



FABASA

Estate Planning is an important and everlasting gift you can give your family

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ESTATE PLANNERS | FAMILY TRUSTEES BEWARE OF ABUSE

Phia van der Spuy: THE TRUSTEEZE SOLUTION

I have read a recent court case with a shocking judgement by a judge which should send warning signals to estate planners and ‘family’ trustees. They diagnosed the father who is the estate planner and also a trustee, already in 2013. (As usual) the siblings started fighting over their share in the substantial assets the father built up in trust over the years. The controlling ‘so-called’ independent trustee is biased through his rela-

tionship with one sibling. He hides behind the fact that he is the lifelong trusted friend of the founder

This contravenes the clear aim set out in the trust—to create a fund for the benefit of all beneficiaries. The father always wished for equal treatment of all the siblings. The controlling trustee influenced the other trustees to benefit the sibling who relates to him at the expense of the other siblings.

FAMILY BUSINESS TIPS

What are the lessons to be learned from this case?

- **Be careful about controlling trustees.**

Many people appoint their best friends as trustees just for those people to act for their own benefit, directly or indirectly, in the future. It is becoming hard to remove a trustee in Court, as the Courts can treat a trustee removal with “circumspection” (wary and unwilling to take risks), especially if the estate planner handpicked the trustees.

- **Joint action, joint decisions.**

The Courts have, most times, established the “Joint Action” rule, requiring trustees to act jointly in dealing with trust property. Even when the trust instrument stipulates that the majority of trustees can decide, all trustees must sign the resolutions. All trustees should take part in trust affairs.

- **When to remove a trustee with Alzheimer’s?**

A person could be disqualified as a trustee in terms of an express provision in terms of the trust instrument (the Land

and Agricultural Bank of South Africa v Parker case of 2005). A person can also be removed as trustee by the Master of the High Court – if they have been declared by a competent court to be mentally ill or incapable of managing their own affairs; or if they are, by virtue of the Mental Health Care Act 17 of 2002, detained as a patient in an institution or as a State patient (in terms of Section 20(2)(d) of the Trust Property Control Act).

trustees, and create mechanisms in the trust deed that pre-empt any eventualities.

The complete article can be read at: <https://trusteeze.co.za/article/estate-planners-beware-of-abuse-when-your-mental-capacity-deteriorates>

Concluding remark

Estate planners should consider the above risks when setting up a trust and selecting first

