

## POTENTIAL PITFALLS WHEN APPOINTING TRUSTEES FOR A FAMILY TRUST

Who should act as trustee for a family trust? - a family member, a professional independent trustee, or both? This is one of the biggest decisions to be made by people planning their estates – and it's a decision which can have consequences for the heirs and the estate if not carefully thought through.

One of the most important functions of the Board of Trustees is to take control of a trust's assets in their capacity as trustees and to take all reasonable steps to protect the assets for the benefit of the beneficiaries. Trustees are also responsible for day-to-day administration of the trust, keeping a record of all trustees' decisions and should provide the trust beneficiaries with full disclosure of the financial matters of the trust.

These responsibilities are governed by common law principles and legislation. Trustees have a formal fiduciary duty, meaning they should always act in the best interests of the trust beneficiaries. Their appointment and duties are specifically governed by the Trust Property Control Act. Trustees must have detailed knowledge of the terms of the trust deed and give effect thereto. They must further perform their duties with the skill, care and diligence expected of someone managing the affairs of another. It is vital when setting up a trust to make sure that the trustees you appoint are more than capable of carrying out these duties with expertise and deep insight, over and above exercising their discretion with the necessary objectivity and independence.

Given the enormity of the task, opting for a family member can seem tempting. After all, blood is thicker than water. But perhaps they don't have the technical skills to make all the right decisions. The following should be considered when appointing trustees:

- **The number of trustees.** Decision-making should either be by majority vote or unanimously. Where there are only two trustees, decisions have to be unanimous. With four, it can lead to a deadlock. And having too many trustees is impractical. There are no hard and fast rules, but three trustees in office generally means that a majority vote can be reached if necessary.
- **The right skills to carry out fiduciary duties.** At least one of the trustees, whether a professional trustee or a family member, needs to know how to administer a trust and document trust transactions.

Whether or not family members are appointed, each trust should contract a professional independent trustee or an institution providing professional trustee services. This will give peace of mind that the trust will be managed properly and in terms of legal requirements. A professional independent trustee will also be able to advise the other trustees of any legislative changes, such as changes in tax laws, and the potential impact of these on the trust. In the case of a legacy trust spanning several generations, an institution providing professional trustee services will provide continuity without disrupting the trust's activities from one generation to the next.

When comparing the appointment of a family member with a professional independent trustee:

Family member or friend		Professional independent trustee	
Advantages	Disadvantages	Advantages	Disadvantages
Understands the family dynamics, and will be familiar with the wishes of the trust founder if the latter is deceased.	Family dynamics may influence impartiality.	Impartial, and not subject to emotional family pressure.	Could not be familiar with family dynamics.
May render services for free.	May not be up to date with current legislation or recent court cases pertaining to trusts.	Will be up to date with recent court cases and relevant tax laws.	Will charge an annual fee for services rendered.
	May not have the required skills or time.	Will have the required skills to perform fiduciary duties.	Decision-making may be delayed.
		With a legacy trust spanning several generations, a reputable professional institution providing trustee services can provide continuity.	