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Phia van der Spuy

Case highlights key issues when creating a testamentary trust

By Phia van der Spuy  Jul 13, 2020



In a recent court case, *Van Rensburg v Van Rensburg NO and Others* (March 24) issues around a testamentary trust were highlighted. As the will of a deceased person forms the trust instrument, no further trust instrument is required to be lodged with the Master of the High Court.

A will typically does not provide detailed provisions of how a trust should be administered. This often leads to issues arising at a later stage.

In this case, the joint will of the mother and father provided that on the death of the father a testamentary trust had to be established for the benefit of the mother. The trustees had to apply the income and the capital of the trust for the maintenance and benefit of the mother until her

death. On her death, the trust should have terminated for the four children, or the survivors of them.

All four children had been appointed trustees of the trust.

After the mother's death, the brother requested the banking details from his sisters so that he could pay over their respective portions of the trust assets, to wind up the trust.

Unfortunately, the one sister's emails were intercepted and fraudulent bank account details were conveyed, upon which payment was effected. Her siblings were of the view that it was not fraud perpetrated against the trust, but her own issue.

She approached the court to have the trustees removed, because she was of the view that they, as trustees and beneficiaries of the trust, were conflicted. She requested the appointment of new trustees, for them to decide whether to pursue the matter against the trustees or the brother, whom she believed acted negligently in paying her share to an incorrect account.

The following issues were addressed in the application:

Termination of the trust and the resultant lack of beneficiaries

The one issue was whether the trust terminated on the death of the mother. In this instance, the will was clear about the termination date - it had to terminate on the death of the mother.

It was not the intention for the trustees to hold the assets for the benefit of the children, only for the benefit of the mother.

After the mother's death, no further beneficiaries could be appointed, as the trust had effectively terminated.

The sister was therefore not successful in alleging that the trustees were conflicted due to them also being beneficiaries of the trust.

Even though people may refer to each other as beneficiaries in communication, they are not beneficiaries if they are not indicated as such in the trust instrument (will).

The lesson is that a testator or testatrix should carefully consider his or her wishes when drafting a will, as no rights, which beneficiaries normally have, would be available to such legatees.

A will should also clearly stipulate when the trust ought to terminate, as well as the instructions on termination.

Removal of trustees

The removal of trustees, particularly in a testamentary trust, where the testator or testatrix hand-picked the trustees, will always be a delicate matter.

The judge in the *Volkwyn NO v Clarke and Damant* case of 1946 stated that it "is a matter not only of delicacy but of seriousness to interfere with the management of the estate of a deceased person by removing from the control thereof persons who, in reliance on their ability and character, the deceased has deliberately selected to carry out his wishes. Even if the administrator has acted incorrectly in his duties, and has not observed the strict requirements of the law, something more is

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required before his removal is warranted. Both the sufficiency of the cause for removal is to be tested on the estate.”

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The judge also referred to the *Gowar v Gowar* case of 2016, where the court was mindful of the fact that disharmony may exist in the administration of a trust and that this is in itself not sufficient for the removal of a trustee. The court held that the “overriding question is always whether or not the conduct of the trustee imperils the trust property or its proper administration. Consequently, mere conflict amongst trustees would not be a sufficient reason for the removal of a trustee at the suit of another.”

That case established a couple of important principles:

* The court must exercise its power to remove a trustee with caution. Conflict among the trustees and/or beneficiaries is not sufficient reason for a court to remove a trustee. The overriding factor is the welfare of the beneficiaries and the proper administration of the trust and the trust property. A trustee’s removal will be ordered only if the trustee’s continuance in office will prevent the trust from being properly administered, or will be detrimental to the welfare of the beneficiaries.

* Neither dishonesty or even misconduct is required for the removal of a trustee - the only requirement is that such removal must be in the interests of the trust and its beneficiaries.

In conclusion

In this case, the trust terminated (as discussed above), and the role of the trustees terminated with it. Thus the judge correctly stated that the removal of the trustees would be redundant.

The following is clear:

* Trustees of a trust need to read through and completely understand the trust instrument.

* The terms of a will creating a testamentary trust have to be unequivocally clear. This includes the wishes of the testator or testatrix, including whether he or she wants heirs to be nominated beneficiaries of the testamentary trust or just residual heirs of the estate, as in this case. The decision may have tax and other consequences.

* Trustees need to verify banking details before making payments from the trust’s bank account.

* When a trust terminates, there are no remaining beneficiaries: the roles of the trustees terminate with the trust.

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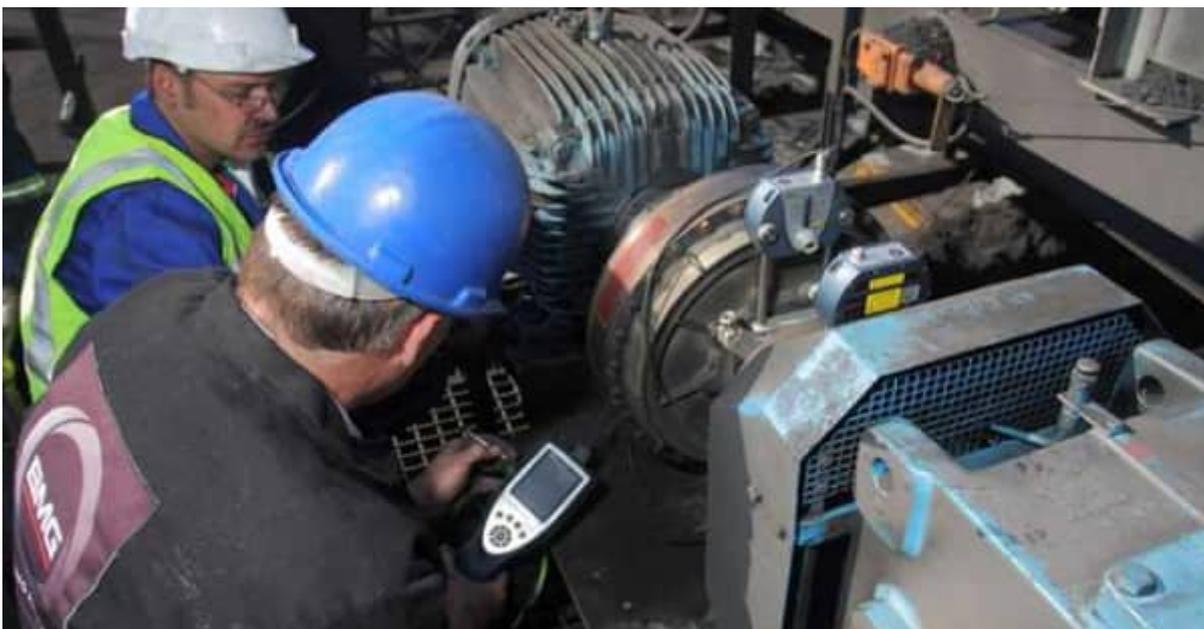
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