Do I need an independent trustee for my family trust?

After a string of court cases the answer to this question is without doubt yes. These court cases have firstly made it clear that you cannot register a new family trust without an independent trustee. This approach is indeed followed by the Masters' offices where trusts are being registered. Secondly the court cases demonstrate that you need an independent trustee to ensure that a spouse, in the case of a divorce, SARS or a creditor cannot claim that the trust assets are actually part of your personal estate based on the so-called alter ego argument.

A trust is amongst others formed to

protect assets from creditors,
save estate duty, capital gains tax and income tax and
to ensure that it is not part of a joint estate, where parties are married in community of property, or party of the accrual system.

If you do not have an independent trustee, the chances of the alter ego argument succeeding is very good. Your trust will then be declared a sham trust and the trust assets will be regarded as part of your personal estate. This could cost you a lot of money.

The courts have furthermore confirmed that the existence of an independent trustee is not on its own enough to ensure that the alter ego argument cannot succeed. The independent trustee must also be actively involved with the running of the trust's affairs.

Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA) was the watershed case. Judge Cameron confirmed that enjoyment and control should be functionally separate in the case of a trust.

There are several divorce cases where the alter ego argument was successfully used. In Jordaan v Jordaan 2001 (3) SA 288 (C) the court concluded that the husband had made loans between various trusts and himself without any formal decision by trustees. The court found that the husband's own evidence had shown that the trusts were actually his alter ego and were regarded by him as

such. He had seen the trusts as a means whereby he could gain a financial advantage for himself.

Also in the divorce case of Badenhorst v Badenhorst 2006 (2) SA 255 (SCA) the court held that the trust assets could not be regarded as separate from the personal estate. It appeared that the husband had seldomly consulted or sought approval of the co-trustees in dealing with the trust assets.

In Van Zyl v Van Zyl and Others[2014] JOL 31973 (GSJ) the court made reference to "prudent estate planning" without consulting theindependent trustee. Also in that case the court held that funds had flown between the trust and the first respondent without any formal decisions and clearly entirely on the instructions of the first respondent. The trust assets were therefore part of the redistribution in terms of the divorce action between the parties.

In V.Z v V.Z and Others (2011/5122) [2014] ZAGPJHC 42 (14 February 2014), which is an unreported case, the alter ego argument was also successfully used in a divorce action.

In the case of FNB v Stefanus Britz and six others (handed down on 20 July 2011 in the North Gauteng High Court) the creditor successfully got an order declaring the trust a sham trust. The trust assets could consequently be attached for the debts of the trustees. The court made reference to the fact that

the couple, who had signed a suretyship in favour of the bank, had the power to appoint and remove all trustees,
there was no lease agreement between them and the trust,
there was no evidence that the trust operated any bank account and that trustee meetings were held.

You should therefore ensure that:

you have an independent trustee, i.e. a person who is neither a beneficiary of the trust nor close family of any of the beneficiaries;
the independent trustee is involved with the running of all trust affairs and part of the decision making process for all important trust matters – a paper trail in the form of amongst others resolutions should be kept.

If you don't do this, you might get away with it – where there is no complainant

there’s no complaint. But why run the risk?! Rather do what needs to be done to ensure that your trust assets are safe from SARS, from creditors and from your spouse in the case of a divorce.

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U kan ‘n testamentinstruksievel hier voltoi: Testament Instruksievel / Will Instruction Sheet