



**STEP CT 2016  
War Stories!**

# Scenario

- ④ I am a trustee of a charitable trust for a deceased colleague
- ④ Other trustees are deceased's brother, another litigation attorney and deceased's spouse
- ④ Deceased's spouse and 7 year old son are beneficiaries
- ④ We raised around R750 000 8 years ago when deceased passed, from old school friends and colleagues
- ④ We wrote a clause into the deed that trustees cannot charge any fees
- ④ Spouse battling to run her business, and money almost all spent

# Problems

- ⊕ Spouse sees the trust as her bank account
- ⊕ Tells us she wants “her money”
- ⊕ Normally mails us saying “I need my money urgently by tomorrow”
- ⊕ The money is now almost all depleted
- ⊕ The last 250k was spent to buy her a house [it only funded about 10%], which was registered in her name
- ⊕ An amount of R1m was recently paid from the deceased estate of the 7 year old’s grandmother. Clause in the will simply left the money to the trust. A further amount of R500k was also recently donated to the trust by a friend

# Law

- ④ **Section 9 of the Trust Property Control Act-**“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”
- ④ Tijnstra NO v Blunt-Mackenzie NO and Others [2002 (1) SA 459 (T)]
- ④ “The common law duty of a trustee in respect of trust property may be equated to that of a tutor towards the property of his ward. He must observe greater care in dealing with trust property than he does with his own, for, while a man may act as he pleases with his own property, he is not at liberty to do so with trust property. The standard of care to be observed is accordingly not that which the ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man, the bonus et diligens paterfamilias. “

# Cont

- ④ “The investment of trust property must accordingly be made with safety and security, and it is not to be placed in anything involving the element of uncertainty or risk. It is a rule of South African law that a person in a fiduciary position is obliged, in dealing with and investing the money of the beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks”
- ④ “A trustee may be removed even if his conduct complained of was bona fide. Mala fides or even misconduct are not necessary requirements for his removal. Whenever trust assets are endangered a trustee should be removed. Some circumstances which justify the removal of a trustee by a Court in terms of s 20(1) of the Trust Property Control Act 57 of 1988 are the following:

# Cont

- ④ Where the trustee treats the trust and its assets as his own, for example by selling the trust assets without the proper approval of the other trustees as required by the trust deed.
- ④ Where the trustee expresses no independent views about matters affecting the trust, but relies entirely upon a dominant co-trustee and approves of his (wrongful) conduct.
- ④ Where the trustee, without objection, allows grave misconduct on the part of a co-trustee in the administration of trust property, and thus exercises no control at all over the trust property. “

# Cont.

## ⊕ My concerns:

- We are acting in good faith to help the widow, but that does not assist us-are we really managing the money properly for the beneficiaries in giving the mom whatever she wants? Should she not get a job?
- When the 7 year old turns 18, what are we going to say to him when there is no money left to support him?
- How do we balance mom's need for income and son's need for capital growth?
- Who is going to tell mom we won't pay for school fees for her son?

# Conclusion

- ⊕ When the estate money and extra donation come through, I made mom and my other co-trustees take half of all the cash and invested it in a long term insurance policy [At least 10 years]. Mom won't be able to dissipate that.
- ⊕ Mom was not that happy. The mail she sent me expressing her unhappiness is good for us trustees!
- ⊕ I have made her amend her will [off course not enforceable] to state that on her death the house will be bequeathed to the trust
- ⊕ No perfect answer, as there is simply not enough money, **and we can't throw mom into the street,** but we must show our independence and that we are trying to preserve some capital. Could become a bigger issue when mom remarries!

# Dimitri's Asset Protection Trust

Richard Pease TEP, Consultant

# Ship with no captain

- ④ Client brought his very aged father to a consultation
- ④ Father lived in a house. House was in a trust. Father wanted to sell the house
- ④ I told him that he would need all the trustees to sign the sale document. He said to me “That will be impossible”
- ④ It turned out that all three trustees were colleagues of the father and had all died. For the last few years the trust had been “running” with no trustees!
- ④ Father did not have money for a court application

# Cont.

- ④ “When this application was first mentioned counsel were warned that this might well be a case where the trust would be left without any trustees. They stated that there was no prospect of a settlement. The result is a rudderless ship.” [Tijmstra NO v Blunt-Mackenzie NO and Others, page 477].
- ④ Client was referred to a specialist trust company. The trust company, father and beneficiaries of the trust all met in the Master’s office. With the consent and agreement of all the beneficiaries of the trust, the Master appointed the Trust Company to be the trustee.
- ④ **Section 7 of the Trust Property Control Act** reads “ (1) If the office of trustee cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust instrument, after consultation with so many interested parties as he may deem necessary, appoint any person as trustee...”

# A similar problem

- ④ A Discovery policy is owned by a trust
- ④ The policy pays back a portion of the premiums every 5 years
- ④ At the end of year 5 we want to pay the Payback benefit, but we are told the trust has since been closed down. The policy therefore has no owner and no one to pay the benefit to! It cannot be ceded.
- ④ We tell them to go to the Chief Master to “resuscitate” the trust, so we can pay the benefit out. The trust should not have been closed while still owning an asset, and apparently, the Master would not have allowed it to close if he knew it still owned an asset. On that basis the Master will “resuscitate” the trust
- ④ Legal authority for doing this?

# The Over-Zealous Protector

Richard Pease TEP, Consultant