

# The removal of trustees

Most trust deeds of family trusts give the trustees a wide discretion in respect of the management of the assets of the trust and the distribution of the income and capital of the trust to the beneficiaries. This statement applies to trusts created while the donor is still alive or in terms of his will after he has passed away.

When can beneficiaries of a trust remove a or all the trustees of such a discretionary trust if they are unhappy with their conduct? When can a trustee remove a co-trustee?

The following are, in my opinion, some guidelines in this regard based on the Trust Property Control Act, 1988, and more specifically section 20 thereof, and the case of *McNair v Crossman and Another 2020 (1) SA 192 (GJ)*.

Both a beneficiary as well as a trustee can get a court order to have a trustee removed if they can show that the specific trustee

1. has been guilty of misconduct while performing his duties as a trustee, such as, for example, misappropriating trust funds;
2. cannot properly perform his duties as trustee because of incapacity or incompetence; for example, a trustee who
  1. is mentally ill;
  2. has been found guilty of fraud or theft;
  3. fails or refuses to attend trustee meetings or provide a proper account of trust funds on request of co-trustees or beneficiaries;
  4. has been negligent in the performance of his duties as trustee by failing to properly apply his mind to the management of the assets of the trust.

If a co-trustee or a beneficiary can show that the relationship between the trustees has broken down to such an extent that they can no longer constructively cooperate and attend to their obligations as trustees, the court would also, in the interest of the trust and the beneficiaries, remove one, some or all of the trustees. The court then also has the power to appoint a new trustee or trustees.

The trust deed of the trust might also cater for further grounds to have a trustee removed.

On the other hand, “mere friction or enmity between the trustee and beneficiaries will not in itself be adequate reason for the removal of the trustee from office”. If beneficiaries are, for example, unhappy with the trustees because they refused to release funds that they want to use to buy a new car or do an overseas trip arguing that the money should rather be used for the beneficiaries tertiary education and a rainy day, the court would not, in my opinion, interfere with the trustees’ exercise of their discretion.

Volker Krüger, Van Velden-Duffey Inc