WRS Fiduciary and Tax

QUOD ILLUSTRATIO

February 2019

The quarterly newsletter which keeps you informed, enlightened and up to date with interesting and relevant events and incidents in the fiduciary and tax industry.

Clients, advisors and practitioners will benefit from this informative newsletter. We here at WRS, together with the contributors to this newsletter, the University of Johannesburg, Haasbroek & Boezaart Attorneys, The Cypress Group, John Stretch, Cores, Master Assist, TLT Accountants, Fuchs Roux Attorneys and Statadmin, have prepared this newsletter to assist clients and practitioners with information, useful tips and it also includes a questionnaire for those who want to test their knowledge!

PRAEFATIO (FOREWORD)

By Dr. Stefan Strydom (LLD)(CA(SA))
Director (WRS FIDUCIARY AND TAX (PTY) LTD

I am convinced that most of you would feel that it is fair to say, at the very least, that it is going to be an interesting year, both in respect of the upcoming developments in the country as well as the promise of what the future holds. Our economy seems to have decided to board a rollercoaster, the end of which is still hidden from our sight, the ongoing discussions around the expropriation of land without compensation continue to spark fierce debate and state capture enquiries dominate headlines. If nothing else, we cannot say that we live in a boring time. I think I speak for most of us when I say that we desire more stability, consistency, legal certainty and of course more public trust in order to spark economic growth and job creation.

With everything happening in the country right now, it is quite understandable to lose track of the fact that we are also effectively on the cusp of a new era – a technological new dawn if you will, which promises the increased usage of advanced technologies ranging from even smarter smart phones and tablets to artificial intelligence ("AI") and robotics at an unprecedented level on an international scale. This will force a change in the way our daily lives operate, the scale of which is still largely uncertain as even the leading experts have not begun to scratch the surface of what our current technology brings to the table for modern businesses.

We have already begun to see the potential benefits of AI, but the question remains as to whether this implementation will be the "silver bullet" that solves our problems or whether it will raise even more issues which need to be considered. One should consider the words of the author Frank Herbert, especially in relation to financial services - *"Technology tends toward avoidance of risks by investors. Uncertainty is ruled out if possible. People generally prefer the predictable. Few recognize how destructive this can be, how it imposes severe limits on variability and thus makes whole populations fatally vulnerable to the shocking ways our universe can throw the dice."*

Although some risks should be avoided, to completely avoid any risk, particularly in the sphere of investments, would likely be the safer route but not necessarily the best course of action. It is the ability of humankind to adapt to change and embrace certain risks that define our role in shaping the future. Change is certain and with change comes opportunity for those with the will to seize it. It is easy to paint a gloomy picture of the future, especially when we consider our economy, but there is always room for ingenuity to create and utilise opportunities. Provided that we embrace technological developments here and now without losing track of the foundations upon which existing business principles have been built. There will always be room for those with the cunning to carve out a place for themselves in the world.

Yes, it is true that AI brings a whole new level of information gathering to the table, at a scale which I do not believe could be matched, but information alone is not a enough. Human ingenuity, which has ironically led to the current situation, is the factor which an AI cannot replicate, and it is an inexpressible source of opportunity.

PRAEFATIO (FOREWORD)

By Dr. Stefan Strydom (LLD)(CA(SA))
Director (WRS FIDUCIARY AND TAX (PTY) LTD

Maybe we should all take moment to reflect on the following thought –

"Before you become too entranced with gorgeous gadgets and mesmerizing video displays, let me remind you that information is not knowledge, knowledge is not wisdom, and wisdom is not foresight. Each grows out of the other, and we need them all."
- Arthur C. Clarke

And yet notwithstanding the advice to keep a steady eye on the horizon as illustrated above it is also, quite ironically due to the speed at which this year has already flown by, time to take a moment to sit back and reflect on the past as well as looking towards the future. For only be understanding the past can we truly hope to catch a glimpse of our future.

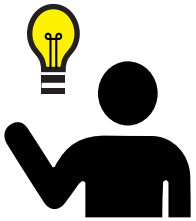
Here we are at last, at the very dawn of 2019, and what an amazing year it promises to be. All around us Christmas decorations have faded out of sight, celebrations of the new year are slowly being forgotten and business plans are morphing from vaguely thought out dreams to concrete plans for the year.

As each of you start getting back into the swing of things at work, do spare a quick moment to ensure that all your affairs are in order, making sure that your wills and insurance products are according to your wishes, as it takes significantly less time and effort to be proactive about it than sorting out the issues which arise should something go wrong and you not being there anymore to assist.

Finally, all of us here would like to wish each and every one of you a truly wonderful and prosperous 2019. Let each of us make the very best of each and every moment which is afforded to us in and embrace 2019 for what it is – a new dawn, which has ever been a source of hope to humankind.

In this spirit, let me leave you with the following quote from the poem Invictus which I hope will stir the same passion for the coming year in all of us –

"No matter how straight the gate, how charged with punishments the scroll, I am the master of my fate, I am the captain of my soul"



CONTENTS

1. FINDING THE FOUNDER BEFORE TROUBLE FINDS YOU – The Amendment of Trust Deeds Where the Founder is an Outsider

By Edrick Roux (LLB)
WRS FIDUCIARY & TAX (PTY) LTD

As with all legal personae, there are myriads of aspects which could result in trouble arising in a trust, ranging from the decision-making powers of the trustees not being adequately illustrated in a trust deed to the very wording used in the trust document itself. Any potential flaw with a trust could have a domino effect that have exceptionally far reaching consequences and could even lead to trustees being held liable for damages in their personal capacity. It is a fact that trust deeds also need to be reviewed and updated from time to time because of the ever-changing legal environment, almost like wills.

One of the aspects which was often overlooked in the past, and which now holds very serious consequences for trusts in the present, was the identity of the founder of the trust. As part of efforts to reduce the perception of control of a trust as well as a way to get past the section 7 anti - avoidance provisions in the Income Tax Act, it used to be common practice to appoint a person completely unrelated to the beneficiaries and trustees to be the founder of a trust. This practice not only stripped the trust of certain transfer duty benefits when immovable property is distributed to beneficiaries, it also greatly impacted upon the possibility of amending the trust deed.

We often come across provisions in older trust deeds where it is specified that beneficiaries can only consist of natural persons and furthermore that this clause cannot ever be subject to amendment. We know that amongst today's sophisticated estate planning techniques it is necessary to have other legal entities and trusts also qualifying as part of the discretionary beneficiaries. So, this begs the question whether an inter vivos trust deed can be amended with such a prohibitory provision contained it? In Master's Directive 2 of 2017 the Chief Master acknowledged that it can, but conditional upon certain circumstances:

a) Parties to a contract are free to vary (or amend) their agreement. This means that all the parties to the original contract may amend the original agreement as they please, provided that, if a statute prescribes formalities for the amendment of a contract, those formalities must be complied with.

b) Where the original agreement (deed) contains a clause prohibiting the amendment of the contract, the parties may still amend the contract, but it must now take place in two stages, first the prohibition clause needs to be amended, after which the contract may be amended. The two-stage approach can be contained in the same document, but the first stage is a pre-requisite for the second stage.

1. FINDING THE FOUNDER BEFORE TROUBLE FINDS YOU – The Amendment of Trust Deeds Where the Founder is an Outsider

It is clear that all the parties to the original contract must take part in the amendment of the prohibitory clause first. This necessitate an amendment in terms of the common law applicable to trusts. Now this is where knowledge of the whereabouts of the Founder becomes important. If the Founder was a secretary of a Legal Firm and has since left the employ of that firm, such person's absence would mean that the trust deed which contains the prohibitory provision could not be amended. The same would apply if that person has passed away.

There are three methods in terms of which the provisions of an inter vivos trust deed may be amended:

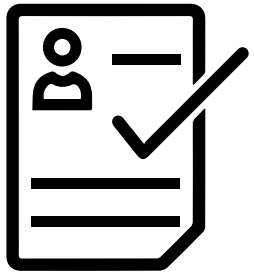
1) By way of making use of the amendment clause contained within the trust deed. This is the preferred method as the amendment procedures and any potential restrictions or formalities are listed in the trust deed and thus leaves little uncertainty in respect of how to proceed;

2) By way of the provisions of the common law relevant to contracts, which requires the consent of all of initial contracting parties, which in the case of a trust refers to the Founder, the Trustees and the Beneficiaries of the trust;

3) By way of an application to the court in terms of section 13 of the Trust Property Control Act, Act 57 of 1988. Such an application is subject to the requirements contained in the Act and is also limited to certain circumstances, most notably that the amendment must be in order to accommodate aspects which the Founder could not have foreseen.

Where the amendment of a trust deed is prohibited in the trust deed itself, or which has been restricted to such a degree that the any amendment would not accomplish the desired goals, the amendment in terms of the amendment clause in the trust deed self, is impossible. The next port of call will be for one to proceed to the common law principles. And one can only achieve this when all the parties to initial agreement exists and agrees to the suggested amendment. As such the estate planner is left in an undesirable position where the trust provisions as it was set up may essentially be frozen in its last state, unable to be amended.

By Edrick Roux (LLB) admitted attorney of the High Court of the Republic of South Africa



2. MISUSING THE MAJORITY VOTE? CAN THE MAJORITY TRUSTEES TERMINATE THE SERVICES OF ONE OF THE TRUSTEES?

By Dr Stefan Strydom (LLD, CA(SA))
Director: WRS FIDUCIARY & TAX (PTY) LTD
Relevance in practice

This is a very important question in the fiduciary environment as many an advisor has played this card in putting an estate planner's mind at ease when trying to explain the joint action rule and decision - making process within family trusts. *"No sir, although all the trustees need to decide on trust matters, if there is a delinquent trustee which does not follow your protocols, the majority can merely decide to end his services."* Is this indeed a correct assessment of the law applicable to trust administration? Surely the Founder and initial trustees can agree to include a provision to this effect in a trust deed? It is not against public policy or illegal, or is it? Most of the trust deeds circling in the commercial domain contains one or more provisions where this right to terminate a trustee's services by the majority vote of trustees are explicitly reserved. Normally it is also stipulated that this power shall not be exercisable against this or that person.

Tested in court of law

The exercise of such reserved powers by the majority of trustees against another trustee was recently questioned in a court of law. In Du Plessis NO and Others v Van Niekerk and Others (836/2018) [2018] ZAFSHC 120 (26 June 2018) this issue was to be decided by the Free State High Court.

The facts

The three applicants, two auditors and an attorney, were the trustees of the Ritom Trust with a thirty-year-old female as its single income and capital beneficiary. The trust was created for her when she was 11 years old. The beneficiary was cited as the 2nd responded. The 1st respondent was the mother of the beneficiary and was also a trustee, whilst the Master of the High Court was the 3rd respondent. The Founder was an outsider. There were accordingly four trustees, three independent trustees and one person related to the beneficiary, which trustee composition is in itself a scarcity. The trust property consisted of valuable agricultural land in the Knysna area. Although the father of the beneficiary was instrumental to the facilitation of the creation of the trust he was not the founder nor one of the initial or later trustees of the trust. He used the farm to conduct agricultural activities through the use of a private company and close corporation. Apparently, he never paid rental to the trust for the use of the property.

A trustee meeting was held on 18 January 2018 where the three applicants were together in one room and the 1st respondent and her attorney was linked by telephone. A serious difference of opinion between the first respondent and the three applicants ensued. The three applicants were in favour of the payment of interest on a loan account payable by the trust to the father of the beneficiary (in the absence of an agreement), whilst the first respondent strongly opposed it.

2. MISUSING THE MAJORITY VOTE? CAN THE MAJORITY TRUSTEES TERMINATE THE SERVICES OF ONE OF THE TRUSTEES?

The clause in the trust deed

The three applicants later, after the meeting, invoked a clause in the trust deed that afforded the majority trustees the power to request another trustee to resign. They were of the opinion that no reasons needed to be supplied for their decision. The relevant provision in the trust deed was worded as followed:

> *5.7 The office of a TRUSTEE shall be vacated if –*
> *5.7.4 the majority of TRUSTEES request a TRUSTEE to resign."*

The applicants informed the 1st respondent in a letter dated 18 January 2018 that she was removed as trustee in accordance with clause 5.7.4 of the trust deed. The applicants argued in court that, because the body of clause 5.7 states that the office SHALL be vacated if the majority of trustees request the trustee's resignation, nothing further is required. They were of the opinion that the Master was obliged to issue new letters of authority. The Master in Bloemfontein refused, which led to the application. The Master pointed out to the applicants that they could not resolve to remove first respondent as trustee, but could only request her to resign.

Reasons for terminating the services of the Mother as trustee

Later three reasons were advanced by the applicants for the supposed dismissal of the 1st respondent, ie i) all items discussed were either rejected or opposed, ii) she made false allegations against the applicants, and iii) she admitted that she did not have sufficient knowledge to fulfil her duties as trustee.

Applicants' case

It was the applicants' case that clause 5.7 was clear and unambiguous. The majority of trustees could resolve to request a trustee to vacate his/her office and such trustee did not have any option than to vacate his/her office and no reasons had to be given and the Master had no option than to issue new letters of authority in favour of applicants only. It was further mentioned that apparently the applicants believed that even the court had no say in the matter, except to confirm the decision of the trustees.

Respondents' case

On behalf of the respondents it was submitted that the authorities are clear in that the removal of trustees shall be done with circumspection. If the wording of clause 5.7 had to be accepted as it stood, the majority of trustees could cause a trustee to vacate his/her office for frivolous reasons or for no reasons at all, or worse, for mala fide reasons. Therefore, the court was requested to find that an implied term had to be read into the relevant clause so that the request to resign may only be made on good cause.

2. MISUSING THE MAJORITY VOTE? CAN THE MAJORITY TRUSTEES TERMINATE THE SERVICES OF ONE OF THE TRUSTEES?

Finding

The court found that the removal of the first respondent as trustee was invalid for four reasons:

1. The applicants were found not to have taken a proper decision at the trustee meeting as there was no proper notice of their intention given to the 1st respondent. The applicants' resolution should have been taken on a properly constituted trustee meeting and upon proper notice of their intention. They failed to act accordingly, but elected to take a decision behind first respondent's back;

2. Although the words used in clause 5.7 was of a peremptory nature ("SHALL RESIGN"), the word "REQUEST" implies that the requestee had a choice. The peremptory word was thus negated by the choice afforded to the person, which result in an ambiguity in the clause. The Court emphasised that such request can never in itself mean that the office of trustee must be vacated. The Court also mentioned that it could never have been the intention of the parties that either one of the trustees, and the mother of the only beneficiary especially, could one day be requested to resign and vacate office without any good reason.

3. Good cause for the removal of the trustee must be taken as an implied term of clause 5.7.4. In this case none such good cause was advanced by the applicants.

4. The decision to request a trustee to resign must be one by "a good person acting reasonably", and the applicants advanced no evidence or argument to show this. It was found that the trustees could not be heard to say that they had not have to give reasons, or much worse, that they could have taken a decision without any reason or even for a mala fide reason.

The court dismissed the application by the applicants and ordered the costs to be paid from the trust estate but only after seriously considering granting a costs order against the applicants de bonis propriis in order to avoid prejudice to the sole trust beneficiary.

3. CRYPTO IN THE CRYPT? DEALING WITH CRYPTOCURRENCIES IN DECEASED ESTATES

By Riaan Vlotman BCom (Law) LLB LLM
Director at Haasbroek & Boezaart Inc.
Attorney, Notary and Conveyancer

Regardless of the numerous opinions over the continued existence of cryptocurrencies (which is often referred to as "crypto"), the blockchain technology which forms the cornerstone of these currencies has proven that it will be a crucial part of future payment methods. It is inevitable that a cryptocurrency will likely be used in future and is therefore sensible to consider the interplay between cryptocurrencies and various legal processes. This article will briefly discuss how an executor of a deceased estate should deal with cryptocurrencies by examining its legal recognition and highlighting some practical difficulties for the executor and heirs.

Cryptocurrencies as an asset in a deceased estate

A cryptocurrency is any form of currency that possesses the following characteristics:

- it exists only in a digital form;
- it has no central issuing or regulating authority but rather utilizes a decentralized system to record all transactions and manage the issuance of new cryptocurrency units; and
- which relies on cryptography to prevent counterfeiting and fraudulent transactions.

The most popular cryptocurrency is Bitcoin which, on 16 December 2017, saw a peak value of $19 187.00 per Bitcoin and is currently valued at $6 714.60 per Bitcoin. The South African Reserve Bank ("the SARB") held in 2014 that cryptocurrency (which it also referred to as virtual currencies) is not deemed legal tender and is therefore not guaranteed or backed by the SARB. On 6 April 2018 the South African Revenue Service ("SARS") stated that cryptocurrencies are considered assets of an intangible nature.

Section 26 of the Administration of Estates Act, 66 of 1965 (as amended) enjoins an executor, on receipt of the letters of executorship, to take control of all assets which form part of the estate of the deceased. If the views of the SARB and SARS are accepted, then cryptocurrencies are intangible assets which must be dealt with in a deceased estate by an executor.

The volatility of cryptocurrencies is well known, which begs the question at which value it should be reflected by the executor in the estate. It is proposed that the value of the cryptocurrency should be reflected in the inventory (forming part of the reporting documents of the deceased estate) as close as possible to the value thereof at the date of death. It is further proposed that the value of the cryptocurrencies should be reflected at the value at the date of realization or transfer thereof in the liquidation and distribution account.

3. A SOJOURN THROUGH LEGALESE: A LOOK AT THE CAUSAL v ABSTRACT THEORY OF PASSING OWNERSHIP: A LESSON TO TRUSTEES FROM *KRIEL v TERBLANCHE NO AND OTHERS 2002 (6) SA 132 (NC)*

Practical difficulties with cryptocurrencies in deceased estates

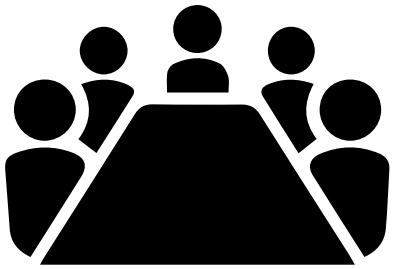
The largest hurdle facing an executor will be to gain access and control of cryptocurrencies. The encryption and protection of these assets are of paramount importance (as with all other digital assets) and to this end is protected by private keys.

The private key for a specific owner of cryptocurrency is a highly complex alphanumerical string which may be as long as 70 digits. The private key must, for obvious reasons, be kept secret and safe by the owner and can be stored electronically on a computer, CD or flash drive. An owner of cryptocurrency can also entrust the private key with an exchange (eg. Coinbase, Luno, iceCUBED, etc.) which will grant them a digital, password-protected wallet wherein the cryptocurrency can be stored and withdrawn.

An executor in a deceased estate would therefore need the deceased's private key to obtain control of the cryptocurrency and be able to sell or transfer it. It is proposed that a deceased at the very least indicate in a document referenced in a last will and testament where the private key may be obtained. As a last will and testament becomes a public document once filed and accepted by the Master of the High Court, it would not be wise nor encouraged to divulge the information in the last will and testament directly.

Most exchanges used by a deceased have prescribed procedures in place to allow an executor the ability to gain access and obtain control of the cryptocurrency held by the deceased. This would, broadly-speaking, involve providing satisfactory proof that the cryptocurrency-holder has indeed passed away (i.e. a death certificate) and that the person requesting the permission to access the cryptocurrency is duly authorised to do so (i.e. letters of executorship).

Cryptocurrencies will in all likelihood form part of most if not all estates in the future. The current legal framework appears able to accommodate cryptocurrencies insofar as deceased estates are concerned. Only time will tell how the practical implications of obtaining access and control of the cryptocurrencies will impact the administration of deceased estates and the interests of heirs.



4. COMMON SENSE RULES FOR MANAGEMENT INCENTIVES

By John Stretch
stretch@global.co.za
www.linkedin.com/in/john stretch-272a475

Management incentive schemes are used to implement strategy, retain the best people, and improve financial performance. A well- designed scheme will induce managers to behave as though they were shareholders of the business. The Enron and WorldCom debacles some years ago, and Wells Fargo in 2016, demonstrated that poorly designed and uncontrolled schemes can promote unethical behaviour. Incentive schemes need transparency and strong corporate governance.

A study in the United States correlated the bonuses paid to 14,000 managers over a period of 5 years, with their organisation's financial performance. This study showed that organisations with high bonus pay outs performed much better financially than those who did not pay high bonuses. This attracted the attention of finance people. Where previously the incentive schemes were designed and administered by the Human Resource function, incentives came to be seen as a **financial tool to drive better performance**, leading to higher ROE and higher share prices.

Types of management incentive schemes

- Budget-beating schemes

In the previous century, many firms used simple profit-based schemes, based either on a straight percentage of profits, or on beating the budget. These schemes are easily understood, familiar to senior management, and measurable through a firm's accounting system. In the 1980's and 1990's many companies used these budget-beating schemes. In recent years, they have become less popular, as budget targets have been invalidated due to factors outside managers' control, including commodity price fluctuations, interest rate changes, and global economic instability.

- Share option schemes

Many managing directors have benefited enormously from share option schemes. These schemes fail when global markets crash. It does not require too much insight to realise that management actions and share prices are often unrelated.

- Appraisal based schemes and subjective awards

Today some firms have chosen to rather focus internally, using appraisal-based schemes based on peer assessment. In spite of accusations of nepotism, some very successful private companies still favour subjective awards based on judgement by each person's superior officer.

- Return based (ROE) and Residual Income based schemes

Return based schemes are popular in many listed companies. Originally, these schemes rewarded a return on assets greater than a target percentage. Today most schemes require a firm to exceed an objective, externally determined cost of capital target. This method incorporates a growth target into the equation.

4. COMMON SENSE RULES FOR MANAGEMENT INCENTIVES

You take real dollars, not percentages, to the bank.

Twenty five years ago Coca-Cola CEO Roberto Gouizetta described his company's business " We raise capital to make concentrate, and sell it at an operating profit. Then we pay the cost of that capital. Shareholders pocket the difference." Source: Fortune Magazine, 1993.

Two subjective decisions must be made after the residual income number has been finalised. The first is the portion of residual income that should be set aside as the management bonus pool for the year. The second is how to divide the bonus pool among individual managers.

Common-senserules for management incentive schemes

- Management incentive schemes should be self-financing. The bonus should pay for itself out of the savings arising from the scheme.

- Bonuses should only be paid if the financial objective in the firm's strategic plan has been met or exceeded. Profit participation is a privilege not a right.

- The scheme should reward exceptional, not average, performance.

- Managers entering into the scheme will be required to share in both profits and losses. Thus, when the incentive targets are not met, the deficit must be made up before managers can be eligible for future bonuses.

- Managers must be able to exert significant influence on their targets through their actions and the reward should be a major and not a minor part of their total package. Participants should be shown how to optimise their rewards from the scheme, during the implementation.

- Incentives should be paid regularly; many companies spread the payment over a number of years to encourage long-term thinking. This practice can pose legal challenges when managers resign.

5. FIXED PROPERTY – THE DILEMMA OF DECISION-MAKING TRUSTS v COMPANIES: In which vehicle should I register my immovable properties?

Sarakie Rossouw (CA(SA))
Director: CYPRESS FINANCIAL GROUP

All of us have different needs and goals in life. When it comes to decision-making, especially financially, people will always have different opinions which is based on specific needs.

But one thing is sure, we cannot ignore the future aspects and long-term effects when it comes to decision-making. The tax-effects is just too enormous if we do not plan upfront and make the correct decision from the starting point, especially when it comes to buying property.

Winston Churchill's wise words quoted – *"Let our advance worrying become advance thinking and planning."*

This is a very important statement to apply in deciding which vehicle to use when buying property. Should I register my property in a trust or in a company?

Although this answer mainly depends on a person's individual financial planning and what his / her medium and long-term intentions are, there are still some guidelines that we need to follow before we make this decision.

In this comparison we disregard death taxes, hence we compare the tax consequences where an asset is held in a company versus an asset in a company which shares are held by a discretionary trust. In neither instance would the assets be included in the personal estate of the person, hence a neutral position from a death tax point of view.

Income tax

- The normal income tax rate of a company is 28% compared to the 45% of a trust. The rental income accruing to the trust would hence be taxable at a much higher rate.

- This is a huge difference if the flow through principle applicable to trusts is ignored. The flow through principle makes it possible to distribute the taxable rental income accruing to the trust to the level of the beneficiaries. If the trust income is distributed to low income beneficiaries, then the effective income tax rate can be very low or even zero. Obviously if the trust income is distributed to persons with other high taxable income, the applicable marginal tax rate can still be 45%.

- A very important question is whether tax rules can render the flow through principle not applicable. The answer is yes. Section 7 of the Income Tax Act is generally applicable where an interest free loan is created against a trust in favour of a connected person where he has financed the trust or has transferred assets to the trust. SARS deems this foregone interest as something that needed to have accrued to the donor, and hence the income accruing to the trust is deemed to accrue to the donor instead of for example to the minor children to whom the income has been distributed. These anti – avoidance measures are not applicable to private companies.

5. FIXED PROPERTY – THE DILEMMA OF DECISION-MAKING
TRUSTS v COMPANIES: In which vehicle should I register my immovable properties? Continue.

- Another consideration is the type of income accruing to the entity. In our example we made mention of a rental property to be housed in an entity. The rental income accruing to the entity will indeed constitute taxable income and then the 28% tax rate versus the 45% rate is an important consideration. But,
- if the income accruing to the entity is not taxable then this difference in tax rates is not all that relevant. If the trust assets for example consist of a listed share portfolio which renders tax free dividends to the holder thereof, then the higher income tax rate applicable to trusts is not too high a consideration.

Cognisance must also be taken of dividend tax (20%), which is applicable to companies and not to trusts. If one compares the effective tax rate applicable to get the after-tax trust income in the hands of the individual the cost of
- dividend tax should also be considered. The effective tax rate applicable to companies if all the after - tax income is to be distributed to the individual – shareholder is 42,4%ghtly less than the 45% flat rate applicable to trusts.

Capital Gains Tax

- If the property is disposed and the intention is to invest the after - tax proceeds in the disposing entity, the company will be the better option as the effective CGT rate would be 22,4% as oppose to the 36% CGT rate applicable to trusts.

- Should the intention however be to distribute the after - tax proceeds to the individual the capital gains could be distributed from the trust to the individual – beneficiaries, which means that the flow through principle would render the capital gains taxable in the hands of the individual/s at a maximum rate of 18% and not at the CGT rate applicable to trusts of 36%. If the asset was held in a company the effective tax rate to end up with the after-tax proceeds in the hands of the individual – shareholders would be 37,92%. The CGT rate in the company would be 22,4%, with the remaining (100% - 22,4%) 78,6% to be subject to dividend tax of 20%. This is even higher than the 36% CGT rate applicable to trusts.

Loans to Trusts – Section 7C

As from 1 March 2017, interest-free or low interest loans to a trust by a connected person give rise to a deemed donation. This section was expanded to include instances where the interest free loans is against a company which shares are held by a trust connected to the loan-provider. The donation is the difference between the interest charged and the official interest rate applied to the loan amount. This deemed donation applies to new and existing loans. Therefore, section 7C will be applicable where any asset is brought into a trust against an interest free loan account, or into a company which is held by a trust. Both instances will be impacted in the same way.

In Conclusion

Both have their place. The question is - What is your strategy: short term, medium term, long term? Is it a residential or commercial property? So there's no hard and fast rules, but hopefully this has given you a bit of a heads up on different options available to you, get you thinking about what's ideal for you.

6. WHERE EAGLES DARE

"My grandfather once told me that there were two kinds of people; those who do the work and those who take the credit. He told me to try to be in the first group; there was much less competition." **- Indira Ghandi**

Atlas Shrugged…and so do the Professionals:

Every now and then we are hit with a query or a question which we simply do not have any conclusive answer to. Each of us attempts to answer such mysteries in our own stride and with our own unique views. Naturally wisdom can come from many founts and it is in this very concept that the inherent ingenuity of humankind lies – we grow not only from what we know but also from what we hear from others. It was Benjamin Franklin who said - *"Tell me and I forget, teach me and I may remember, involve me and I learn."*

It is from this perspective that we invite you, dare I say our avid readers, to join in the conversation and be part of the learning process in our new segment "Where Eagles Dare". Although not quite as thrilling as a tale of mountain top espionage, we do hope that you will enjoy this as well as drawing some valuable knowledge from same. So please do put on your thinking caps, peruse the paragraph below and send us your feedback, with the intention being to publish the insightful thoughts in our next edition.

Protection of Trustees from Other Trustees

In the case of *Steyn NO and Others v Blockpave (Pty) Ltd (F) (Case No: 2959/2010)* the principle was established that the trustees could differ from each other internally, but once a decision was taken, that they would for all external parties be seen as a unified front, notwithstanding whether the internal decision making procedures of the trust require a unanimous or majority vote to be valid.
Although this does assist with the administration of the trust in the case where a majority vote is required in the sense that it prevents a trust from becoming paralysed should there be a dissenting trustee, it does leave a question as to what happens with the dissenting trustee(s) should amiss occur and dire consequences arise from a decision which was taken – will they now face the ire of the beneficiaries to the same degree as their co-trustees or will they be held to a lesser standard?

The question could be expanded further to ask whether they should be held liable at all since they were in fact against the relevant decision being taken in the first place.

We look forward to your enlightened response.

Please send your answer to miajvr@s-bro.co.za

7. QUESTIONNAIRE – HAEC RESPONDE (ANSWER THESE)

YES / NO – answers (answer sheet on the 3rd last sheet)

A. Wills:

1. Unless a purported will has been personally drafted by the testator, the court cannot condone the document as a valid will?

B. Deceased Estates:

2. The maximum statutory rate, inclusive of VAT, that is allowed as an Executor's Fee is 3,99%?

C. Intestate succession:

3. If a descendant of a deceased who, together with the surviving spouse of the deceased who died intestate, is entitled to a benefit from an intestate estate, and he renounces his right to receive such a benefit, such renounced benefit shall vest in his descendants per stirpes?

D. Marital Property regimee

4. The wife is on the brink of filing for a divorce. She and her husband are married out of community of property subject to the accrual claim. In anticipation of the divorce she has informally computed her accrual claim. Her husband had stipulated an opening value in their anti - nuptial contract which was mainly attributable to his two farms which he inherited.

   This opening value needed to be recalculated based on an CPI index. Because of the political situation in SA the realisation value of the farms is much less than what this CPI method reflects. This is to the disadvantage of the wife and decreases her accrual claim. Can she adopt a different method to compute the current value of the opening value?

E. Trusts

5. The Balance sheet of the trust only reflects a farming property with a market value of R10m and no accumulated reserves, as the net profit after tax was always distributed to the two beneficiaries (brothers). The one brother (A) wants to continue with the trust and the farm, whilst the other brother (B) wants to have his share reduced to cash which will enable him to emigrate from SA. The trustees intend to encumber the farming property in order to acquire R5m from the bank with the intention to distribute the funds to B. Is it possible?

6. Can an unrealised capital profit be distributed to a trust beneficiary? The trust possesses a farm worth R10m. The farm is reflected on the Balance Sheet of the trust at R4m. Can the farm be revalued, and the unrealised capital profit be distributed to the trust beneficiary?

8. QUESTIONNAIRE – HAEC RESPONDE (ANSWER THESE) CONTINUE

F. Life insurance policies

7. Mr A has taken out life insurance in 2010 on his life. He was also the owner of this policy. His estate is sequestrated in 2018. He has ceded the ownership of this policy to his spouse in 2015. He passes away in 2019. Will this policy on his life form part of his sequestrated estate?

8. Mr A has taken out life insurance in 2010 on his life. He was also the owner of this policy. His estate is sequestrated in 2018. He has ceded the ownership of this policy to his trust in 2015. He passes away in 2019. Will this policy on his life form part of his sequestrated estate?

9. Mr A has taken out life insurance in 2008 on his life. In 2012 his estate was sequestrated. He passed away in 2013. The policy contract contained no nominated beneficiary, but in Mr A's will the policy proceeds was bequeathed to his son. Will this policy on his life form part of his sequestrated estate?

G. Business Entities

10. Can a close corporation still be registered?

11. Can a trust be a member of a close corporation?

12. Assuming that a personal liability company adhere to the statutory requirements set for Small Business Corporations (SBC) (sect 12E of the Income Tax Act), can it indeed qualify as a SBC?

8. SNIPPETS – EXTRAORDINARY TALES

Loans from Beyond the Grave:

Financial Planners have been abuzz about the inclusion of the provisions relating to interest free loans, advances or credit made by connected persons to trusts, as contained in section 7C of the Income Tax Act, in the last few years due to the far-reaching consequences which this has had on financial planning in general. With all the clamour and commotion surrounding these provisions, or rather in finding ways to address the substantial concerns which have arisen since the inclusion of same, very few of us have stopped to think about how this will affect a deceased estate.

We know that a deceased estate will in terms of the new section 9HA be taxable in accrued income from the date of death of the deceased until the distribution of the inheritances to the heirs. If there was a loan owing to the deceased by a trust, must interest be levied on that receivable loan during the winding up process? Can it be said that that deceased estate is a connected person in relation to the trust? These questions will be discussed in following publications.

Not really Rules…more like Guidelines:

For years practitioners have looked to the content of Interpretation Notes issued by SARS as guidelines for how to proceed with given aspects, especially since Interpretation Notes are a formal writing by SARS in respect of how they approach given aspects. Relatively recently the legal status of these writings has been examined by the Constitutional Court in *Marshall NO and Others v Commissioner of SARS* (CCT208/17) [2018[ZACC 11.

It is now established that when interpreting legislation, SARS should not have regard to the contents of Interpretation Notes but they may still take cognisance where the issue surroundings a practice of SARS provided that it is evidenced by the taxpayer and SARS.

So it will seem that the status of Interpretation Notes have become significantly more dubious. *Cest'la'vie.*

SARS v Kris Kringle – The Night Santa was sued for Tax Fraud

Although we all like to think of Santa as a jovial old fellow who brings presents to children across the world, one has to wonder whether Santa is really as good a guy as he seems. At the very least it is abundantly clear that Santa is probably guilty of quite a few Tax Law violations – ranging from Custom and Excise matters right down to outright tax evasion. Maybe Santa should reflect inward next time he sets up his naughty list... To find out more about Santa's tax affairs, go take a look at https://www.forbes.com/sites/kellyphillipserb/2013/12/24/the-true-cost-of-christmas-santas-tax-bill/#1656243a4e66

8. SNIPPETS – COMPOSITION OF SA TAX PAYERS

RSA population	57 398 421	
SARS Registered individuals	14 044 637	24.47%

Estimates of individual taxpayers and taxable income, 2018/19

Taxable bracket	Registered individuals		Taxable income		Income tax payable after Proposals	
R thousand	Number	%	R billion	%	R billion	%
R0 - R70[1]	6 557 245	–	170.2	–	0.0	–
R70 - R150	2 502 678	33.4	262.0	10.8	10.2	2.0
R150 - R250	1 790 280	23.9	351.8	14.5	33.2	6.6
R250 - R350	1 178 901	15.7	349.8	14.4	50.5	10.0
R350 - R500	934 615	12.5	386.8	15.9	72.7	14.4
R500 - R750	576 469	7.7	348.4	14.3	84.5	16.7
R750 - R1 000	233 652	3.1	200.7	8.3	58.0	11.5
R1 000 - R1 500	161 014	2.2	192.3	7.9	62.1	12.3
R1 500 +	109 783	1.5	339.4	14.0	134.6	26.6
Total	**7 487 392**	**100**	**2 431**	**100**	**506**	**100**
Grand total	**14 044 637**		**2 601**		**506**	
			2 601 000 000 000		506 000 000 000	

1,5% of the registered taxpayers contribute 26.6% of the total Income Tax

6,7% of the registered taxpayers contribute 50.3% of the total Income Tax

DISCLAIMER

"The information contained in this publication by WRS is provided for discussion purposes only and is intended to provide the reader or his/her entity with general information of interest. The information is supplied on an "as is" basis and has not been compiled to meet the reader's or his/her entity's individual requirements. It is the reader's responsibility to satisfy him or her that the content meets the individual or his/ her entity's requirements. The information should not be regarded as professional or legal advice or the official opinion of WRS. No action should be taken on the strength of the information without obtaining professional advice. Although WRS take all reasonable steps to ensure the quality and accuracy of the information, accuracy is not guaranteed. WRS shall not be liable for any damage, loss or liability of any nature incurred directly or indirectly by whomever and resulting from any cause in connection with the information contained herein."

© WRS Fiduciary and Tax (Pty) Ltd [Registration number 2017 / 350059 / 07]("WRS"). All rights reserved.

ANSWER SHEET

	YES	/	NO		YES	/	NO
Question 1:	☐		☐	Question 7:	☐		☐
Question 2:	☐		☐	Question 8:	☐		☐
Question 3:	☐		☐	Question 9:	☐		☐
Question 4:	☐		☐	Question 10:	☐		☐
Question 5:	☐		☐	Question 11:	☐		☐
Question 6:	☐		☐	Question 12:	☐		☐

WHAT DO WE OFFER?

- Estate Planning
- Administration of Estates
- Wills
- Trusts – creation / audits
- Independent Trusteeships
- Tax Consultation
- B-BBEE Restructuring
- Corporate Restructuring
- Business and Personal Insurance
- Investments

WHO TO CONTACT?

Willie Botha (CA(SA))
Director
wsbotha@s-bro.co.za
Tel: 012 942 4560
Cell: 082 559 8282
Nedbank Building
• 17 Pres. Boshoff Str.
• Bethlehem
• Tel: 058 303 0450

Dr Stefan Strydom (LLD, CA(SA))
Director
sstrydom@s-bro.co.za
Tel: 012 942 4560
Cell: 082 786 6107
105 Club Avenue, Waterkloof, Extension 1, 0181

OUR CONTRIBUTORS

Haasbroek & Boezaart Prokureurs : Attorneys
Haasbroek & Boezaart Ing / Inc
Reg Nr / No 1988/07176/21

Telefoon / Telephone (012) 481-3678
Faks / Fax (086) 673 2450
E-Pos / E-Mail VlotmanR@hblaw.co.za
Internet http://www.hblaw.co.za
4de Vloer / 4th Floor
HB Forum
Stamvrugstraat 13 / 13 Stamvrug Street,
Val de Grace, Pretoria
Posbus / PO Box 74224, Lynnwoodrif / Lynnwood Ridge, 0040
Docex 31 Pretoria

UNIVERSITY OF JOHANNESBURG

Department of Finance and Investment Management
Johannesburg Business School
College of Business and Economics
Tel +27 11 559 2461

TLTACCOUNTANTS
REKENMEESTERS

T +27 (0)12 809 2056
M+27 (0)82 322 7261
F +27 (0)86 688 4928
E theunis@tltsa.co.za

CYPRESS GROUP
FOUNDATION OF GROWTH

Cypress Financial Group (Pty) Ltd
Chartered Accountants & Tax Practitioners
Office: 010 110 1444
Unit 5A, Levin & Steyn Building
383 Ontdekkers Road, Florida Park, 1709

STRETCH global

John Stretch
(0027)82 9006065
stretch@global.co.za
www.linkedin.com/in/john-stretch-272a475

082 823 2911
086 666 2195
MASTER ASSIST NATIONAL
est. 2015
www.masterassist.co.za
info@masterassist.co.za
SPECIALISING IN DECEASED ESTATES, TRUSTS, INSOLVENT ESTATES etc