

Conflicts of Interest

Threat or Opportunity?

Louis van Vuren



- What is a conflict of interest?
- Who is subject to fiduciary duty?
- More about fiduciary duty
- Conflict of interest for person in role of fiduciary
- Conflict of interest examples in case law and elsewhere
- FISA Code of Ethics
- How to deal with a conflict of interest
- Conflict of Interest: Threat or Opportunity?



What is a conflict of interest?

- A **conflict of interest** is a situation where a person or group has personal, money, or professional goals that clash with their official duties. When these ties pull in opposite directions, people may lose their ability to act in a fair or honest way for others. (*Investopedia*)
- A **conflict of interest** (COI) is a situation in which a person or organization is involved in multiple interests, financial or otherwise, and serving one interest could involve working against another. Typically, this relates to situations in which the personal interest of an individual or organization might adversely affect a duty owed to make decisions for the benefit of a third party. (*Wikipedia*)



What is a conflict of interest?

- If you act on behalf of another and is remunerated for that, there is always an inherent conflict of interest
 - You are bound to act in the best interests of the other; and
 - You have to live and is entitled to be remunerated
- “What is your reasonable greed?” — Prof Leon van Vuuren at the 2014 FISA Conference
- This kind of conflict acceptable – it is out in the open
- The **secondary interest** interferes with the proper execution of actions w.r.t. the **primary interest**
- You are usually remunerated for the execution of actions w.r.t. the **primary interest**





Who is subject to fiduciary duty

- Company directors
 - Can take more risks, but cannot hide behind employment “instructions”
- Public and political functionaries
 - Also bound by legislation, e.g. Municipal Finance Management Act, Act 56 of 2003
- Retirement fund trustees
 - S 7C of Pension Funds Act, 24 of 1956 – Protect interest of members and act with care, diligence and good faith
- Trustees
 - S 9 of Trust Property Control Act, 57 of 1988 and common and case law
- Executors



9. Care, diligence and skill required of trustee (Trust Property Control Act, 57 of 1988)

(1) 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.

- No similar provision in Administration of Estates Act, but same care, diligence & skill required and duty to act in best interests of estate
 - *Brimble-Hannath v Hannath and Others* [2021] ZAWCHC 102 at par 11

“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 reason for existence of the fiduciary duty

- In trusts & deceased estates, beneficiaries often not capable of enforcing their rights – unequal power relationship
- In general, beneficiaries cannot act on behalf of trust or deceased estate
 - Beningfield Exception (*Beningfield v Baxter* (1886) 12 AC 167 (PC) - http://www.bailii.org/uk/cases/UKPC/1886/1886_49.html)
 - Accepted as part of our law in *Gross v Pentz* [1996] ZASCA 78; 1996 (4) SA 617 (SCA); [1996] 4 All SA 63 (A)
- However, action for breach of trust – claim against trustee in personal capacity by beneficiary
- Anything that detracts from proper execution of duty is a potential conflict



- Summaries of fiduciary duty in case law
 - ***Robinson v Randfontein Estates Gold Mining Co Ltd*** 1921 AD 168 at 177

“Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty.”
 - ***Cowan and Others v Scargill and Others*** [1984] 2 All ER (Ch. D) at p 760

Sir Robert Megarry V-C

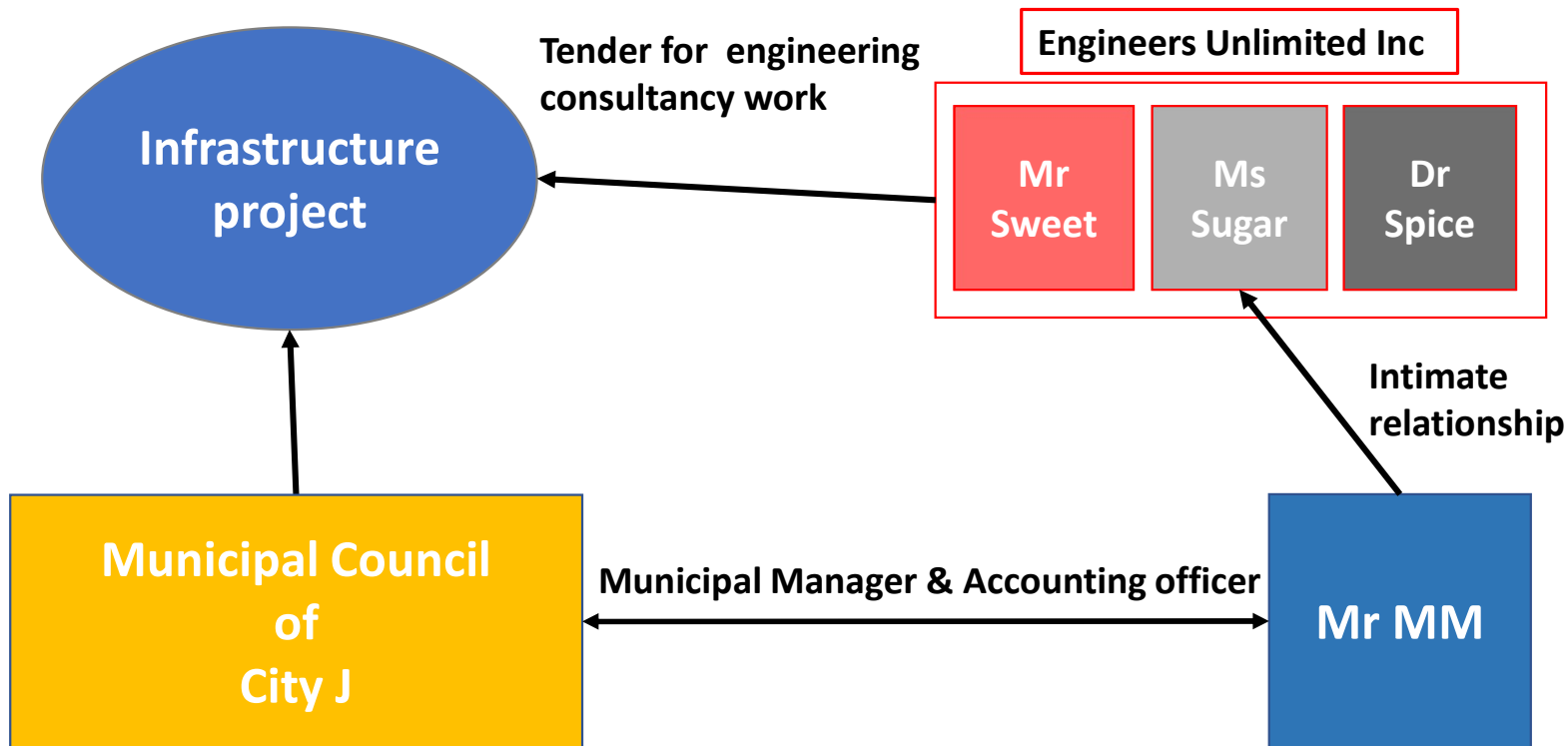
“The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries.”
 - Quoted in ***PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union*** [2007] ZAGPHC 146; 2008 (2) SA 351 (W)



- *Wikipedia definition*: Relates to situations where personal interest might adversely affect duty to act for the benefit of a third party
- Fiduciary must avoid entering relationships where inherent conflict exists
- When unavoidable, conflict must be disclosed fully
- Trust clause:
 - “A trustee who is a professional person is entitled to such remuneration for professional services rendered as if s/he was not a trustee”*
 - In order?
 - Is there a potential conflict?
 - Should the trustee account for it to co-trustees?



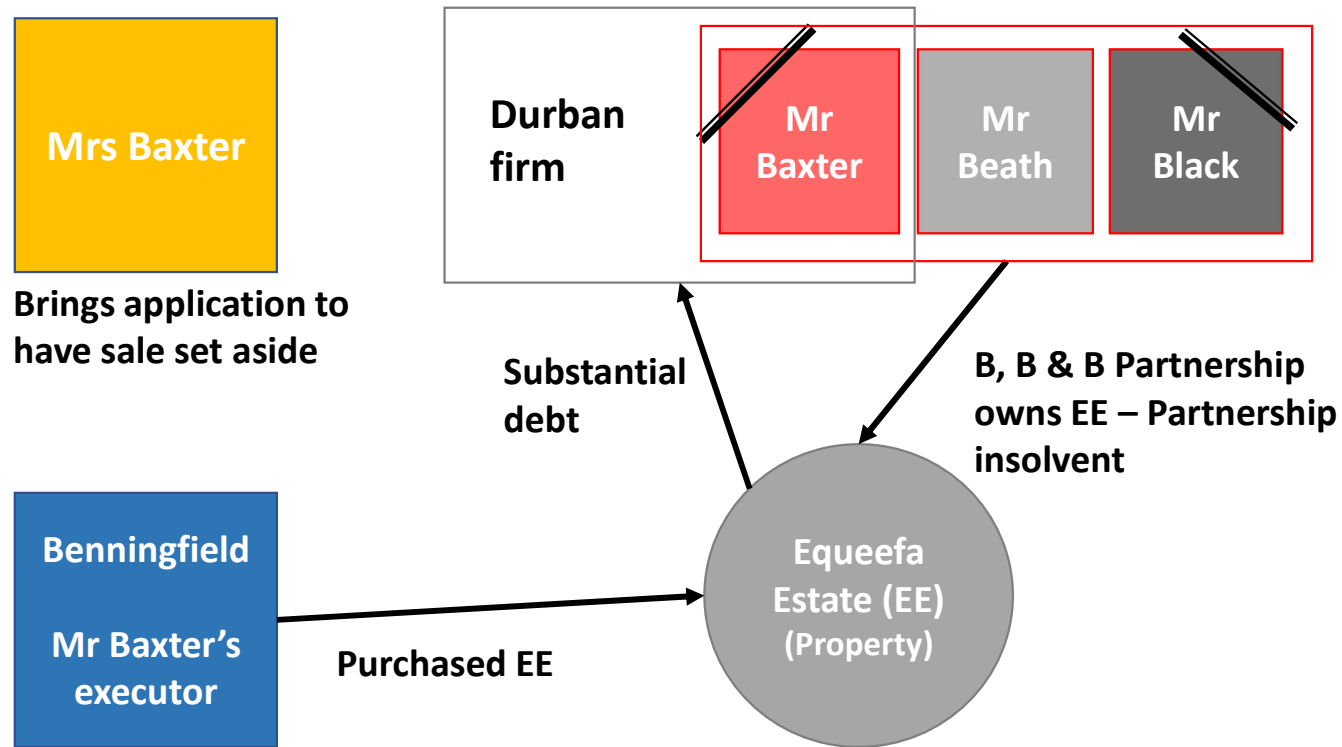
Conflict of interest and fiduciary duty Examples



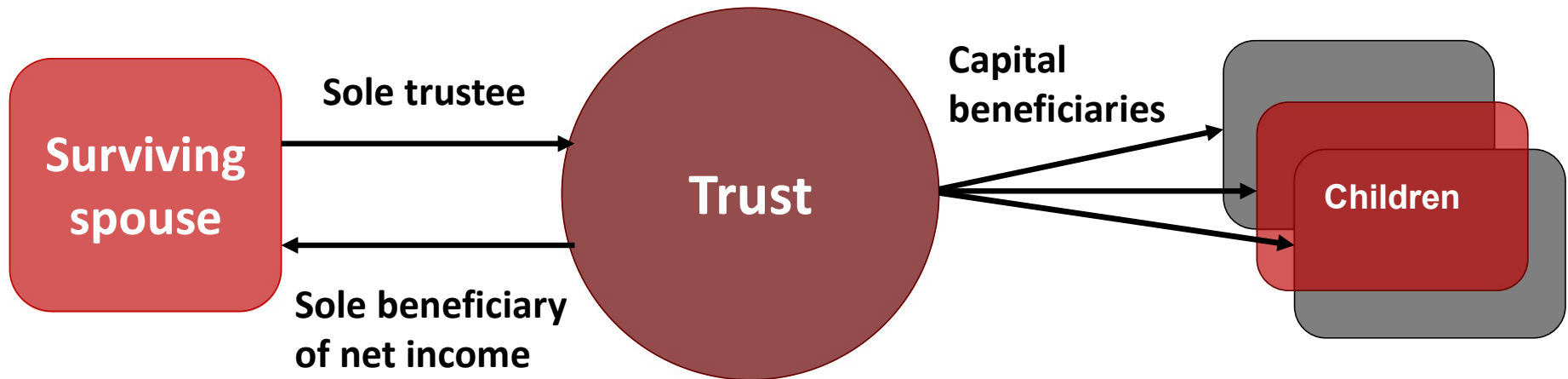
Mr MM recommends EU (Pty) Ltd for the contract. **Should Mr MM inform council of his relationship?**



Benningfield v Baxter [1886] UKPC 49



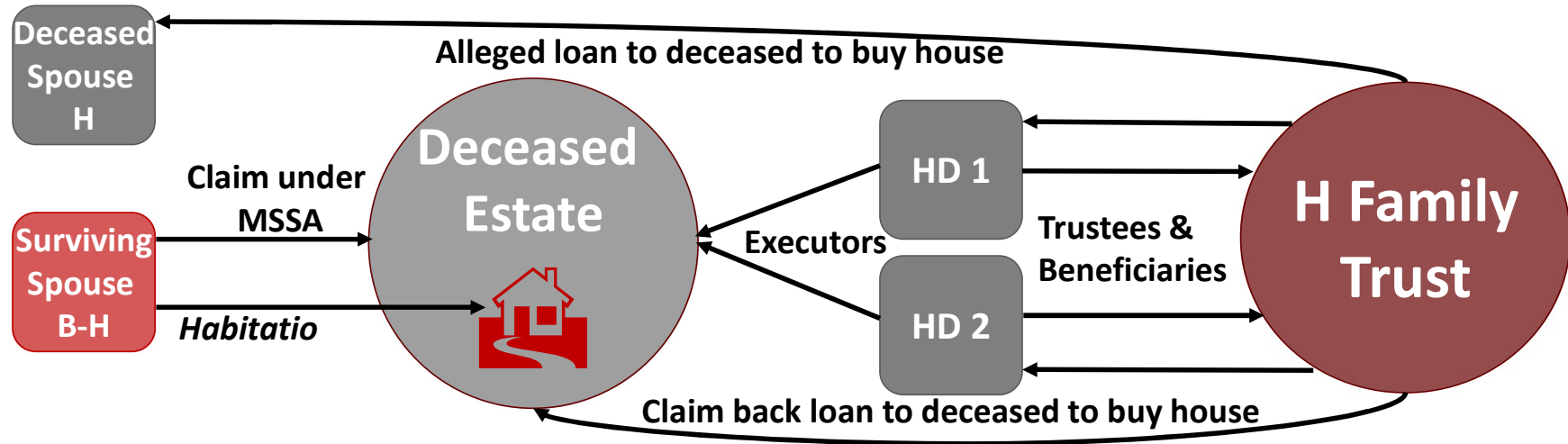
Conflict of interest and fiduciary duty Examples



- The trustee, after consultation with advisors, entered into a scheme to maximise revenue.
- Conflict of interest?
- The trustee not given power to realise the shareholding held by the trust.
- Court held: The trustee acted improperly in interests of one class, the income beneficiary (herself), and disregarded interests of capital beneficiaries.

Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W).



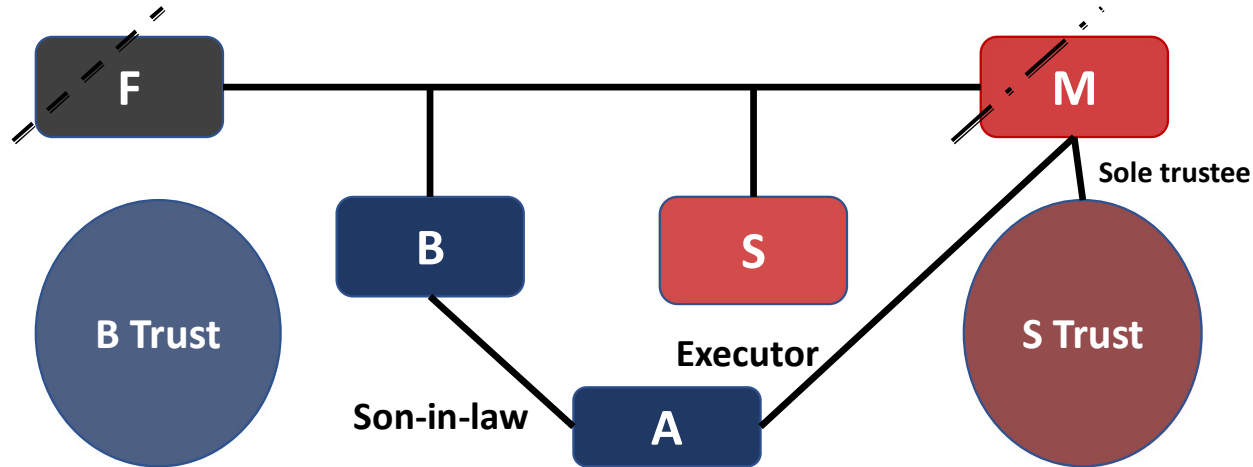


- Surviving spouse inherited only *habitation* over house
- Claim under MSSA for rest of estate
- Trustees claimed balance of loan from estate
- Survivor applied for HD1 & 2's removal as executors on basis of conflict of interest
- Court held them fatally conflicted

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



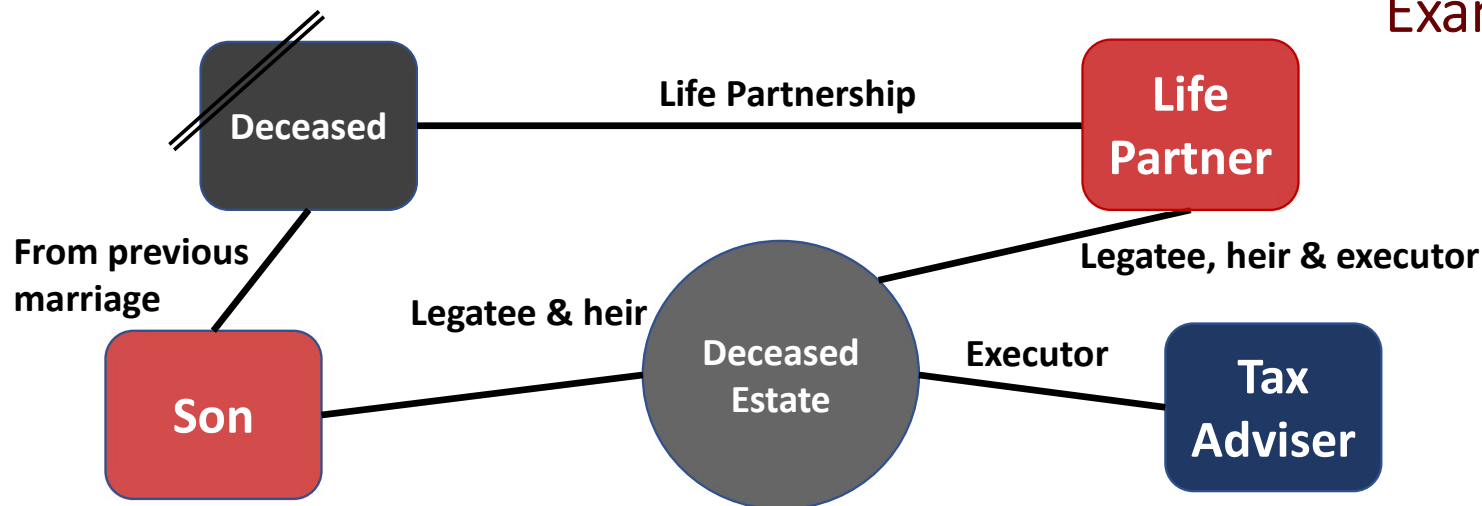
Conflict of interest and fiduciary duty Examples



- B and S *inter vivos* trusts set up. F and M's farms divided in two and transferred to trusts.
- B in financial trouble – farms in B trust sold to help B.
- After F's death, M drew nett income from S Trust as "trustee fee" for 13 years – deed limited fee to 5% of nett income.
- After M's death S now claiming the excess trustee fee plus interest from the estate, because B is sole heir in M's estate.
- Was M conflicted? Is A conflicted?



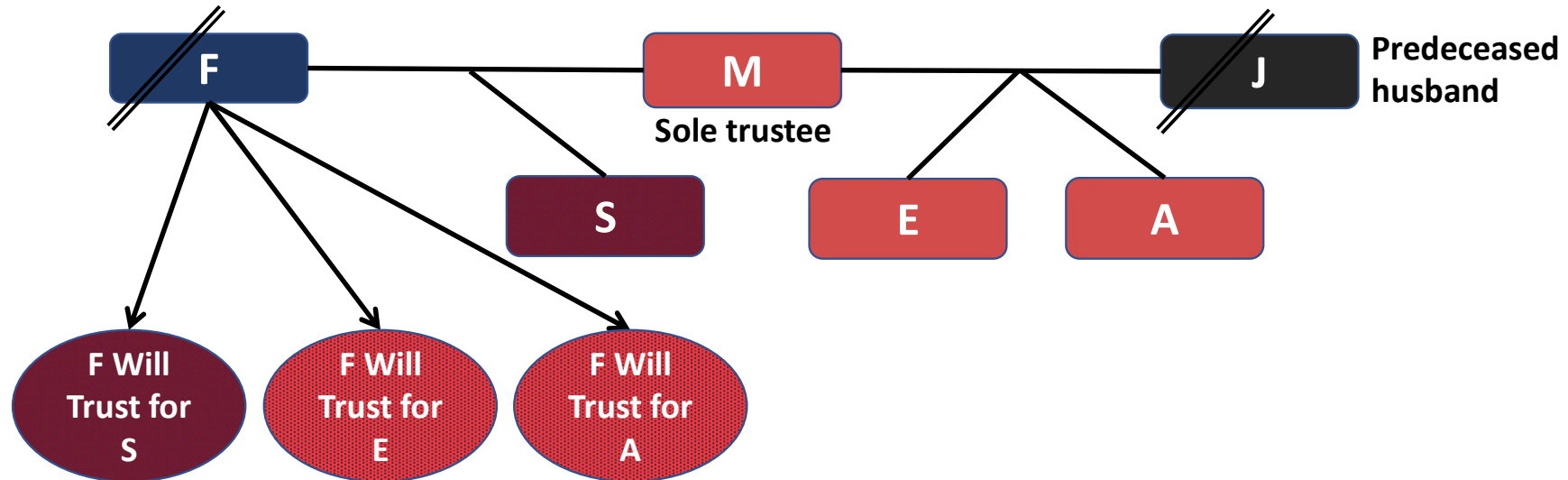
Conflict of interest and fiduciary duty Examples



- Life partner can live on premises & continue to manage guesthouse
- Dispute over interpretation of will – income from guesthouse
- Son asks for information about guesthouse income – executors refuse
- Is life partner conflicted? Tax adviser?
- Court removed both & awarded punitive costs (*Beukman v Pieterse N.O and Others* [2024] ZAWCHC 391)



Conflict of interest and fiduciary duty Examples



- F dies and his will sets up will trusts for S, E and A
- M is the sole trustee of all three trusts
- F regarded E and A as his own children
- M is income beneficiary, with S, E and A, of all three trusts
- Is M conflicted? *Jansen van Rensburg en Andere v Maree en Andere* - SN1453/2014 FSHC



1.5. Conflicts of interest

- 1.5.1. A member shall conduct all professional affairs in a manner that avoids any conflict of interest, or any appearance of a conflict of interest. Whilst the Institute cannot prescribe to members how they should arrange their personal lives, it is recommended that members extend this principle to their personal affairs.
- 1.5.2. A member shall take all reasonable steps to foresee possible areas and scenarios where a conflict of interest could arise.
- 1.5.3. A member shall not use any information that is not publicly available to invest in any venture that is or may be a client, borrower, or supplier of the member or his/her employer, or is in any other business relationship with the member or his/her employer, or share such information with any party that is or may be connected to the member or his/her employer, unless it is legally permissible to do so.
- 1.5.4. A member shall, immediately when he/she becomes aware of a conflict or potential conflict of interest, notify all interested parties of his/her interest in the matter that leads to the conflict or potential conflict of interest. This paragraph shall not be interpreted in such a way that it removes any member's right to consult his/her employer before making the existence of the conflict or potential conflict of interest known to interested parties.
- 1.5.5. A member who is in the employ of another person or institution shall not secretly act in competition with such employer.



1. Take all reasonable steps to foresee possible areas and scenarios where a conflict of interest could arise
2. When you become aware of a conflict or potential conflict of interest, notify all interested parties of your interest in the matter that leads to the conflict or potential conflict of interest
3. Seek guidance from all the interested parties as to how to proceed
4. Obtain expert advice as to how to proceed
5. Follow your conscience. Rather walk away if it still does not feel right



- One thing clear from all examples – Not a good idea to appoint anyone as executor / trustee if person has stake in result of decisions
 - Biggest problem? Not understanding boundaries! Alter ego trusts
 - In average “family” trust – may be reasons for having family members as trustees
 - Usually not a good idea to have heir as executor – certain exceptions
- Strong case for independent professional fiduciary practitioner
 - Family attorney?
 - Family accountant?
 - Family financial planner?
- Are they not automatically conflicted?
- Can you be independent if you advise head of family on insurance and investments?





Thank you

