

LEGAL CONSIDERATIONS IN FORMING A TESTAMENTARY TRUST

In a recent court case, *van Rensburg v van Rensburg N.O. and Others* (24 March 2020) issues around a testamentary trust were highlighted yet again. 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 the 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 upon the death of the father a testamentary trust had to be established for the benefit of the mother; i.e. the trustees had to apply the trust income, and even trust capital, of the trust, for the maintenance and benefit of the mother until her death. Upon her death the trust should have terminated and the trust assets were to be divided equally between the four children, or the survivors of them. All four children had also been appointed trustees of the testamentary trust in terms of the will. After the mother's death the brother, requested the banking details from his sisters, so he could pay over their respective portions of the trust assets as required in terms of the will, in an effort to wind up the trust. Unfortunately, the one sister's emails were intercepted and fraudulent bank account details were confirmed, upon which payment was effected. Her siblings were of the view that it was not fraud perpetrated against the trust, but rather her own issue. She approached the court to have the trustees removed as 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 to pay her share to an incorrect account.

The following issues were addressed in the application proceedings:

Termination of the trust and the resultant lack of beneficiaries

The one issue that was addressed was whether the trust terminated upon the death of the mother. In this instance the will was clear in terms of the termination date – i.e. it had to terminate upon 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 to allege that the trustees were conflicted due to them being beneficiaries of the trust as well. Even though people may refer to one another as beneficiaries in communication, it does not make them beneficiaries, if they are not beneficiaries as indicated in the trust instrument (will). The lesson is that a testator/testatrix should carefully consider his/her wishes when drafting a will, as no rights, which beneficiaries normally have, such as a right to information, will be available to such legatees. A will should also clearly stipulate when the trust ought to terminate as well as the instructions upon termination, if termination is so directed.

Removal of trustees

Another issue that was addressed was the removal of trustees. The removal of trustees, especially for a testamentary trust, where the testator/testatrix handpicked the trustees, will always be a delicate matter. The judge quoted the *Volkwyn N.O. v Clarke and Damant* case of 1946, which 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 upon 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 required before his removal is warranted. Both the statute and the case cited indicates that

the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate”.

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 friction or enmity between the trustee and the beneficiaries will not in itself be adequate reason for the removal of the trustee from office... Nor, in my view, would mere conflict amongst trustees themselves 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’s power to remove a trustee must be exercised with caution – it should consider whether the trustee’s conduct endangered the trust property or its proper administration. Conflict between the trustees and/or beneficiaries are therefore 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 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 from this case:

- 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/testatrix, including whether he/she desires 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 beneficiaries left and the roles of the trustees terminate with the trust.

~ Written by Phia van der Spuy ~