argued that the facts of this case were comparable with the matter Grobbelaar v Grobbelaar 1959 (4) SA 719 (A). The fast facts of that case:**
- *In Grobbelaar, the testamentary executor of the deceased estate was one of the testator's sons. The testator had been married in community of property and had a joint a will with his wife in terms of which their estate devolved first on the surviving spouse and thereafter on the couple's children in equal shares. The principal assets in the estate were certain farms. After his wife's death the testator subdivided the farmland to be able to sell part of it to the respondent and to donate another part to another of his sons, Hendrik Petrus, to whom he then also sold an additional portion. To give effect to the forementioned sales and donation the deceased needed the written consent of all his children. All the children duly provided their consent, save for the appellant. The transactions could therefore not be executed, but the deceased registered mortgage bonds over the subject properties in favour of the two sons to whom he had intended to transfer them. The bonds were ostensibly to secure claims by the two sons for the value of improvements that they had effected to the properties. After the testator's death, the respondent, in his capacity as executor, gave notice that because the estate was illiquid it would be necessary to sell the properties by public auction to settle the secured debts, including that allegedly owed to himself. The appellant objected on the grounds that he disputed the validity of the registered mortgage bonds. He sought an interdict prohibiting the sale of the property pending the determination of the dispute as well as an order removing the respondent as executor of the estate on the grounds that he had a material conflict of interest.*

VAN BLERK JA SUMMED UP THE LEGAL POSITION THAT APPLIED ON THE FACTS OF THE CASE IN GROBBELAAR

- *It appears from the papers that **as executor** the respondent **accepted** as **claims against the estate** the capital amounts of the two mortgage bonds **in favour of himself** and Hendrik Petrus respectively of £2,750 and £10,000, whilst the appellant disputes the claims. Mr. Jacobs for the respondent conceded that the two claims fell to be reduced by £6,000, being £4000 in respect of the purchase prices of the portions purchased by the respondent and Hendrik Petrus plus £2000 as the value of the land that had been donated to Hendrik Petrus; but there was not any mention of that concession in the papers by either the respondent or Hendrik Petrus. The contention of the appellant is that the mortgage bonds were registered for fictitious debts, merely as device to facilitate the mortgagees later obtaining transfer of the encumbered properties; something that the testator had not been able to achieve by reason of the appellant's refusal to consent to the cancellation of the existing bond in respect of the children's 'mother's portion'.*

- *It is **obvious** that we have here a **material conflict of interest** between the **personal interest of the respondent** and that of the estate whereby a situation has arisen that makes the **respondent's position as executor untenable** for him. He finds himself in the **impossible position that on the one hand, as a creditor of the estate, he will have to press his claim and on the other hand, in his capacity as executor, he will have to defend the estate against that very claim. He will of necessity have to choose a side. He will not be able to remain neutral or impartial.***

- *A comparable situation arose in the matter of **Barnett v Estate Beattie, 1928 CPD 482**, which was an appeal from a decision of the High Court of Southern Rhodesia, in which an executor was removed from office for that reason. There, the Court quite rightly pointed out that it was not necessary at that stage to go into the validity of the respondent's claim because the question of who was right or wrong was not the issue.*

- *The situation that has arisen in the current case can be addressed by removing the respondent from his office as executor. It is only in that manner that the interests of the estate can be served as it is put in section 99 of the Administration of Estates Act.*

ADDITIONAL CASES REFERRED TO IN BRIMBLE-HANNATH

It was held in ***Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 at 177-178 that*** '(w)here one man stands to another in a position of confidence involving a duty to protect the interests of that other in a fiduciary relationship he is not allowed to ... place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position.

The Aberdeen Railway Company v Blaikie Bros ..., the doctrine is to be found in the civil law (Digest 18.1.34.7), and must of necessity form part of every civilised system of jurisprudence.' It was rightly accepted by both sides in the current matter that an **executor stands in a fiduciary relationship to the beneficiaries** in respect of his administration of a deceased estate. The first and second respondent stressed that the applicant **was not an heir or legatee in the deceased estate**. That might be true, **but she is undoubtedly a beneficiary**. The rule that a fiduciary cannot act in a situation in which he or she has a conflict of interest has been described as 'a strict one'. It applies 'not only to actual conflicts of interest but also to those which are a real possibility'.

JUSTICE BINNS-WARD SETS OUT

*In the current case …….**an executor** also has a **duty towards creditors** of the estate to **exercise his or her powers bona fide and with objectivity**. In dealing with a claim an **executor is expected to assess its merits on a fair consideration of the facts and its legal merits**. Van Niekerk v Van Niekerk and Another [2010] ZAKZPHC 85 (17 December 2010), 2011 (2) SA 145 (KZP), [2011] Should an **executor also be one of the creditors** of the estate an **unenviable situation** will arise in which he or she will have **to be the judge of his or her own claim**. In my view it is generally **undesirable that an executor should find him or herself in such a situation**. It not only goes against basic principle that anyone should be judge in their own case**, it also poses a potential conflict between the executor's interest as a creditor of the deceased estate** and his or her fiduciary duty to administer it for the benefit of the beneficiaries.*

AND FURTHER…

Binns-Ward referring to Margo J (Davidson and Franklin JJ concurring)noting in ***Die Meester v Meyer en Andere 1975 (2) SA 1 (T) at 17D-E****,*

"In the case of a ***conflict of interests, the mere fact than an executor cannot be impartial*** *in the consideration of claims against the estate is prima facie a ground for his removal'. Webster v Webster en 'n Ander, 1968 (3) SA 386 (T) at p. 388C – D'*

In arriving at his judgement, Binns-Ward states
In my view that consideration, when it arises, will ordinarily determine how a court will exercise its discretion in terms of s 54(1)(a)(v) of the Administration of Estates Act.

I would therefore respectfully endorse the previously expressed view ***that the mere existence of a demonstrated conflict of interest affords prima facie sufficient ground for the removal of an executor in terms of the provision****. ……it would ordinarily be undesirable for an executor affected by a conflict of interest to remain in office.*

I am accordingly satisfied, in the context of the applicant disputing of the trust's claim against the estate, woolly as her grounds for doing so might appear to be at this stage, that it is ***undesirable that the first and second respondents, who are the co-trustees and beneficiaries of the trust, should remain in office as executrixes*** *of the deceased's estate.*

It is evident that a representative of the third respondent has been attending in a professional capacity to the practical work of administering the estate. ***I do not think that it necessarily follows****, because the third respondent was engaged by the first and second respondents,* ***that the individual appointed by the third respondent to do the work is compromised or unable to complete it professionally****. In the circumstances, especially having regard to the limited value of the estate and the extent to which its administration has already been completed, I* ***suggest****, without in any way intending to be prescriptive, that it might be in the best interests of the estate and the beneficiaries were the Master, with an eye to limiting the incurrence of additional costs of administration, to consider appointing* ***that person as the substitute executor.***

ORDER MADE

- *The first and second respondents be and are hereby removed as Executrixes*
- *The first and second respondents are directed forthwith to return to the fourth respondent their letters of executorship.*
- *The fourth respondent is directed to appoint a substitute executor to the forementioned Estate within 15 days of the service of this order at the Master's Office.*
- *The **costs** of this application incurred by the applicant, of the one part, and the first and second respondents, of the other part, including those stood over for later determination in the order granted by Hlophe JP on 23 March 2021, **shall be treated as costs in the winding-up of the Estate**.*

SO? THOUGHTS?

- What about the statement

  that the mere existence of a demonstrated conflict of interest affords prima facie sufficient ground for the removal of an executor.

Is the statement too harsh? What are the thoughts from the floor on this judgement?

- **Is there the possibility of a "stepping aside" by an Executor in certain decisions to be made where he/she has an interest?**
- **Or can a court suspend an executor and re-instate after? Meyerowitz thought not, due to new Act.**

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CASE STUDY 1 – CLOSE TO ACTUAL EXAMPLE

Grandfather (G) leaves his entire estate to the will trust created by his deceased son (D) for the benefit of his sole surviving blood relative, his minor granddaughter (K). Stipulates that the main home be subject to a usufruct in favour of his second wife (B) who is not the mother of his deceased son (D) or the mother of his granddaughter (K). Information is that during his lifetime he loaned/invested heavily into B's business, to the extent that at his death, all that remained in his estate was the property subject to the usufruct in favour of (B) and a small flat that was let for income.

- nominated Executor in the will is an attorney (A) and (B).
- nominated attorney (A) resigns as Co-Executor as, advises that he feels "conflicted" but gives no reasons???
- Directly thereafter remaining executor B appoints an agent to assist her (C).
- (B) then lodges a claim in terms of Maintenance of Surviving Spouse Act for funds in excess of the value of the properties by herself to herself and (C) as Executors together with another claim for funds due to her "loaned" to the deceased during his lifetime. (B) and (C) accept the claims as Executor and agent
- (B) and (C) then instruct the main home be sold at auction, as the estate needs to be administered as insolvent estate.
- Property is sold at auction, ostensibly at R2mil below market value

- At no stage was the Will trust for (K) advised prior to or post the sale of the situation.

In the words of Ripley's, "believe it or not".

Question. Is B in a conflict-of-interest position?

HOW ABOUT NUMBER 2?

Second marriage, deceased left entire estate to testamentary trust created in terms of his will, with the surviving spouse (second wife) as income beneficiary only, with a few loose requests as to how surviving spouse must be cared for.

- Son of deceased, not child of surviving spouse, is the nominated trustee of the testamentary trust.
- Son is the ultimate beneficiary of the trust on the death of the surviving spouse, failing him his issue.
- Intention of testator was to keep his spouse in the standard of living she was accustomed to, and on her death “hand the jewels back” to the family.
- Son has utilized the funds in the trust to invest in very good capital investments with a good track record for growth etc. but it generates very little “income”, which barely covers “his trustee administration expenses” with a small stipend to cover the assisted living accommodation for the surviving spouse which she had to move to, as the grand house “had to be sold” according to the son.

Question. Is the son in a conflict-of-interest position?

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SOME PRACTICAL THOUGHTS ON HOW TO PREVENT CHAOS – AT THE ESTATE PLANNING STAGE

Take FULL instructions from your client at the time of drafting the will. Investigate and interrogate.

1. What are the family dynamics and relevant issues. Are there any “in laws that may become outlaws”?
2. Are there possible rifts, feuds or underlying undercurrents that you need to know about?
3. Advise what “Collation” really means and whether it should or should not apply
4. Advise on why a professional in their specific real situation is the best person to be the Executor and or Trustee.
5. Advise on the correct number of Executors to appoint in the specific case and who is best to be appointed.
6. “Pressure test” the will with the ACTUAL scenario as to what will happen if testator dies with, before, or after surviving spouse etc.
7. Minute all advise given, so as to protect yourself against the feuding family in the future, as to why the will was done that way.

8. NB NB NB DO NOT TAKE CHANCES AND BE PREPARED TO STEP BACK AND AWAY IF THE CLIENT DOES NOT LISTEN TO YOUR ADVICE.

This too, is why using a simple will template off the internet or a “one size fits all” copy and paste template, or mass will instructions will never work in these situations and will in all likelihood end up in litigation. YOU MUST do proper estate planning.

ENOUGH ABOUT CONFLICT OF INTEREST– How about this?

In a small family estate, father is survived by his 2 daughters.

The will has a few bequests and leaves the residue of the estate to the 2 daughters in equal shares. Executor assumes they get on and advises them to obtain valuations of the cars and the movables in the family home and once provided they can independently meet and decide who will take what.

Executor does not want to have every entire item in the property valued and appraised, as this will be costly and “surely” the 2 daughters can sort this out amongst themselves.

BIG MISTAKE!! Daughters cannot agree on ANTHING and start removing items without the others agreement or presence. They disagree as to what is worth something or not, start removing plants,and gates. Wall tiles and just about everything they can get their hands on to “spite” the other.

What was thought to be in the best interest of the heirs by the Executor (get a soft value for items in the house as a lot by an appraiser and then awarded 50/50 in L&D Account) turned into pending litigation!!

Executor had to step into the role of Solomon, retrieve ALL the movables, send them off to Auction and split the proceeds instructing the daughters that if they really wanted anything, they should bid on it at the auction. Moral of the story is that sometimes, you must be cruel to be kind to protect the beneficiaries against themselves, and more particularly, yourself.

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SOME PRACTICAL THOUGHTS ON HOW TO PREVENT CHAOS – AT THE START OF THE ESTATE ADMINISTRATION PROCESS

Take FULL instructions from the family at the time of meeting them on the estate.

1. Get all the facts, figures, updates especially if it is an estate of someone who was NOT a client
2. Make sure that all information is documented and if necessary minuted and signed off, especially fee agreements.
3. Be very clear on timelines and worst-case scenarios
4. Try to keep everyone on course as regards expectations on reporting , meetings, timelines etc. , Be clear as to who can do what, decide what, and that of the 3 main culprits as to why deceased estates may take a long time to wind up
    1. FEUDING families is by far the worst, followed by
    2. lack of information on assets and liabilities; and
    3. SARS landmines, where “Daddy Dearest” did not submit any tax returns for years etc.
5. Give clear INDEPENDENT advice and guidance.
6. Explain how assets can be valued in an estate, or rather how they “get valued” and when and why the get valued.
7. Make sure that you ALWAYS get consent from the heirs and beneficiaries on transactions, whether you have to or not, “what your back”

NB NB DO NOT TAKE CHANCES AND BE PREPARED TO STEP BACK AND AWAY IF THE FAMILY IS NOT 10000% HONEST WITH YOU.

IN CLOSING

- The two examples given in my “case studies”, may seem very straight forward and easy to pick out as definitely or maybe a conflict of interest situation.
- BUT…it is not always that simple at the outset of the planning journey with a testator or the start of the administration of an estate to realise that you are starting down a slippery slope.
- Be careful in wills, trust etc. make sure you have the FULL brief and advise accordingly and if necessary if no one will listen to reason or the law, step back or step away.

- Remember the words of Binns-Ward…….

“I do not think that the individual appointed by the third respondent to do the work is compromised or unable to complete it professionally”

Sometimes all we have left is our reputation

ANY QUESTIONS – OTHER EXAMPLES, OR JOKES?

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