

TRUSTS – THE GOOD, THE BAD AND THE UGLY

In this issue of Estate Planning Essentials - the third and last in a series on Trusts - we look at the “ugly”. The “ugly” being where a Trust fails and the Trust assets form part of the planner’s personal assets.

Only when it’s too late!

The planner or his estate will typically only discover that his Trust is wanting when it is attacked by:

- a creditor,
- a disgruntled spouse, or
- SARS, in the case of income tax (for arrear taxes where assets still vest in the planner) or estate duty (Section 3(3) (d)).

When will Trust assets be exposed?

In, Badenhorst vs Badenhorst, a case dealing with divorce, it was stated that “the mere fact that assets vested in the Trustees and did not form part of the respondent’s estate does not per se exclude them from consideration when determining what must be taken into account when making a redistribution order.”

Even though the Trust is a valid Trust and not a sham as described by many commentators, the assets can still be regarded as part of the planner’s personal estate where there is evidence that:

- the planner controlled the assets, and
- that if it wasn’t for the Trust, the assets would have been acquired in the planner’s own name.

How to determine control

The two main considerations in determining control are the provisions of the Trust Deed and how the affairs of the Trust were conducted.

The Trust Deed

One would look for the following;

- Who are the Trustees? (and what is their relationship to the planner)
- Who are the beneficiaries? (The closer the link between the planner and the beneficiaries, the more likely there is to be a measure of control.)
- Who is empowered to appoint and dismiss Trustees? (Could the planner control these appointments thereby appointing supine trustees?)
- Who may alter the Trust Deed?
- Are the Trustees’ decisions subject to approval by any party? (usually the planner)
- A Trust Deed may sometimes make provision for a veto right in favor of the planner. In the case of a positive veto, the planner will have the power to overrule Trustee’ decisions – this is a clear indication of control. (An acceptable so-called negative veto right, provides that the planner merely has to be part of the majority)

Affairs of the Trust

When looking at how the Trust is conducted, all of the points below should point to a clear distinction between the investor's assets and those of the Trust.

- All Trustee meetings are to be formal meetings with the required number of Trustees in attendance. (A husband and wife meeting in bed at night will usually not constitute a trustee meeting)
- Consideration to be given to how the Trustee decisions are taken.
- Consideration to be given to how the resolutions are passed.
- A record of decisions and resolutions must be kept.
- Decisions are to be made by the required number of Trustees, as per the Trust Deed.
- The Trust Deed must authorise the type of decision being taken, e.g. empowering Trustees to invest in certain types of assets or make interest free loans.
- A yet unreported case - *Soekoe v Le Roux* - dealt with the Trustees' duty to account transactions in the Trust. Trustees are required to do more than keep a record of disbursements. They are required to keep a record of to whom disbursements were made and receipts for monies paid out.

In *Land and Agricultural Bank v Parker* the court found that – “the core element of a Trust is that there should be separation of ownership (or control) from enjoyment of the Trust assets”.

If a planner transfers assets to a Trust but continues to deal with those assets “as before” there can be no separation of ownership. The Trust will therefore offer little in the way of protection.

How to ensure your Trust will protect your assets

It is not sufficient to merely appoint an independent Trustee as suggested in the Parker judgment. The planner needs to ensure that the Trustee is someone who will fulfill that role properly.

Personal experience has shown that some so-called independent Trustees have never bothered to read the Trust Deed. They merely sign anything placed in front of them, but at the same time are happy to bill the client for acting as Trustee.

To ensure the Trust protects the planner's assets in the way intended, it is imperative that the investor employs the best Trustees he can afford.

Ultimately, the Trust must be able to stand up to any of the attacks listed above. This will only be the case if the Trustees truly act as Trustees and not as the puppets of the planner.

For planners or Trustees who have any doubt with regard to the provisions of the Trust Deed and how it will stand up to attack, we recommend that a full legal audit be conducted on the Trust Deed.

Glacier Fiduciary Services offers this service at an hourly fee.

Seminar

Glacier Fiduciary Services will be hosting a seminar on Trusts during July. Sessions will be held in the major centres and more information will be communicated closer to the time.

Any queries may be directed to:
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