SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 3

PROJECT 9

LAW OF TRUSTS

APRIL 1983

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The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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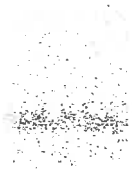




PREFACE

This working paper has been prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not at this stage be regarded as those of the Commission. The working paper is being published in full to furnish persons and bodies wishing to comment or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any person or body wishing to make oral representations to the Commission should submit a brief résumé of his or its proposed representations, together with a request to be heard by the Commission, to the Commission in writing.

It would be appreciated if written comments, representations or requests could reach the Commission not later than 31 July 1984. Please refer to the previous page for the address to which correspondence should be directed.

The research workers responsible for the project who may be contacted for further information are: Messrs M Cronjé and W Henegan.

HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR

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1. Introduction

1.1 The review of the law of trusts is one of the projects which has been on the Commission's programme for some considerable time. Up to now the Commission has made a provisional study of the law of trusts to identify shortcomings in this branch of the law as well as problems experienced in the application of the law of trusts. Comment on such shortcomings or problems has been elicited from the bodies and persons listed in Annexure B. The said bodies and persons were expressly invited to comment on the provisions of Chapter III of the Administration of Estates Act[1] which was designed to improve the administration of trusts but which has not yet come into operation.

1.2 For the purposes of this working paper it is unnecessary to explain or discuss the law relating to trusts. It should be borne in mind, however, that the expressions "trust" and "trustee" are used in different meanings. In this working paper the trusts dealt with are those where property is placed under the control of a trustee to be administered by him in accordance with specific directions on behalf of particular persons or to achieve a particular object.

1.3 The present statutory provisions pertaining to trusts are contained in the Trust Moneys Protection Act[2] (hereinafter the 1934 Act) and the Financial Institutions (Investment of Funds) Act.[3] The object of the former Act according to its long title, is the protection of trust moneys. The trustee has to find security to the satisfaction of the Master for the due and faithful administration of trust moneys. The Master may require

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1 Act 66 of 1965. Hereinafter the "Administration of Estates Act".
2 Act 34 of 1934.
3 Act 56 of 1964.

of the trustee an account of his administration. The trustee may be removed from his office on the application of the Master or an interested party. The scope of the Act is relatively limited. The object of the Financial Institutions (Investment of Funds) Act is "to make better provision regarding the investment, safe custody and administration by financial institutions of funds and trust property". Here the emphasis is placed on the investment of funds and trust property, and the situation where a financial institution accepts trust responsibilities is provided for. Chapter III of the Administration of Estates Act contains extensive provisions aimed at placing the control of trust property under the supervision of the Master. As has been mentioned, Chapter III has not been put into operation.

1.4 The main problems which have been identified relate to the insolvency of the trustee, the filling of a vacancy in the office of trustee, the removal of a trustee from his office and the variation of the trust conditions. These matters are dealt with in greater detail later. For the rest the Commission's investigation has not brought to light a need to codify or review the law of trusts as a whole. All that appears to be necessary at this stage is to provide more fully for control over trust property in order to meet specific problems. For this purpose the Commission has drafted a Bill which appears in Annexure A of this working paper. The proposed provisions of the Bill are explained below.

2. Explanatory memorandum to the Bill

2.1 Clause 1: Definitions

2.1.1 "Court": This definition is modelled on the 1934 Act.

2.1.2 "Master": Compare section 1 of the Administration of Estates Act. The definition of Master in the 1934 Act defines the jurisdiction of the Master. This is now contained in clause 2 of the Bill.

2.1.3 "Trust instrument": "Trust" has not been defined in the Bill because this expression does not lend itself to suitable definition for the purposes of an Act.[4] The meaning attached to "trust" for purposes of the Bill appears from the definition of "trust instrument".

"Trust instrument" is not defined in the 1934 Act. This definition has been included in the Bill to simplify the wording of certain clauses.

The definition excludes such persons as a guardian, curator bonis, trustee of an insolvent estate, ordinary agent etcetera, and does not cover trusts created by legislation. The 1934 Act does not apply to a unit trust scheme managed in terms of the Unit Trusts Control Act.[5] In terms of the provisions of section 12(1) of the Interpretation Act[6] the draft Bill will not apply to such schemes either.

Although a court frequently appoints a "trustee" to control assets recovered in terms of a court order, this is more a case of a curator bonis or guardian (called a "trustee") with powers and duties subject to the relevant provisions of the Administration of Estates Act.[7] It is not the intention to cover such cases in the Bill.

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4 Compare Honorē 1-6.
5 Act 54 of 1981.
6 Act 33 of 1957.
7 Cf Van Rij v Employers' Liability Assurance Ltd 1964 4 SA 737(W); Woji v Santam Insurance Co Ltd 1981 1 SA 1020(A); Mashinini v Senator Insurance Co Ltd 1981 1 SA 313 (W).

The definition in the Bill changes the concept of a trust as it appears from the definition of a "trustee" in the 1934 Act, as follows:

The definition makes it clear that it does not cover only cases where the assets have been made over to the trustee but also cases where the assets have been made over to a beneficiary to be administered by the trustee (the so-called "bewind-trust"). Although Joubert strongly objects to the common law bewind being regarded as a trust[8] he admits that our case law often fails to distinguish between a trustee who is an owner and an "administrator" who is not an owner.[9] Because the same problems and practical application are found in the case of both figures, the Commission considers it desirable to cover both in the Bill.[10] It is interesting to note that the Special Commission on Trusts and Analogous Institutions - Hague Conference on Private International Law holds the same view:[11]

> A broad sphere of application was favoured in that the legal problems arising in connection with trusts were the same regardless of the type of trust involved.

The 1934 Act referred to "moneys". The Bill makes it clear that it covers any property.[12]

In Provident Fund Clothing Industry v Fidelity Guarantee Fund[13] the Court attached the following meaning to the word "entrust":

> From these definitions it is plain that "to entrust" comprises two elements: (a) to place in the possession of something, (b) subject to a trust. As to the latter element, this connotes that the person entrusted is bound to deal with the property or money concerned for the benefit of others ...

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8 1968 THRHR 129.
9 At 269-270.
10 Honoré 199; Consulta 3 at 8; Corbett et al 405.
11 Unidroit News Bulletin N56 January 1983 at 8.
12 In re Estate Late Hearson 1944 NPD 341 at 345; Ex parte Holmes 1949 2 SA 327 (N).
13 1981 3 SA 539 (W) 543E.

Meyerowitz[14] is of the opinion that the application of the 1934 Act can be excluded if such an agreement is entered into verbally and later reduced to writing for record purposes. Paragraph (b) of the definition of "trust instrument" in the Bill makes provision for such cases.

2.1.4 "Trustee": The definition differs from the definition in the 1934 Act in consequence of the definition of "trust instrument" which has been included in the Bill. It has also been modified in the following respects:

(a) In terms of the Bill the Master may appoint a trustee in certain instances and the definition makes provision for this.

(b) In the application of the 1934 Act there is doubt[15] whether the Act covers a trustee appointed in terms of an order of court (in a case where the court fills a vacancy). The Bill makes it clear that such a trustee is covered.

(c) The 1934 Act referred to a person appointed by written instrument. The Bill uses in terms of. It is therefore clear that "trustee" includes an assumed trustee and a trustee appointed by a later instrument (e g variation of the trust instrument or by the founder in terms of the trust instrument).

The term "trustee" is usually used by the courts and was also used in the 1934 Act. The term "administrator", which appears in the Administration of Estates Act, has a narrower meaning in common usage than "trustee" and the latter has consequently been used in the draft Bill.[16]

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14 323.
15 Ex parte Estate Edmonds 1951 3 SA 339 (N) 404.
16 Cf Corbett et al 408.

2.1.5 "Trust property": The definition has been added to simplify the drafting of later clauses. The intention is to cover not only original assets but also assets which are acquired later as well as income from assets.

2.2 Clause 2

This clause corresponds substantially with the provisions of the 1934 Act as appears from the definition of "Master" in section 1 of that Act. The proviso corresponds with section 4(2)(i) of the Administration of Estates Act.

2.3 Clause 3

Subclause (1) corresponds with section 2 of the 1934 Act and makes provision for the appointment of a trustee by order of court. At present the Master refuses to supply copies of instruments operating inter vivos because he has no authority to do so. This gives rise to practical problems, and subclause (2) of the Bill makes the necessary provision. Since the Master does not automatically protect the rights of interested parties on their behalf it is desirable that they should be able to obtain a copy of the trust instrument in order to protect their own interests.

2.4 Clause 4

2.4.1 Introduction

(a) In terms of the law as it stands (except where the court appoints a trustee in terms of the common law) a trustee is appointed by or in terms of the trust instrument. Unlike an executor he has no letter of appointment.

(b) Chapter III of the Administration of Estates Act[17]

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17 S 57.

makes provision for appointment by the Master where a trust has been created by will and the testator dies after the commencement of this Chapter or where a donor created a trust operating inter vivos by written instrument and dies after the commencement of this Chapter. In cases where the founder of a trust inter vivos died before the commencement of this Chapter the Master may prohibit the trustee under certain circumstances from administering trust property without an appointment by the Master.[18] Any trustee may also apply for an appointment by the Master.[19]

(c) The only apparent advantage of this system is that the trustee can readily furnish proof of his appointment. The system has the following disadvantages -

(i) The effect of the provisions referred to above is that there will be two types of appointments for many decades - the old type in terms of the trust instrument and the new one by the Master's certificate.

(ii) In the case of the executor the appointment by the Master works well since every executor has certain basic powers and duties irrespective of the provisions of the will. In the case of a trustee his powers and duties depend to a large extent on the provisions of the trust instrument. It is of course a nuisance for a person dealing with the trustee to have to look up the trustee's authority in the trust instrument[20] but this is an inevitable result of the recognition given by law to the right of a founder of a trust to determine the trustee's powers. A letter of appointment by the Master might result in powers

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18 S 58.
19 S 59.
20 Meyerowitz 340.

being attributed to the trustee which he in fact does not have.[21] It appears to be desirable that the powers of a trustee should be determined with reference to the trust instrument.

The identity of the person who holds office as a trustee at a given time does not necessarily appear from the trust instrument. The Master must, however, either receive security to his satisfaction or exempt the trustees from giving security. If the Master gives his decision in writing, with reference to the identity of the trustees concerned, there should not be any problems with identification. Comment from persons concerned with the practical administration of trusts concerning the scope of the alleged problem of furnishing proof of an appointment in practice would be welcomed.

(iii) Any drastic change in the present practice with a short transition period would place a heavy burden on the Master who works under pressure as it is. The draft maintains the present practice.

2.4.2 Subclause(1)

In Maghrajh v Essopjee[22] the Supreme Court of Natal held that a trustee had no locus standi if he did not furnish security as required or had not been exempted from furnishing security. A similar decision was given in Kruger v Botha.[23] Meyerowitz[24] criticises the decisions and Honoré[25] maintains that they would not apply to all cases. It is, however, suggested that the principle

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21 Ibid.
22 1945 2 PH A 43.
23 1949 3 SA 1147 (O). See now also Die Meester v President Versekeringsmaatskappy 1983 3 SA 410(C).
24 339.
25 191.

is sound, and the Bill does not alter the position.

According to the decision in Ex Parte Estate Edmonds[26] there is a lacuna in the 1934 Act in the case of an appointment by the court. The court states however:[27] "The gap would thus remain open, but the Court would see that no one got through it." It is clear that by virtue of the definition of "trustee" in the Bill the same rules will apply in respect of security irrespective of whether the appointment has been made by the court, by the Master, in a trust instrument, by assumption or in some other manner in terms of the provisions of the trust instrument.

In respect of an instrument executed after September 1934 the position at present is that the Master has no discretion to dispense with security if this is not sanctioned by the instrument. In the case of small trusts, in particular, this frequently frustrates the trust because the estate cannot afford the premiums or the trustee cannot obtain security. In other instances it is also sometimes obvious that the trustee has not been exempted from the obligation to furnish security owing to an oversight or ignorance. If the founder of the trust does not want to entrust this wide discretion to the Master he can still exclude it by stipulating that the trustee must give security. It is suggested that a founder of a trust who feels strongly about this would even now indicate in the trust instrument that security must be required. In the case of an appointment by the Master the Master would certainly take cognisance in the exercise of his discretion of the fact that the trustee was not appointed by the founder.[28]

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26 1951 3 SA 399 (N).
27 At 404E.
28 As the court has in fact done in Van der Merwe v Saker 1964 1 SA 567 (T).

2.4.3 Subclause (2)

Section 3 of the 1934 Act places the Master in an untenable position. He has to decide whether he requires security. If he requires security he can increase the security later but if he exempts the trustee he can apparently not require security later. The duration of trusts is frequently very long and it is almost impossible to assess the financial stability of the trustee for the expected duration of the trust. The courts have also regarded this as an important consideration in the fixing of security. In Van der Merwe v Saker[29] it is said, for example[30]:

> This Court does not know what the position of Santam will be in six years, seven years, eight years or ten years and although at the present moment it is completely financially stable the Court has to look to the future. I think it ought to be made clear that in exercising its discretion the Court should rather lean in favour of ordering security than otherwise, particularly where a trust is to last for some years.

Paragraph (c) of this subclause enables the Master to assess the position more realistically because he can reconsider it later. If the trustee does not comply with the Master's request, the Master may remove him from office.[31]

2.4.4 Subclause (3)

Although there is a shift in emphasis, in effect subclause (1), read with subclause (3), reflects the present position:[32]

> Prima facie one would expect the wishes of the testatrix to prevail. It is only where there are good reasons for departing from them that security should be demanded ... The Master has a function to perform under the section: he should consider all the circumstances, make such enquiries as he deems necessary as to the suitability

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29 Ibid 571B.
30 Cf Ex parte Sherring 1953 2 SA 823 (N) 826.
31 Clause 12(2)(b) of the Bill.
32 Ex parte MacKenzie and Hemp 1950 2 SA 47(0) 49.

of the trustees, call upon the latter for such information as he may require, and insist on security in opposition to the will of the testator only if he considers that there are good grounds for doing so.

Some bodies are not happy about the Master's still having a say if the trust instrument exempts the trustee from giving security. Subclause (3), now provides expressly that in such a case the Master may insist on security only in exceptional cases. A duty therefore no longer rests on the Master either to make enquiries or obtain information in every case.

2.4.5 Subclause (4)

This subclause has been modelled on section 3(4) and (5) of the 1934 Act.

2.5 Clause 5

In terms of the existing law it is necessary, in every case of a vacancy, to bring an application to court for the appointment of a trustee. Most people concerned with the practical administration of trusts regard this state of affairs as a major defect in the existing law of trusts. This clause has been drafted on the lines of section 60 of the Administration of Estates Act but several changes have been introduced.

Section 60 of the said Act applies only in certain cases.[33] It is not clear why it should not apply in all cases.

That section makes provision for a meeting before the Master or a magistrate to receive nominations. A similar procedure obtains at present in the case of executors. These meetings seldom yield results which justify the time wasted and the inconvenience. Nominations submitted to the Master direct would serve the same purpose with less inconvenience.

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33 More or less as in par 2.4.1(b) supra.

Honoré has the following to say on this procedure:[34]

> The procedure for appointment, and particularly the provision for a meeting of the beneficiaries, seems rather clumsy and will tend to increase rather than reduce the expense involved ... It would have been better to allow the Master to make the appointments on his own initiative after receiving in writing any observations which the beneficiaries might care to make.

In accordance with the line taken in paragraph 2.4.1 (c)(ii) above the Master would simply fill the vacancy but the trustee would still derive his powers from the instrument by which the trust was created.

2.6 Clause 6

This provision is modelled on section 2(a) and (c) of the Financial Institutions (Investment of Funds) Act.[35] Although the principles embodied in this clause probably already apply in terms of the common law, these principles are of such importance that it seems desirable for them to be laid down by statute. The inclusion of this clause in the draft Bill may also serve to elicit comment on these important principles.

2.7 Clause 7

There is no consensus of opinion on the question whether sequestration of a trustee results in vesting of the trust property in the trustee's insolvent estate.[36] There is a fair consensus that it is desirable that the position be clarified by statute. The provisions must preserve a balance between the interests of the trust beneficiaries and the personal creditors of the trustee.[37]

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34 139.
35 Act 56 of 1964.
36 Coertze 109; Van der Merwe and Rowland 343; Joubert 1968 THRHR 275 and 1975 SALJ 22; Swanepoel 1957 THRHR 257; Honoré 404; Corbett et al 435.
37 Coertze 113.

The first four subclauses compel the trustee to keep trust property in such a way as to be identifiable as trust property. These provisions have been modelled on section 4 of the Financial Institutions (Investment of Funds) Act.[38] There is already a common law duty on the trustee to keep trust property separate from his own assets.[39] In the case of certain assets it may be difficult or even impossible for the trustee to comply with this requirement. Movables such as household goods and livestock may cause problems if for practical consideration they have to be kept with other movables. The rules of some companies prohibit the registration of shares in the name of an agent. The Companies Act[40] provides that a company cannot be compelled to make an entry nomine officii if its articles of association provide otherwise and the company is not bound to see to the execution of a trust.[41] There were representations that a company should be compelled to make such registrations. This would, however, be in conflict with the right of a private company to limit its membership and would be a denial of the interest which the members and management of any company have in knowing who controls the majority of the shares. The clause consequently allows the trustee the alternative of identifying the property as trust property in his books.

It is the executor's duty to register immovable property in the name of an heir.[42] If a trustee has been appointed to administer the bequeathed property the executor must cause the terms of the will, or a reference thereto in so far as they relate to the administration, to be endorsed against the title deeds of the property.[43] The clause does not require the trustee in such cases to see to the registration but leaves this duty to the executor in terms of section 40 of the Administration of Estates Act.

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38 Act 56 of 1964.
39 Honoré 215.
40 Act 61 of 1973 s 103 (3).
41 Ibid s 104.
42 S 39(1) of the Administration of Estates Act.
43 Ibid s 40.

The present deeds office practice is apparently to register property in the name of a trust or trustee without mention of the trustee's name. When there is a change of trustees no registration takes place to put this on record. In Group Areas Development Board v Hurley[44] this state of affairs was criticised as follows:

At 129E: The legal basis for the passing of dominium, albeit the bare dominium, in such a manner, without any act of transfer whatsoever, is not clear to me. (Cf. Sec. 14 of the Deeds Registries Act, 1937).

At 129H: "It may be doubted whether in our law, except in the Cape Province in terms of the 1873 Act, registration in the name of an office-bearer for the time being is sufficient in itself to vest successors in office with the ownership in the property.

Honoré[45] suggests that the Deeds Registry Act be amended to make the position clear. Comment on the desirability of such an amendment and the form it should take would be appreciated.

The object of subclause (5) is to protect trust beneficiaries on sequestration of the trustee.

Section 4(7) of the Financial Institutions (Investment of Funds) Act[46] reads as follows:

> Notwithstanding anything to the contrary in any law or the common law contained, trust property which is expressly registered in the name of a financial institution in its capacity as administrator, trustee, curator or agent, as the case may be, shall not under any circumstances form part of the assets of such financial institution.

Such a provision would have consequences (for example in respect of estate duty) which are not intended. The wording of clause 7(5) is suggested as a suitable solution.

A possible alternative would be that no trust property should

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44 1961 1 SA 123 (A).
45 206.
46 Act 56 of 1964.

be liable to a claim against the trustee in his personal capacity. It seems unreasonable however that a person can obtain credit because he appears to own considerable assets but that the assets are excluded on the grounds of a trust which is unknown to the creditors. The criterion suggested is that only assets which are registered or identified in such a way as to make them recognisable as trust property should be excluded from claims other than trust claims. The following criticism might be levelled against this criterion:

(a) The requirement of notice is given an important part while in other cases like a hire-purchase agreement or lease it does not matter whether other creditors are aware of the contract;

(b) the criterion is so vague that it might give rise to disputes and litigation; and

(c) the criterion would be unfair to trust beneficiaries.

Comment on the proposed clause and possible alternatives would be welcomed.

2.8 Clause 8

2.8.1 Subclause 1

The view is held by some that the courts should have a wide discretion to vary trusts.

In regard to this matter Gauntlett writes:[47]

> Running through all these cases is that crabbed conflict between the beneficiaries' interests and the literal application of the settlor's original scheme; in every instance the latter wins through. The English and American experience shows how difficult it is to mitigate by case law the harsher effects of the traditional rule even where there is a gradual judicial inching in that direction. Where there is no such movement, the prospects of an expanding judicial capacity to vary trusts on broad grounds of necessity are infinitely remote. As Schreiner J summed up the prevailing approach in Loewenthal's case:

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47 1976 THRHR 20.

> "It is not merely the rights of the beneficiaries that are involved but the right, if it can be called such, of the testator to have his plan carried out."

It is submitted that this approach can no longer be sustained. The principle voluntas testatoris servanda est must be rendered less rigid in its application to trusts. In all the decisions on variation on grounds of necessity mentioned above, it does not seem once to have been considered that a trust is an ongoing institution brought to life by a will or contract; it is not the instrument itself. Our law not knowing a rule against perpetuities, a trust may endure for generations. Is it reasonable to expect a psychic omniscience about the future from a settlor, and to presume that what he has not specifically protected his beneficiaries against, he has - with equanimity - clearly envisaged? The weakness of this 'must have intended' reconstruction is illustrated by the Jewish Colonial Trust (Est Nathan) case. The elaborate reasoning was that:

> "He [the settlor] had lived through the Great War of 1914-18, concluded six years before his death, and so he must have appreciated the changing circumstances in the world, political, economic and sociological. Although the war was over, there were "alarms (sic) and excursions", disturbances, warlike and economic, and it would be unrealistic to suppose that he held the view that conditions during the period of 50 years and at the end of that time remained static ... in particular, he must have known that the value of money was prone to change ..."

This concept of the settlor as a Superman on the Clapham bus must be seriously questioned. Must a settlor in the 1930's for instance, who with memories of the Great Crash etched on the matrix of his mind, invests in low-yield government securities, be credited with spurning for all time higher interest rates for the sake of greater security? Is he to be ascribed a determination to restrict trust investments to a particular type suitable at the time of settlement, come what may 40 years later?

The case for a broad judicial discretion to vary trusts is based on a simple precept: that a settlor cannot be expected to foresee the limitless variety of possible changes of circumstances. Clearly some will be minor. But other may make the trust as it stands undermine both the interests of the beneficiaries and the whole intention behind the settlor's original act. There is a distinction between best serving the intention of the settlor and a primal obeisance to the dead hand.

As we have seen, this has not been recognised by our courts. Running through the decisions is a constant assumption that the alternative to the literal implementation of the settlor's scheme is a sort of unrestrained Bacchalian revel by the beneficiaries. This is unwarranted. The simplest approach which could have been adopted would be to require the court to be satisfied that a variation is necessary in the interests of all the beneficiaries or in the interest of the public. If a bold court would be prepared to beat against the drift, distinguish Bydawell v Chapman or at least its narrow interpretation in the Jewish Colonial Trust (Est Nathan) case, invoke the strong parallel of our suggested formulation with that in the Immovable Property (Removal of Modification of Restrictions) Act and its application in Ex parte Wallace it might yet be done.

Since this prospect is at best remote, the need for statutory reform is obvious. This could be effected most simply along the lines mentioned above: in effect, an enlargement of the court's powers by introducing a jurisdiction - with regard to movables as well as immovables - with alternative legs of the public interest or that of the beneficiaries. The need is rendered all the more urgent by the fact that our law knows no limitation on the duration of a trust. This is surely ill-considered in view of the limitation imposed ten years ago on the lives of fideicommissa. Significantly enough for this discussion, in a memorandum to the Law Revision Committee opposing a statute against perpetuities on the English model, C P Joubert suggested:

> "'n bevredigender oplossing om die gemeenregtelike bevoegdhede van die howe ob causam necessariam uit te brei deur aan die howe 'n wye diskresie te verleen om billikheidshalwe op goeie gronde toe te stem tot die opheffing van fideicommissa ... (D)it geld ook die trust."

Both these persisting areas of rigidity and uncertainty could be eliminated by a composite provision giving the courts a discretion to vary or discharge trusts.

There is no reason to believe that such a reform would move the courts from their traditionally sceptical enquiry to a profligate 'scattering of largesse'. More important, the present position is undesirable. It is based on a simplistic equation of a settlor - whether inter vivos or mortis causa - with a testator, attributing to him a foresight beyond the dreams of most mere mortals. And it petrifies at one arbitrary moment in a tumultuous age what should be a supple, living institution.

Honoré[48] also expresses the view that the courts should have wider powers when he states:

> The court should be given a general power to modify the provisions of trusts when it is in the interests of the beneficiaries, born or unborn, to do so, or when the public interest so requires. The present statutory powers to modify restrictions on the alienation of immovable property alone are too narrow.

Clause 8(1) restricts the court's powers to vary trusts to cases where circumstances arise after execution of the trust instrument which the founder, in the court's opinion, did not intend or foresee. This restriction has been included because it is not the court's function to draw up a contract or will on behalf of the parties. If a party stipulates enforceable consequences for events which he foresees effect must be given thereto in accordance with the general principles of the law of contracts and succession. In the case of trusts of long duration, there seems to be justification for authorising the court to give relief in the event of unforeseen circumstances. The subclause will not provide relief in cases where a founder notwithstanding existing circumstances lays down provisions which cause difficulties. It appears to be desirable not to saddle the court in all cases where an ill-considered trust instrument causes difficulties with the task of remedying the situation.

2.8.2 Subclause (2)

Problems with investment arise when the trust instrument is ambiguous or silent on certain avenues of investment. The trustee may feel that the risk attached to a certain investment is too great where it has not been expressly authorised. A trustee who has insufficient powers of investment in terms of the trust instrument or the common law may approach the court to vary the provisions of the trust. This is however, a costly procedure.

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48 V.

Honoré[49] holds the view that a trustee should be expressly authorised, subject to the provisions of the trust instrument, to invest trust moneys in defined investments and says that it is necessary "to give trustees an express power ... to invest a certain proportion of the trust fund in industrial and other companies of a certain standing".

The necessity of wider powers of investment is, according to Honoré, further underlined by the extent of inflation which results in the shrinking of trust assets which have been invested at ordinary rates of interest.

Some of the commercial banks who commented advocate such a power of investment.

In Ex parte Van Hasselt[50] the court makes the following relevant[51] remarks:[52]

At 554 E: The Master submits that many hazards are implicit in holdings on the stock exchange. That is not to be denied. But investment in gilt-edged securities, like Government stock and mortgage bonds, also has its disadvantages. The value of money is uninterruptedly and steadily declining, and has always done so. A capital amount invested 20 years ago and safely returned to-day can buy about one-third of what it could buy, say, in 1945. The interest received in the interim at about 7 percent, or even less, cannot compensate for this loss. There is indeed greater certainty in this kind of investment than there is in the purchase of shares; one of the factors most certain is that the investor will recover bad money for good.

At 555H: The seventeenth and eighteenth century writers referred to by the Appellate Division in 1925 expressed no preference for a particular type of security. They merely insist on prudence on the part of a trustee. To suggest that investment in a portfolio of shares ipso facto involves so much "uncertainty and risk" that the whole undertaking automatically betrays lack of "due care and diligence" is in my view unrealistic.

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49 218.
50 1965 3 SA 553 (W).
51 In casu there was no trust involved but the powers of a curator bonis over the assets of a patient.
52 The 1925 decision of the Appellate Division referred to is Sackville West v Nourse 1925 AD 516.

The powers of investment granted by the courts are usually conservative:

(a) In Ex parte Rooth : In re Morarjee's Estate[53] the court granted consent for investment in Government and municipal stocks, public utility securities and loans or deposits at building societies, but refused a request to invest in immovable property.

(b) Peffers v Board of Control[54] mentions the following as usual investments:
Government and municipal stocks; loans secured by first mortgage bond (not more than one-half to two-thirds of the value of the property); fixed deposits in banks, trust companies and building societies.

(c) In Ex parte Bennett[55] the will, inter alia, authorised investment in shares of public companies. The court held that this did not cover shares in a unit trust scheme and left the question undecided whether such an investment is a trustee investment.

In England, New Zealand and the Australian States and Territories there are statutory lists of investments in which a trustee may invest.[56] These apply in addition to the powers of investment (if any) in the trust document unless the contrary appears from the trust instrument.[57] For some of the investments the trustee must first obtain "proper advice".[58] In all these legal systems the court has, in addition, a wide power to make declaratory orders on powers of investment.[59] In New Zealand, England and three of the eight Australian States and Territories authorised investments include shares in certain companies.[60]

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53 1948 3 SA 538 (T).
54 1965 2 SA 53 (C).
55 1969 3 SA 598 (N).
56 Law Reform, Commission of Western Australia Working Paper on Trustees Powers of Investment Appendix III.
57 Ibid 9.
58 Ibid 12.
59 Ibid 39.
60 Ibid Appendix III.

In America most States follow the "prudent man rule":[61]

> This rule is described by Keeton as permitting trustees to invest in the same range of stocks and shares and in the same manner as a prudent man would do, when investing on behalf of others.
>
> However, it has been suggested that the apparent breadth of discretion accorded trustees by the rule has been reduced by judicial interpretation so that "despite the seeming liberality of the prudent man rule, the courts have reached a result similar to that reached by the legal lists: the restriction of investment opportunities to only certain classes of securities". Nevertheless, the prudent man rule does seem to provide somewhat broader powers of investment than the narrow list approach adopted in some American States. It also contains a potential for flexibility and development if new forms of investment arise or economic conditions change.

If a list of authorised investments is the appropriate solution, comment on the nature of the list and the rules for its application will be required. It appears to be reasonable that the wishes of the founder regarding the investment of trust property should be the starting-point. The question that arises is whether provision should be made for exceptions to this rule. The provisions of subclause (2) permit an exception only in exceptional circumstances and an application to court is a requirement. This provision might be critised as being too narrow and granting no relief in small trusts where the cost of an application to court will cancel out the possible advantage of wider powers of investment. In favour of the provision, however, it may be said that it is the founder's right and duty to make the necessary arrangements and that the court should not be burdened with this unnecessarily. To determine the best investment at a given time is in any case a complicated matter. In a trust with its conflicting claims of income and capital beneficiaries the problem is aggravated It is clear that the best investment policy will vary depending

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61 Ibid 14.

on the nature of the assets, the duration of the trust and the benefit which the founder envisaged for the income and capital beneficiaries, respectively. If the founder wants to leave decisions of this nature to his competent trustee he may, of course, do so. If he himself elects to stipulate how investments should be made it does not appear to be desirable simply to undermine these conditions by statutory provisions or by powers of the court to vary.

The Commission does not have at its disposal any statistics pertaining to the extent of the problem. Bodies involved in the practical administration of trusts are requested to furnish information on the number of cases occurring where a trustee has allegedly provided for insufficient powers of investment, as well as the amounts involved.

There was a proposal that the assets of a trust not exceeding a certain amount in value (say R10 000) should be deposited in the Guardian's Fund of the Master of the Supreme Court for administration by the Master. This can of course be done only if the assets are in cash or can be converted into cash. The question also arises whether the Master would be able to carry the extra burden, whether the Master should have an option, whether the beneficiaries should have a say and whether the Master should charge a fee for his administration.

2.9 Clause 9

This clause is modelled on section 9 of the 1934 Act.

2.10 Clause 10

Trusts may be of long duration and the Master normally has no regular contact with the trustee. It appears to be

desirable that the Master should have an address for notices to and the service of process on a trustee. The position stated in the clause is already achieved administratively on the appointment of executors and in the case of trustees who furnish security.

2.11 Clause 11

The main objection against the coming into operation of Chapter III of the Administration of Estates Act is that, in all cases where this Chapter will apply, the trustee will have to lodge annually with the Master an account supported by an auditor's certificate. The objections were that this would cause unnecessary expense and inconvenience. The Master, and possibly also the auditors, would not be able to cope with the additional burden, resulting in delays to the prejudice of the beneficiaries. It has been argued repeatedly that section 4 of the 1934 Act is adequate and works well. The draft clause is modelled on section 4 of the 1934 Act.

2.12 Clause 12

In terms of section 7 of the 1934 Act only the court may remove a trustee from office. In terms of section 70 of the Administration of Estates Act, read with section 54, the Master will be able to remove a trustee on the coming into operation of Chapter III. Clause 12 of the Bill is based on section 54 of the Administration of Estates Act.

Certain changes have, however, been made to the present provisions of this section:

(a) In terms of section 54 only the court may remove a trustee in certain cases if he has not furnished security. This power is granted to the Master in the Bill because speedy action may be essential. The

trustee may approach the court if he wishes to object.[62]

(b) Section 54 (1)(b)(i) of the Administration of Estates Act makes provision for the removal of a trustee if the will has been revoked or declared void. In such a case there is obviously never a valid appointment as a trustee and removal is unnecessary. The same applies to a person "if at the time of his appointment he was incapacitated".[63] If a person becomes incapacitated to act as trustee[64] a vacancy may occur in the office of trustee and the Master must act in terms of clause 5 of the Bill.

(c) Subclause 2(c) of the draft does not appear in section 54 of the Administration of Estates Act.

(d) Certain decisions have indicated that, in the absence of authorisation in the trust document, the trustee may resign only with the consent of the court.[65] Clause 12(2)(d) of the Bill empowers the master to consent and also provides that the resignation becomes effective in all cases only after consent has been given by the Master.[66]

(e) Section 54(2) of the Administration of Estates Act gives rise to problems in practice. It is not clear whether the removal takes effect when the Master forwards the notice to the executor, or whether the removal takes effect after the expiry of 30 days or whether or not the Master still has a discretion after the expiry of 30 days to remove the executor.

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62 Clause 14 of the Bill.
63 S 54(i)(b)(iv) of the Administration of Estates Act.
64 Ibid.
65 Ex parte Moodley 1968 4 SA 622 (D).
66 Cf Honoré 168.

In the cases for which clause 12(2) (a), (c) and (d) of the Bill provides there appears to be no need for the Master to notify the trustee before he exercises his discretion to remove him from office. In the case of clause 12(2)(b) there is already a notice by the Master that the trustee must furnish security within a certain time. Any removal of a trustee by the Master may be set aside by the court in terms of clause 14 of the Bill.

2.13 Clause 13

All the banks and three of the Masters who commented believe that there is a need for a tariff of fees for trustees.

The draft is modelled on section 69 in Chapter III of the Administration of Estates Act. Because the Master will not, in terms of the draft, receive and examine accounts in all cases the requirement of taxation of the fees was omitted.

The Master of the Supreme Court, Pretoria, who administratively acts as Chief Master, suggested that the tariff should be the same as that of tutors and curators, namely 5% on income collected and 1.5% on the value of the capital assets on delivery or payment thereof or termination of the trust.[67]

Shrand[68] agrees with this when he says:

> The present practice is, in the absence of any specific remuneration in the will or trust deed, to charge 5% on the gross amount of income collected and 1.5% in respect of the capital when finally distributed.

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67 Reg 8(3) in terms of section 103 of the Administration of Estates Act Government Gazette 3425 of 24 March 1972 at 9.

68 293.

Honoré[69] regards the normal tariff as 5% on gross income and 1% on capital distributed.

The Chief Master is opposed to the charging of a so-called acceptance fee on receipt of the trust assets. In Ex parte Thornton[70] the court says in connection with a request for such a fee:

> I am not surprised at and heartily agree with the Master's comment when he says that he opposes the granting of this fee which is unheard of.

2.14 Clause 14

Section 95 of the Administration of Estates Act and section 151 of the Insolvency Act[71] give aggrieved persons a right to apply by way of motion for review by the Supreme Court.[72] It is not clear why an application by way of motion is required. Reference to "review" poses the question which type of review is intended.[73] Clause 14 of the Bill is modelled on section 48 of the Companies Act.[74] The wording makes it clear[75] that no appeal is intended but a review in the sense of a retrial as set out in the third example mentioned in Johannesburg Consolidated Investment Co v Johannesburg Town Council.[76] There is no provision for a time-limit and the application may be lodged within a reasonable time.[77]

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69 253.
70 1960 1 SA 453(E) 454E.
71 Act 24 of 1936.
72 Section 95 of the Administration of Estates Act also grants a right of appeal to the Supreme Court.
73 De Hart v Klopper and Botha 1969 2 SA 91(T) 96C.
74 Act 61 of 1973.
75 Kredietbank van SA v Registrateur van Maatskappye 1978 2 SA 644(W) 650C.
76 1903 TS 111 at 116-117.
77 De Hart v The Master 1971 3 SA 366 (O) 371H.

2.15 Clause 15

In our law a trust inter vivos operates as a contract for the benefit of a third party.[78] This approach of the Appeal Court has evoked considerable criticism.[79] It would appear, however, that this approach of the courts has not resulted in serious practical problems.

Hahlo[80] puts the position as follows:

> From the practical point of view two points have caused concern. The first one is that on the construction which has been adopted it is impossible in our law to create a trust which is ab initio irrevocable. Until the beneficiary has accepted, the trust can always be re= voked. It is true that the settlor cannot do so unilaterally, without concurrence of the trustee, but in practice the trustee is almost invariably a creature of the settlor.

The second point which causes concern is the insolvency of the trustee which is dealt with in clause 7 of the Bill.

Shrand[81] puts the position as follows:

> Criticism has been levelled at this construction of a trust inter vivos on the ground that it prevents unborn children to be brought within the framework of a trust inter vivos as acceptance is a prerequisite for the formation of a trust inter vivos set-up and there can thus be no acceptance on behalf of unborn children (apart from the operation of the Perezian rule).

Bayer[82] points out these problems and also indicates that the construction of a contract for the benefit of a third party creates problems in charitable trusts or trust with an impersonal object.

In view of this critcism the commission has included clause 18 in the Bill in order to elicit comment on this aspect.

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78 CIR v Estate Crewe 1943 AD 656; Crookes v Watson 1956 1 SA 277 (A).

79 Cf eg Pollak 1956 Annual Survey 179, Bayer 1956 SALJ 255; Murray 1958 Acta Juridica 64; Kerr 1958 SALJ 84; Hahlo 1961 SALJ 195.

80 1961 SALJ 204.

81 7.

82 1956 SALJ 260.

2.16 Clause 16

This clause is of an administrative nature. Subclause (2) is modelled on section 103(3) of the Administration of Estates Act.

2.17 Clauses 17-31

2.17.1 From the comment obtained thus far it appears beyond doubt that there are still objections on all sides to the coming into operation of Chapter III of the Administration of Estates Act. It appears to be preferable not to introduce the proposed amendments in Chapter III or in the 1934 Act. The Bill makes provision for the repeal of Chapter III of the Administration of Estates Act[83] and the 1934 Act.[84]

2.17.2 In view of the proposed repeal of Chapter III all references in the remainder of the Administration of Estates Act to "administrator", "accountant", "letters of administratorship" and to provisions contained in Chapter III would become meaningless. The sole purpose of clauses 18(a), 19, 20, 23 to 28 and 30 of the Bill is to remove such provisions from the Administration of Estates Act.

2.17.3 Clause 4 contains complete provisions relating to the furnishing of security by trustees. Clauses 17, 21(b) and 29 remove other provisions on the subject which may cause confusion.[85]

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83 Clause 22.

84 Clause 31.

85 Honoré 172.

2.17.4 Although Chapter III of the Administration of Estates Act has not yet come into operation section 40 is already being applied to "administrators" who receive bequests from a deceased estate. Section 1 of the Administration of Estates Act defines an "administrator" by implication as a person who has been appointed in terms of Chapter III. Clauses 18(b) and 21(a) of the Bill apply the provisions of section 40 of the Administration of Estates Act to a "trustee" as defined in the Bill.

3 Matters not dealt with in the Bill or the explanatory memorandum

Certain existing provisions in legislation and aspects which elicited criticism have not been dealt with in the Bill or the explanatory memorandum, but are set out here in order that persons or bodies who wish to comment can do so conveniently. Comment on any other aspect will also be welcomed.

3.1 The legal personality of trust

Van Zyl[86] suggests that the trust itself as legal person is the legal holder of the trust property. Such an approach would solve many practical problems. This is, however, applicable only to the "official trust" and will not cover all cases where problems arise. Since the Appeal Court has, up to now, not accepted this view, a complete exposition of the prerequisites for such legal personality, the termination thereof and the functioning of the organs, would be necessary. It has been pointed out above[87] that the Commission is at this stage opposed to drastic reform of the law of trusts or the excessive regulation of trusts. Persons or bodies who feel that such amendments are desirable are requested to make concrete proposals.

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86 Gedenkbundel Swanepoel 1.

87 Par 1.4.

3.2 Limitation on the duration of trusts

The legislature has already placed a restriction on the duration of *fideicommissa* over immovable property.[88] In practice the same economic results are often obtained with trusts as with *fideicommissa*. In this regard Honoré[89] writes as follows:

> (T)he claim of a founder to control the management of property by future generations of his descendants or relatives is surely neither logically deducible from the nature of ownership nor justifiable by an appeal to the supposed economic incentive which the prospect of post-mortem autocracy provides. There are ample incentives for making money without this. When Hitler claimed to have founded a Reich to last a thousand years he was regarded as unbalanced, but when a South African testator purports to create a settlement to last for ever the law takes him seriously.
>
> It seems to me therefore that the basic principle on which the permissible duration of trusts should be based is that no restriction on the disposition of capital should be valid beyond the lifetime of beneficiaries born at the time when the trust instrument takes effect, i.e. during the testator's lifetime or before he executes the trust instrument *inter vivos*. The reason is that the founder could not form any opinion about persons unknown to him and therefore could have no reason to suppose them incapable of managing property.
>
> This does not dispose, of course, of the question: what is to happen to the capital on the death of the last beneficiary born before the trust instrument takes effect if the founder has made no provision for that event and has, for instance, bequeathed the capital to his descendants in the sixth generation. The solution appears to be to provide by statute that in that event the capital should be distributed to the existing income beneficiaries in proportion to their shares in the income, and, if the trust confers a discretion on the trustees as to income, to award the capital to the income beneficiaries along the lines suggested in paragraph 387 in relation to estate duty under discretionary trusts.
>
> Even this does not completely solve the problem, because, as the law of South Africa stands at the moment, there may be no income beneficiaries. The founder is at the moment free to require or permit income to be accumulated for an indefinite period. It hardly seems possible to inhibit this abuse except by adopting, somewhat arbitrarily, a fixed term of years beyond which accumulation will not be permissible. Public policy must surely, reprove the withdrawal of property from use for more than a short period. Income should not be allowed to accumulate for some conjectural benefits to future generations. I suggest a solution along these lines:

88 Ss 6 and 7 Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965.

89 First edition 474.

(a) when there are no income beneficiaries accumulation should be permitted for a maximum period of thirty years. The thirty years represents the lifespan of a generation, and is chosen in order to equate, roughly, gifts of capital ex die subject to intermediate interests in income with gifts ex die without such intermediate interests;

(b) when there are income beneficiaries any direction to accumulate part of the income should be construed as a permission to accumulate, so that the trustees would have the power to pay income to the beneficiaries or to accumulate as they in the circumstances saw fit. This permission would terminate when the beneficiaries reached majority or ten years after the instrument took effect, whichever was the later.

As regards (a) the capital would be distributed to the capital beneficiary on the expiry of thirty years. If the capital beneficiary were not then in existence the capital would go cy près or fall into the residue of the founder's estate. As regards (b) the rule as to distribution of capital would be ... to distribute on the expiration of the trust to the existing income beneficiaries.

The preceding part of the proposals by Honoré assumes that the beneficiaries are natural persons. The beneficiary who receives a benefit from the trust may, however, be a legal person as happens frequently in the case of charitable trusts.

If the proposal to place a limitation on the duration of a trust is accepted, consideration will have to be given to treating charitable trusts as an exception or to imposing some other limitation.

From Honoré's exposition it is clear that it will be extremely difficult to devise legislation which will regulate all cases satisfactorily. In the nature of things the rules will be arbitrary.

It would seem that if there is a need to give the courts wider discretion to vary trusts, unsatisfactory aspects of long-term trust provisions could be dealt with in terms of an enabling provision.

3.3 Apportionment of costs against income and capital

The Bill does not indicate how certain costs should be paid. It is frequently a practical problem whether costs such as premiums for security bonds, remuneration of trustees and accountants etcetera, should be paid out of capital or income.

In respect of security section 3(2) of the 1934 Act provides as follows:

> The Master shall allow the reasonable costs of finding security to be charged out of the income of the settled moneys or if such income is insufficient for the purpose, out of the settled moneys: Provided that not more than one-half of such costs shall be charged out of the settled moneys.

It is clear that this proviso is arbitrary and creates an unsatisfactory position where a trust yields no income for a long period.

Section 63(3) (Chapter III) of the Administration of Estates Act provides as follows in this regard:

> The costs of finding such security shall be paid out of the income derived from the property concerned or out of the property itself: Provided that such costs shall, subject to the terms of the will or written instrument operating inter vivos, for the purposes of adjustment between the beneficiaries concerned, be brought into account against the said income and against the property in such proportions as the Master may determine.

Sections 65(3) and 69(3) of the Administration of Estates Act contain similar provisions in respect of the costs of auditors and accountants and remuneration for trustees, respectively.

The only provision in the Bill in this regard is contained in clause 11(3). Some hold the view that it is desirable

that the trustee should deal with these matters as circumstances require and that parties feeling aggrieved should resort to their ordinary remedies.

3.4 Statutory provisions for the practical administration of trusts

3.4.1 There were proposals that the keeping of books by the trustee, procedures at meetings etcetera should be regulated by statute. Although there is not complete clarity in this connection[90] the situation apparently does not justify regulation by statute. Clauses 7(1), 9 and 11(1) are the only provisions in the Bill in this connection.

3.4.2 There was a proposal that a trustee who has a personal interest in transactions of the trust should disclose such interest and register it with the Master. At common law conflicting interests are a possible ground for the removal of a trustee.[91] Furthermore the trustee may not make a profit from his office, and transactions with himself in his personal capacity are voidable.[92] In this case, too, it does not seem desirable to regulate the position by statute.

3.4.3 There was a proposal that the administration of trusts should be restricted to certain professions. There was also a proposal that the disqualifications of trustees should be set out as in section 218 of the Companies Act.[93]

The Commission is not aware of adequate grounds for such proposals.

3.5 Business trusts

Honoré[94] points out the following:

> Since a trustee acting in his capacity as such is liable only to the extent of the trust assets, it seems that a business carried on by trustees enjoys a form of limited liability independent of the Companies Act.

90 Honoré 149 et seq.
91 Ibid 165.
92 Ibid 230 and 256.
93 Act 61 of 1973.
94 224

It may be that this point will call for the attention of the legislature.

Many of the advantages of a company may be enjoyed through a trust without compliance with the protective and administrative provisions of the Companies Act.[95] The use of business trusts is apparently on the increase and the possibility that these trusts may be abused does exist.

The secretariat of the Commission learnt[96] that the Standing Advisory Committee on Company Law is giving attention to this aspect. It appears to be desirable to leave the investigation to that Committee. Co-operation between the Law Commission and this Committee is possible.[97]

3.6 Penalty clauses

The appropriation of trust property contrary to the provisions of the trust instrument is theft at common law.[98] It is, however, also customary to make failure to comply with statutory provisions (which are generally of an administrative nature) punishable as an offence.[99]

The Commission is of the opinion that it is undesirable to apply criminal sanctions in an area where civil remedies, administrative procedures or common law offences exist. This leads to unnecessary criminalisation of the law.

The Bill consequently contains no penalty clauses.

3.7 Foreign trustees

Section 41bis of the old Administration of Estates Act[1] made provision for the recognition of foreign trustees appointed by will. The Master had to be satisfied that the will had been accepted in the foreign country, that

95 Act 61 of 1973.
96 Telephonic communication: Prof S J Naude on 23 May 1983.
97 S 18 of the Companies Act 61 of 1973.
98 S v Harper 1981 2 SA 638(D) 669D.
99 Cf s 6 of the 1934 Act; s 102 of the Administration of Estates Act; s 9 of the Financial Institutions (Investment of Funds) Act 56 of 1964.
1 Act 24 of 1913.

the trustee had chosen domicilium citandi et executandi in the Republic and that security had been furnished if required.

Section 41bis has been repealed by the Administration of Estates Act. Section 62 of the Administration of Estates Act, which is not yet in operation, makes provision for similar recognition where an appointment as trustee has been granted in certain states. The only relief at present is that the Master is prepared to accept (in the light of section 11 of the Interpretation Act)[2] that section 41bis still applies because the superseding provision has not yet come into operation.[3]

These cases apparently do not occur frequently and no provision has been made in the Bill. Comment on the frequency of these cases, the desirability of provisions to provide for them and the nature of such provisions would nevertheless be welcomed.

In the case of trusts inter vivos the problem of foreign trustees occurs very rarely, if ever. Local trustees are appointed to control assets here. If such cases do occur, the trustee must obtain recognition by the court.

3.8 State control over charitable trust

Honoré[4] puts forward the following suggestion:

> The supervisory jurisdiction of the State over charitable trusts cannot be said to have been clearly received as part of modern Roman-Dutch law. It is probably desirable that the State should by statute expressly be given the right to sue for breach of such trusts and to maintain other proceedings in relation to them.

In terms of clause 11 of the Bill the Master may instruct any trustee to account for his administration and use of trust property and the Master may also cause an investigation to be carried out into the trustee's administration and use of the

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2 Act 33 of 1957.
3 Honoré 157-9.
4 267. Cf Corbett et al 434.

trust property. Should the Master find that the trust property has been used contrary to the trust instrument the trustee may be guilty of theft. This may lead to removal of the trustee by the Master,[5] or the court.[6] The successor trustee may sue the former for breach of trust.[7]

It does not appear to be desirable that trustees should be subjected to unnecessary interference by the State. Nevertheless the procedure to call a trustee to account in the absence of beneficiaries is tedious and cumbersome. Proposals for alternatives would be welcomed.[8]

3.9 Taxes

The tax implications of trusts have not been dealt with. This aspect receives the constant attention of the Department concerned.

3.10 Miscellaneous matters

Many existing statutory provisions in the Administration of Estates Act (some of which have not yet come into operation) have not been incorporated in the Bill. The reasons are the following:

(a) The Commission's view is provisionally that all acts of trustees should not necessarily be subject to the control and supervision of the Master.

(b) If the common law or ordinary procedure is available it is not desirable to make specific statutory provisions applicable to trusts.

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5 Clause 12(2)(a) of the Bill.
6 Ibid clause 12(1)(c).
7 Honoré 266.
8 Cf s 36 of the Administration of Estates Act.

(c) Statutory provisions which are merely declaratory should be avoided if no problem exists.

The following provisions of the Administration of Estates Act have not been incorporated in the Bill or discussed in the explanatory memorandum:

(i) The appointment of a corporation as trustee.[9]

(ii) Preference list for consideration by the Master in making an appointment of a trustee.[10]

(iii) Registration in deeds registry only if the registration officer is satisfied that the registration is in accordance with the trust document.[11]

(iv) Furnishing of security by guardians for the award of trust property.[12]

(v) Payment to foreign governments of amounts due to minors or persons under curatorship.[13]

(vi) Liability of trustee for wrong distribution.[14]

(vii) Appointment of women as trustees; banking accounts of trustees; transfer of immovable property to beneficiaries; production of title deeds to trustees; movable property to which minors or unborn heirs are entitled subject to usufructuary, fiduciary or other like interest; failure of trustees to pay over moneys; consent of the Master to a sale by the trustee; extension of time for payment and compounding of debts owing to trusts; purchases by trustee, certain of his relatives etcetera of trust

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9 S 59(3).
10 S 61.
11 S 64.
12 S 66.
13 S 67.
14 S 68.

property and the buying-in by a trustee of property held by him in pledge or under mortgage; substitution or surrogation by trustee; absence from the Republic of trustee; continuance of legal proceedings when the trustee ceases to be trustee; removal of trustee.[15]

(viii) Proceedings by Master.[16]

(ix) Master's costs.[17]

(x) Master incapacitated from being trustee in official capacity.[18]

(xi) Exemption from liability for acts or omissions in Master's Office.[19]

(xii) Evidence by the Master.[20]

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15 S 70.
16 S 96.
17 Ss 97 and 98.
18 S 99.
19 S 100.
20 S 101.

Annexure A

BILL

[ ] Words in square brackets indicate proposed omissions.
Words underlined with a solid line indicate proposed insertions.

To regulate further the administration of trust property; and to provide for matters incidental thereto.

Introduced by the Minister of Justice

BE IT ENACTED by the State President and the House of Assembly of the Republic of South Africa, as follows:-

Definitions.

1. In this Act, unless the context otherwise indicates -

"Court" means the provincial or local division of the Supreme Court of South Africa having jurisdiction or any judge thereof;

"Master" includes a Deputy Master or an Assistant Master of the Supreme Court of South Africa;

"Minister" means the Minister of Justice;

"trust instrument" means-

(a) an instrument, whether operating inter vivos or mortis causa, in terms of which property is made over or bequeathed to a trus= tee or a beneficiary, which property is to be administered by the trustee for the benefit, in whole or in part, of the person or class of persons named in the document or for the achievement of the object stated in the document; or

(b) an instrument embodying an oral agree= ment in terms of which property is thus made over and placed under the administration of a trustee;

"trustee" means a person appointed in terms of a trust instrument or an order of court or by the Master in terms of the provisions of this Act to administer trust property in accordance with the provisions of a trust instrument;

"trust property" means property which in terms of a trust instrument is to be administered by a trustee.

The Master who has powers to act.

2. A power conferred or a duty imposed upon a Master by this Act shall be exercised or performed, in the case of trust property which is to be administered in terms of a testamentary writing, by the Master in whose office the testamentary writing or a copy thereof is registered and accepted, and in any other case, by the Master in whose area of jurisdiction the greater portion of the trust property is to be administered: Pro= vided that when a Master has accepted juris= diction with regard to particular trust pro= perty he shall retain jurisdiction with regard to that property.

Trustee must lodge court order or trust instrument with Master.

3. (1) Every trustee appointed after the commencement of this Act by an order of court or by a trust instrument operating inter vivos shall, before he takes control of the trust property, lodge with the Master the order of court or the trust instrument, or a copy thereof certified correct by a notary or other person approved by the Master and shall thereafter lodge with the Master any order of court or instrument or copy thereof certi- fied in the said manner by which the original order of court or trust instrument is varied.

(2) If requested thereto in writing by a trustee or a person having an interest in the trust property, and upon payment of the prescribed fee, the Master shall furnish a certified copy of a trust instrument lodged with him.

Security.

4. (1) After the commencement of this Act no trustee shall enter upon the administration of trust property unless he has to the satisfaction of the Master furnished security for the due and faithful administration of the trust property or has been exempted by the Master or the Court from furnishing security.

(2) The Master may at any time -

(a) order a trustee to furnish additional security;

(b) reduce or discharge any security furnished;

(c) require a trustee whom he has previously exempted from the furnishing of security to furnish security.

(3) If a trustee is in terms of a trust instrument exempted from furnishing security the Master shall not require that security be furnished unless he is satisfied that it is necessary for the due and faithful administration of the trust property.

(4) In the event of any act or default by a trustee in connection with the administration of the trust property which is in conflict with his obligations and as a result of which a loss is suffered the Master may enforce the security or recover the loss from the trustee or his surety, and a certificate under the hand of the Master shall be prima facie evidence of any such loss.

Appointment of trustee by Master.

5. (1) If the office of trustee can for any reason not be filled in the manner required by the trust instrument or an order of court or if a vacancy in the office of trustee occurs or if the Master is of the opinion that it is necessary for the due administration of the trust property that one or more additional trustees should be appointed, the Master shall give notice in the Gazette and in such other manner as in his opinion is best calculated to bring it to the attention of persons having an interest in the

trust property that for a period of 21 days after the date of the notice he will receive written nominations of persons for the office of trustee or additional trustee, as the case may be.

(2) After the expiry of the period referred to in subsection (1) and having considered any nominations received by him, the Master shall appoint the person or persons he deems fit to administer the trust property in accordance with the requirements of the trust instrument or order of court as trustee or trustees.

Trustee must administer trust property diligently.

6. Subject to the provisions of any other law and the provisions of the trust instrument, a trustee -

(a) shall, in making any investment or in the safe custody, control, administration or alienation of trust property, observe the utmost good faith and exercise proper care and diligence;

(b) shall not alienate, invest, pledge, hypothecate or otherwise encumber or make use of trust property in any manner calculated to gain for himself or any other person any improper advantage.

Trust property to be registered or identified in such manner as to make it recognisable as trust property.

7. (1) Subject to the provisions of the Financial Institutions (Investment of Funds) Act, 1964 (Act No. 56 of 1964), section 40 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), and the provisions of the trust instrument concerned, a trustee shall -

(a) in the case of trust property in respect of which registration is required to vest the ownership thereof or any other real right therein or the administration thereof in him cause such property to be registered in such manner that it appears from the registration that he holds the property in his capacity as trustee and not in his personal capacity;

(b) in the case of any other trust property or trust property referred to in paragraph (a) in respect of which registration cannot be legally effected in accordance with that paragraph, identify such property in his accounting or otherwise in such manner as to make such property recognisable as trust property.

(2) In so far as the registration or identification of trust property being administered by a trustee at the commencement

of this Act does not comply with the require= ments of subsection (1), the trustee shall take such steps or cause such steps to be taken as may be necessary to bring the registration or identification of such property in accordance with the said requirements within a period of 12 months after the said commencement.

(3) The officer in charge of a deeds registry in which is registered any deed which must be registered in the name of a trustee in his capacity as trustee in order to give effect to the provisions of subsection (2), shall, if requested thereto by or on behalf of the trustee and upon production to him of such deed and satisfactory proof that such registra= tion is required to be effected in accordance with the said subsection, without payment of transfer duty, stamp duty, registration fees or charges, take such steps as may be neces= sary to register the required transfer or cession of such deed and of any rights there- under.

(4) No stamp duties shall be payable on the transfer of any shares or debentures held as trust property at the commencement of this Act, if such transfer is effected in order to give effect to the

provisions of subsection (2).

(5) Property registered or identi= fied in a manner which makes it recognisable as trust property shall not be liable to any claim which any person has against the trustee, except in his capacity as trustee of such property.

Power of Court to vary trust provisions.

8. (1) If a trust instrument contains any provision which, by reason of circumstances which occurred after the execution of the document, brings about consequences which the person who executed the instrument in the opinion of the Court did not contemplate or foresee and which hamper the achievement of the objects of the said person or the inte= rests of beneficiaries in terms of the document or which are in conflict with the public interest, the Court may on the application of the trustee or any such beneficiary delete or vary any such provision or make in respect thereof any order that it finds just.

(2) In particular the Court may in the application of subsection (1) vary any specific provision which results in the unprofitable investment of trust property.

Records relating to trust property may not be destroyed.

9. Save with the written consent of the Master a trustee shall not destroy any document relating to trust property.

Trustee shall notify Master of his address.

10. A trustee shall furnish the Master with an address for service upon him of notices and process and may change such address only after 21 days' notice to the Master.

Master may require account from trustee.

11. (1) If required thereto in writing by the Master a trustee is obliged to account to the Master to his satisfaction and in accordance with his requirements for his administration and use of trust property and shall when required thereto in writing by the Master deliver to the Master any book or document relating to the administration or use of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and use of the trust property.

(2) The Master may, if he finds it necessary, cause an investigation to be carried out by some fit and proper person appointed by him into the trustee's administration and use of the trust property.

(3) Any costs and expenses incurred in respect of an investigation referred to in subsection (2) shall be a charge against the trust property or the income derived therefrom, whichever the Master determines: Provided that the Court may on the application of the Master or a trustee or any person having an interest in the trust property order such costs and expenses as well as the costs of such applica= tion to be paid de bonis propriis by the trustee or the person at whose instance the investigation was carried out, as the case may be.

Removal of a trustee from office.

12 (1) A trustee may at any time be removed from his office by the Court -

(a) if he has by any misrepresentation or by any reward or any offer of reward, either di= rectly or indirectly, induced or attempted to induce any person to effect or promote his appointment as trustee by the Master or the Court; or

(b) if he obtains or attempts to obtain for himself or any other person at the expense of the trust property or a trust beneficiary or creditor any advantage to which he or such other person is not entitled; or

(c) if he fails to administer and use the trust property under his control duly and faithfully in accordance with the provisions of the trust instrument; or

(d) if for any other reason the Court is satisfied that he ought to be removed from his office.

(2) A trustee may at any time be removed from his office by the Master -

(a) if he is convicted in the Republic or elsewhere of any offence of which dishonesty is an element and is sentenced therefor to imprisonment without the option of a fine or to a fine exceeding one hundred rand; or

(b) if he fails to give security or additional security, as the case may be, to the satis= faction of the Master wihthin 30 days after having been required thereto; or

(c) if his estate is sequestrated or liquida= ted or placed under judicial management; or

(d) if he resigns in writing from his office, whether or not the instrument in terms of which he was appointed provides for his

resignation from office.

Remuneration of trustee.

13. (1) A trustee shall in respect of the execution of his official duties be en= titled to such remuneration as may be provided for in the trust instrument or, where no such provision is made, to the remuneration pre= cribed by regulation under section 16.

(2) The Master may, if in his opinion there are sound reasons why the remuneration referred to in subsection (1) would not be proper in a specific case, in= crease or reduce such remuneration.

Recourse to Court.

14. Any person who feels himself ag= grieved by an appointment or removal of a trustee by the Master or by any decision, order or direction of the Master made or issued un= der this Act, may apply to the Court for re= lief, and the Court shall have the power to consider the merits of any such matter, to hear evidence and to make any order it deems fit.

Repeal or va= riation of trust condi= tions.

15. After a trust instrument or a certified copy thereof has been lodged with the Master in terms of section 3(1) no pro= visions of such instrument shall, subject to

any authority contained in the instrument it= self and subject to the provisions of section 8, be repealed or varied without the written consent of the trustee and all the beneficia= ries who have already been determined or those who are empowered to consent on their behalf.

Regulations.

16. (1) The Minister may make regula= tions relating to -

(a) the fees payable to the Master in respect of anything which shall or may be done under this Act;

(b) the remuneration payable to trustees.

(2) Regulations made under section 8 of the Trust Moneys Protection Act, 1934 (Act No. 34 of 1934), shall be deemed to have been made under subsection (1).

Substitution of section 5 of Act 19 of 1941.

17. The following section is hereby sub= stituted for section 5 of the Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Act, 1941 (Act No. 19 of 1941);

"Obligation upon executors, etc., to provide se= curity incapable of being waived.

5. The obligation to pro= vide security imposed by any law upon executors, [administrators] tutors, curators or trustees in insolvency, shall not be capable of being waived unless the instrument by which they are nominated expressly directs that such security shall be dispensed with or unless a provincial or local division of the Supreme Court of competent juris= diction on application grants special exemption therefrom.".

Amendment of section 1 of Act 66 of 1965, as amended by section 1 of Act 54 of 1970 and sec= tion 1 of Act 79 of 1971.

18. Section 1 of the Administration of Estates Act, 1965 (Act No. 66 of 1965, here= inafter referred to as the Administration of Estates Act), is hereby amended-

(a) by the deletion of the definitions of "accountant", "administrator" and "letters of administratorship"; and

(b) by the insertion after the definition of "territory", of the following definition:

"'trustee' means a trustee as defined in section 1 of the Administration of Trust Property Act, 198__ (Act No. __ of 198__);".

Amendment of section 4 of Act 66 of 1965.

19. Section 4 of the Administration of Estates Act is hereby amended -

(a) by the substitution in subsection (1) for the words preceding the proviso of the following words:

"In respect of the estate of a deceased person, or any portion thereof, [or of any property given under the control of any person by a deceased person for the purpose mentioned in section fifty-seven] jurisdiction shall lie -

(a) in the case of a deceased person who was, at the date of his death, ordinarily resident within the area of jurisdiction of a provincial division of the Supreme Court, with the Master appointed in respect of that area; and

(b) in the case of a deceased per= son who was not at that date so resident, with the Master to whom application is made to grant letters of executorship [or letters of administratorship], or to sign and seal letters of executorship [or letters of administratorship], or to sign and seal any such letters already granted in respect of the estate [or property] concerned:"; and

(b) by the deletion in subsection (4) of the word "administratorship".

Amendment of section 5 of Act 66 of 1965, as amended by section 2 of Act 54 of 1970.

20. Section 5 of the Administration of Estates Act is hereby amended by the substi= tution for the proviso in subsection (2) of the following proviso:

"Provided that -

[(a)] any executor, [administrator] trustee, tutor or curator, or his surety, may inspect any such document or cause it to be inspected without payment of any fee [and

(b) in the case of a document lodged by an administrator in terms of section sixty-five, the right to inspect and to make or obtain a copy or extract shall be limited to the administrator, his surety and the beneficiaries concerned, or the representative of the administrator or of any such surety or bene= ficiary].".

Amendment of section 40 of Act 66 of 1965, as amended by section 5 of Act 54 of 1970 and section 29 of Act 57 of 1975.

21. Section 40 of the Administration of Estates Act is hereby amended -

(a) by the substitution for subsection (1) of the following subsection:

"(1) If an [administrator] trustee has been appointed to administer any proper= ty of a deceased person under his will (including in the case of a massed es= tate any property forming part of the share of the survivor or survivors of that estate which, according to a distribution account, is to be admini= stered by such [administrator] trustee), the executor shall -

(a) deliver to the [administrator] trustee such of the movable property as should, according to the distribu=

tion account, be delivered to him;

(b) cause the terms of the will, or a reference thereto, in so far as they relate to the administration, to be endorsed against the title deed of such of the property as is immovable, and against any mortgage or notarial bond forming part of the property, and de= liver the title deeds and any such bond, subject to the provisions of section 41(2) to the [administrator] trustee; and

(c) lodge with the Master the [admi= nistrator's] trustee's acquittance for any such movable property, deeds or bond, and a certificate by the registration officer concerned or a conveyancer that such deeds or bond have been endorsed as aforesaid."; and

(b) by the deletion of subsections (2) and (3).

Repeal of Chap= ter III of Act 66 of 1965.

22. Chapter III of the Administration of Estates Act is hereby repealed.

Amendment of section 95 of Act 66 of 1965.

23. Section 95 of the Administration of Estates Act is hereby amended by the deletion of the word "administrator".

Amendment of section 96 of Act 66 of 1965.

24. Section 96 of the Administration of Estates Act is hereby amended by the deletion of the word "administrator" wherever it occurs.

Amendment of section 98 of Act 66 of 1965.

25. Section 98 of the Administration of Estates Act is hereby amended by the deletion of the word "administrator" wherever it occurs.

Amendment of section 99 of Act 66 of 1965.

26. Section 99 of the Administration of Estates Act is hereby amended by the deletion of the word "administrator".

Amendment of section 101 of Act 66 of 1965.

27. Section 101 of the Administration of Estates Act is hereby amended -

(a) by the substitution for subsection (1) of the following subsection:

"(1) A copy certified by the Master of any letters of executorship, [admini= stratorship] tutorship or curatorship lodged with him under section 21, or under the said section read with

section [sixty-two or] 74, [as the case may be] or of a copy of any such letters, shall be admissible in evidence as if it were the original letters.";

(b) by the deletion of paragraph (b) of subsection (2); and

(c) by the substitution for subsection (3) of the following subsection:

"(3) A certificate under the hand of the Master shall be prima facie proof of any loss referred to in section 23(5), [or in the said sub-section as applied by sub-section 4 of section sixty-three] or in section 77(5), and of any value referred to in section 35(1) or in section 46 or in the last-mentioned section as applied by section [seventy or by section] 85.".

Amendment of section 102 of Act 66 of 1965, as amended by section 7 of Act 15 of 1978.

28. Section 102 of the Administration of Estates Act is hereby amended -

(a) by the substitution for paragraph (f) of subsection (1) of the following paragraph:

"(f) being an executor [or administrator], wilfully distributes any estate or property otherwise than in accordance with the provisions of section 35(12), or of the relevant will [or written instrument operating inter vivos]; or ";

(b) by the substitution for paragraph (g) of subsection (1) of the following paragraph:

"(g) contravenes or fails to comply with the provisions of section 9(1) or (3), section 13, section 27(1) or (3), [or of the last-mentioned section as applied by sub-section (2) of section seventy,] section 35(13), [section fifty-seven, sub-section (1) of section sixty-five,] section 71, section 78, section 83, section 93(1) or (3), or with any notice under section 9(2) [or any order under sub-section (1) of section fifty-eight, or hinders or obstructs any accountant nominated by the Master in terms of paragraph (a) of sub-section (1) of sec= tion sixty-five in the execution of his duty]; or";

(c) by the substitution for paragraph (h) of subsection (1), of the following paragraph:

"(h) contravenes or fails to comply with the provisions of section 6(4), section 8(1) or (2), section 11(1), section 26(1) or of the last-mentioned section as ap= plied by section 85, section 28(1), (2) or (3) or of the last-mentioned section as applied by section 12(7) [or by section 70(1)] or by section 85, section 30, section 35(1), or with any direction under section 35(2) or any notice under section 43(3) or (4) [or of the last-mentioned section as applied by section 66(2)]; or"; and

(d) by the substitution for paragraph (i) of subsection (1), of the following paragraph:

"(i) contravenes or fails to comply with the provisions of section 7(1) or (2), section 35(8), section 41(1) [or the last-mentioned section as applied by section seventy], section 54(5) or of the last-mentioned section as applied by [sub-section (1) of section seventy or by] section 85, or with any notice under section 7(3) or any direction under section 28(6) or of the last-mentioned section as applied by [sub-section (1) of section seventy or by] section 85, or

fails without reasonable excuse to comply with a notice under section 32(1)(b), or, having appeared in answer to such notice, refuses to take the oath or to submit to examination or to answer fully and satisfactorily any lawful question put to him,".

Repeal of section 108 of Act 66 of 1965.

29. Section 108 of the Administration of Estates Act is hereby repealed.

Amendment of section 109 of Act 66 of 1965.

30. Section 109 of the Administration of Estates Act is hereby amended -

(a) by the deletion in subsection (1) of the words "subject to the provisions of subsection (2)"; and

(b) by the deletion of subsection (2).

Repeal of Act 34 of 1934.

31. The Trust Moneys Protection Act, 1934 (Act No. 34 of 1934), is hereby repealed.

Short title and commen= cement.

32. This Act shall be called the Admi= nistration of Trust Property Act, 198__, and shall come into operation on a date to be fixed by the State President by proclamation in the Gazette.

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Annexure B

Bodies and persons approached to identify defects in the law of trusts

Association of Law Societies of the Republic of South Africa

Association of Trust Companies in South Africa

Clearing Bankers Association of South Africa

General Council of the Bar of South Africa

Justice Training

Masters of the Supreme Court

National Council of Chartered Accountants (now The South African Institute of Chartered Accountants)

Southern African Institute of Chartered Secretaries and Administrators

South African Universities