A PROPOSAL IN FAVOUR OF AN INDEPENDENT EXECUTOR

PHILIPPUS HELENUS CILLIERS

OCTOBER 2019

A PROPOSAL IN FAVOUR OF AN INDEPENDENT EXECUTOR

by

PHILIPPUS HELENUS CILLIERS

Submitted in partial fulfilment of the requirements for the degree LLM

Prepared under the supervision of

PROF. A VAN DER LINDE

FACULTY OF LAW

UNIVERSITY OF PRETORIA

2019

THE EXECUTOR[1]

I had a friend who died and he,
On earth so loved and trusted me,
That ere he quit this earthly shore,
He made me his executor.

He tasked me through my natural life,
To guard the interests of his wife,
To see that everything was done,
Both for his daughter and his son.

I have his money to invest,
And though I try my level best,
To do that wisely, I'm advised,
My judgment oft is criticized.

His widow once so calm and meek,
Comes, hot with rage, three times a week,
And rails at me, because I must,
To keep my oath appear unjust.

His children hate the sight of me,
Although their friend I've tried to be,
And every relative declares,
I interfere with his affairs.

Now when I die I'll never ask,
A friend to carry such a task,
I'll spare him all such anguish sore,
And leave a hired executor.

[1] Guest *Today and Tomorrow* (1942) 12.

TABLE OF CONTENTS

ABSTRACT

Freedom of testation is distinct from the right of a testator to nominate the executor of his choosing.

Regulation 910 allows for the administration of deceased estates by the surviving spouse, person related by consanguinity to the deceased, or persons nominated as executor in a will. It will be purely incidental if such person has any idea how to administer an estate. Chief Master's Directive 20 of 2015 further provides that the Master may not insist on the appointment of an agent to assist the executor where a person was nominated as such in a will, consequently leaving the estate to be administered by a layperson.

The Courts have hinted towards the need for a figure such as the independent executor. An independent executor is a person who has no conflict between his own interests and his interests as an executor. Although a testator has the freedom to nominate an executor in terms of the Administration of Estates Act, such a nomination is distinct from the right to freedom of testation. If the legislator were to intervene by amending the law to only permit for independent outsiders to administer deceased estates, this will not be a limitation on the right to freedom of testation.

Furthermore, an independent outsider as trustee in family trusts is a requirement. It is argued that the same should be implemented with appointing executors. The Master has enacted forms that must be lodged by trustees to determine whether a trustee is an independent outsider. Similar forms do not exist for the appointment of executors, but should be required.

This dissertation works toward the recommendation that the legislator needs to intervene to permit only independent outsiders as executors. The Master must be put in a position whereby he can proactively determine whether a person is an independent outsider, rather than having to remove an executor after receiving a complaint by an aggrieved party. Such an independent executor must then be assisted by a professional person with the necessary skills and knowledge to administer an estate, thereby protecting the interests of the estate.

CHAPTER 1: INTRODUCTION

1 Contextualisation of the research problem

This dissertation will critically analyse the considerations pertaining to the appointment of executors in deceased estates, and more specifically the practice by the Master to appointment laypersons to liquidate and distribute deceased estates. The dissertation will propose that only independent outsiders[2] should be permitted to be appointed as executors.

Regulation 910[3] as promulgated in terms of the Attorneys, Notaries and Conveyancers Admission Act [4] states that, subject to certain exemptions, only attorneys, notaries, and conveyancers shall liquidate or distribute the estate of a deceased person.[5] The exemptions[6] hereto is a *numerous clausus,* limited to: a board of executors; a trust company; a public accountant; a person licenced as a broker or agent on the 27th day of October 1967 under the Licenses Act[7]; a natural person nominated as executor in a will of the deceased; the deceased's surviving spouse and persons related by consanguinity; and any banking institution registered as such on the 27th day of October 1967 and nominated in a will. In support hereof the Administration of Estates Act[8] provides that no letters of executorship may be granted, signed and sealed, or endorsed in favour of any person who is by law prohibited from liquidating or distributing the estate of any deceased person.[9]

---

[2] For a discussion on the meaning of "independent executor" see Chapter 3 para 3.
[3] Regulations Prohibiting The Liquidation Or Distribution Of Estates of Deceased Persons By Any Person Other Than An Attorney, Notary, Conveyancer Or Law Agent, NO R910 (*Gazette* 2080 dated 22 May 1968) as amended by R1013 (*Gazette* 2439 dated 20 Jun 1969), and R1376 (*Gazette* 3227 dated 13 Aug 1971), - herein after referred to as "Regulation 910".
[4] S 30 of Act 23 of 1934.
[5] S 2.
[6] S 3 lists the persons permanently exempted and s 4 lists the persons excepted to such extent as as specified in each case. For a discussion on the persons so listed in the exemptions see Chapter 2 para 3.
[7] The Licenses Act 44 of 1962.
[8] The Administration of Estates Act 66 of 1965. Hereinafter referred to as "The Act".
[9] S 13(2).

The Master's practice, according to the Chief Master's Directive 2 of 2015,[10] in dealing with the appointment of laypersons as the executor, states that:[11]

> "If the applicant is a layperson *and has not been exempted in terms of Regulation 910* he/she must be required to be assisted by a person who, to the satisfaction of the Master, has the necessary capabilities and trustworthiness to assist him/her with the administration of the deceased estate." (Emphasis as per the said directive).

From this it can be deduced that a layperson is any person who lacks either the necessary capabilities to administer the estate of a deceased person or lacks trustworthiness. Such layperson therefore requires the assistance of an agent to administer the estate. Strangely enough, in the same Chief Master's Directive we find the following contradiction:

> "Note that, amongst other exemptions, where an executor has been nominated in a valid will and is going to administer the estate personally, *he/she is exempted from the requirement to appoint an agent* – offices may thus not insist on him still obtaining the services of an agent where he/she indicated that he will not make use of an such."[12] (Own emphasis added).

The effect of the above is that a testator can nominate a layperson such as a friend, a surviving spouse, or parent as executor in his will, and upon making the appointment, the Master cannot insist on the assistance of an agent. Over and above this, even if the layperson has the assistance of an agent, the appointed executor may at any given time end the mandate of the assisting agent.

At first glance Regulation 910 seems to have the objective of having either a professional person appointed as the executor, or where a layperson is appointed that such layperson must be assisted by a professional. However, the effect of reading the Act, Regulation 910 and the Chief Master's Directive together is that the family members of the deceased and other laypersons nominated in a valid will can take appointment as the executor of a deceased without necessarily being trained or

---

[10] Chief Master's Directive 2 of 2015 – Appointment of Executors and/or Master's Representatives in Deceased Estates by the Master. Herein after referred to as "Chief Master's Directive 2 of 2015".

[11] Para 7.10(a)(iv).

[12] Chief Master's Directive 2 of 2015 n29.

having the necessary skillset to liquidate or distribute the estate of a deceased person. To make matters worse, the Act provides that the parent, child or surviving spouse is automatically exempted from the obligation of finding security for the proper performance of his duties.[13]

In an attempt by the Master to promote the appointment of independent trustees as required by the *Parker* case,[14] the Master considers any person who has any blood relation to the beneficiaries, trustees, or the founder as not being independent.[15] Albeit that this Chief Master's Directive deals with the appointment of trustees and not that of an executor, the Courts have looked at the fiduciary duties of trustees when considering the fiduciary duties of the executor.[16] The Courts have time and time again expressed their dissatisfaction with executors who are biased or who do not act independently in their office as such, and indicated that an independent executor would be a solution thereto.[17]

This dissertation will examine the benefits of having an independent executor appointed in deceased estates with, or assisted by a person with, the necessary knowledge and skills to see to the administration of the deceased's estate.

2 Problem statement

The Act, Regulation 910, and the Chief Master's Directive create a situation where a layperson can be appointment as an executor in a deceased estate without being assisted by an agent, notwithstanding the call from the Courts that executors should act independently. Furthermore, if such a layperson happens to be a parent, child, or surviving spouse of the deceased, no security has to be provided to the Master for the proper performance of their duties. Effectively, where laypersons are appointed

[13] S 23(2)(a).
[14] 2005 2 SA 77 (SCA).
[15] Chief Master's Directive 2 of 2017 – Trusts : Dealing With Various Trust Matters Para 3.8 (i).
[16] *Van Niekerk v Van Niekerk* 2011 2 SA 145 (KZP) para 7;*Erasmus v Jacobs* 2012 JOL 29455 (FB) para 16.
[17] *Reichman v Reichman* 2012 4 SA 432 (GSJ) para 21; *Erasmus v Jacobs* 2012 JOL 29455 (FB) para 2; *Judin v Jankelowitz* 2010 JOL 26471 (SG) para 18; *Barnett v Estate Beattie* 1928 CPD 482 485.

as executors of deceased estates (a) without providing to the Master any security for the proper performance of their duties, and (b) neither are they assisted by agents with the necessary skills and knowhow to administer deceased estates. There exist limited protection to heirs or creditors in instances where a layperson has been appointed as an executor to administer a deceased estate. This dissertation will critically analyse the law regarding the appointment of executors to mitigate the risks involved for the layman providing no security when administering a deceased estate.

3 Research question

In order to address the research problem, the following research question and sub questions will be discussed:

Should the legislation be amended to provide that only independent persons be appointed as executors of deceased estates? In order to reach an answer and conclusion to the main research question, the below mentioned sub-questions will be considered and ultimately answered by the dissertation:

3 1 What is the importance and effect of Regulation 910?[18]

3 2 What is an "independent executor"?[19]

3 3 Would a restriction on testators relating to whom they may nominate as executors in their wills be a restriction on their right to freedom of testation?[20]

3 4 How can trust law pertaining to independent trustees be applied to executors?[21]

3 5 Which considerations are before the Master upon making the appointment of an executor?[22]

[18] See Chapter 2.
[19] See Chapter 3, para 3.
[20] See Chapter 3, para 4.
[21] See Chapter 4, para 3.

4 Aim of this dissertation

The aim of this dissertation is to bring clarity to the analogous situation created by reading together the Act, Regulation 910 and Chief Master's Directive 2 of 2015. This dissertation will propose amendments to Regulation 910 regarding the persons who may liquidate and distribute the estate of a deceased person, and specifically an amendment to the effect that only an "independent outsider" may take appointment as an executor or has to assist a layperson who is appointed as executor. Alternatively an amendment to section 23(2)(a) of the Act is proposed that where a parent, child or surviving spouse who is a layperson is to be appointed as executor without the assistance of an "independent outsider", such person may only be appointed in the event that security is provided to the Master for the proper performance of his duties.

5 Value of this dissertation

This dissertation will show the value of independent executors by critically analysing case law where executors acted wrongfully and not independently. It will further show the value of having a preventative approach, in that the Master should take into consideration the relationship of the executor to the deceased and/or the beneficiaries before making the appointment, rather than leaving the heirs to approach the Court's for such executor's removal after the fact.

6 Research methodology

A desktop approach will be used in writing the dissertation; consequently the doctrinal methodology will be applicable. A critical perspective will be applied to the current dispensation of the law regarding the appointment of laypersons as executors without the assistance of an agent, and also to the appointment of family members as executors without requiring them to provide security for the proper performance of their duties.

---

[22] See Chapter 4, para 4.

7 Structure of the dissertation

This dissertation will be divided into five chapters. Chapter one aims to contextualise the research problem and to orientate the reader. Chapter two will critically analyse Regulation 910 and the prejudices created thereby. Chapter three will have a historical overview of the office of the executor and then discuss case law on the issue of removal of executors from their office who did not act independently. Thereafter the right to freedom of testation will be juxtaposed to the right to nominate an executor testamentary. In Chapter four case law on the independent trustee will be analysed where after it will be shown how the same rules can be inferred onto the laws pertaining to executors. The forms lodged with the Master for appointment as trustee will be compared to the forms for appointment as executor in order to show the shortcomings on the forms pertaining to the appointment of executors. Finally, Chapter five will conclude this dissertation and offer recommendations for reform for the appointment of executors.

CHAPTER 2: DISSECTING REGULATION 910

1 Introduction

This chapter will aim to answer research question one. The provisions of Regulation 910 will be critically analysed.[23] Regulation 910 concerns itself with the persons who qualify to liquidate and distribute the estates of deceased persons. It will first be determined whether Regulation 910 is still applicable *in lieu* of the repeal of the Act[24] under which it was made. Then an in depth study will be made as to who may and who may not administer deceased estates. Thereafter the prejudices created by applying Regulation 910, the Administration of Estates Act,[25] and Chief Master's Directive 2 of 2015[26] to the appointment of executors, will be discussed.

2 Is Regulation 910 still applicable?

Regulation 910 was enacted by the Minister of Justice by virtue of the powers vested in him by section 30 of the Attorneys, Notaries and Conveyancers Admission Act.[27] In the preamble to Regulation 910, it is stated that the Minister of Justice made the regulation after consultation with the presidents of the several law societies. The Attorneys, Notaries and Conveyancers Admission Act has been repealed by the Attorneys Act.[28]

The question therefore arises as to whether Regulation 910 was also effectively repealed by the repeal of the Attorneys, Notaries and Conveyancers Admission Act, seeing that the regulation was made by the Minister of Justice pursuant to powers vested in him in terms of an act now repealed. However, the Attorneys Act caters for

---

[23] Regulations prohibiting the liquidation or distribution of estates of deceased persons by any person other than an attorney, notary, conveyancer or law agent, NO R910 (*Gazette* 2080 dated 22 May 1968) as amended by R1013 (*Gazette* 2439 dated 20 Jun 1969), and R1376 (*Gazette* 3227 dated 13 Aug 1971). Hereinafter referred to as "Regulation 910".

[24] Attorneys, Notaries and Conveyancers Admission Act, 23 of 1934.

[25] The Administration of Estates Act 66 of 1965. Hereinafter referred to as "The Act".

[26] Chief Master's Directive 2 of 2015 – Appointment of Executors and/or Master's Representatives in Deceased Estates by the Master. Hereinafter referred to as "Chief Master's Directive 2 of 2015".

[27] S 30 of Act 23 of 1934.

[28] S 86(1) of Act 53 of 1979 read with the Schedule thereto.

the continuance of the regulations made under an act repealed by it. In very broad terms it states that "anything done or deemed to have been done" under any provision of a law repealed by the Attorneys Act, will remain in force as if done by the Attorneys Act.[29] It logically follows that Regulation 910 remained in force as if done under the Attorneys Act. The Attorneys Act has, however, in the meantime also been repealed by the Legal Practice Act.[30] The same question therefore arises, namely whether Regulation 910 was effectively repealed by the repeal of the Attorneys Act, seeing that the Attorneys Act deemed Regulation 910 as something done under its provisions. Put differently, should Regulation 910 fail if its empowering act fails? It would seem that the legislator kept this scenario in mind where the Legal Practice Act provides that any regulation made under any law which is repealed by it and in force immediately before 1 November 2018[31] remain in force, except in so far as it is inconsistent with any provisions of the Act, until amended or revoked under the provisions of the Legal Practice Act.[32] It therefore also follows that even though the Attorneys Act is revoked in totality by the Legal Practice Act, the regulations will remain in force, and consequently that Regulation 910 remains in force. The Legal Practice Act, however, goes even further in this regard and proceeds to state, in a similar broad fashion as the Attorneys Act did, that "anything done in terms of a law repealed by this Act remains valid if it is consistent with this Act".[33] The regulation would consequently remain valid. This validation of regulations made and actions done under repealed acts is, however, qualified by requiring that it should be consistent with the provisions of the Legal Practice Act.[34] It seems that Regulation 910 is indeed consistent with the provisions of the Legal Practice Act, inasmuch as this act in itself empowers the Minister of Justice to make regulations

---

29 S 86(3) of Act 53 of 1979.

30 S 119(1)(a) of Act 28 of 2014 read with the Schedule thereto.

31 S 120(4) of Act 28 of 2014 determines the date on which numerous portions of the Legal Practice Act came into operation. It was proclaimed in Proclamation 42003, No. R.31 of 2018 that 1 Nov 2018 would be the commencement date of, *inter alia,* part 4 of Chapter 10 of the Legal Practice Act, of which s 119 forms part.

32 S 119(2)(a) of Act 28 of 2014.

33 S 119(3)(a) of Act 28 of 2014.

34 S 119(2) states that it remains in force "except in so far as it is inconsistent", whereas s 119(3)(a) states that it remains valid "if it is consistent". It is contested that these phrases are two sides of the same coin and with the same meaning attached thereto.

regarding numerous aspects of the practice of legal practitioners.[35] The Minister of Justice is empowered with a general catch-all regulatory power in that the Minister may make regulations relating to "any other matter in respect of which regulations may or must be made in terms of this Act". From the above it can be deduced that, notwithstanding that Regulation 910 was made under a repealed act, and notwithstanding the changes the legal profession has undergone, the Regulation is still in force and stays still applicable today.

Lastly, regarding the constitutionality of Regulation 910, Meyerowitz opines that "[t]hese regulations may possibly be unconstitutional".[36] However, he provides no further explanation or reasoning behind why he is of this opinion. The Law Reform Commission also comments on the possibility that Regulation 910 could be unconstitutional. The Law Reform Commission states that the unconstitutionality possibly relates to Regulation 910's restriction in the economic sphere, by restricting persons without certain qualifications or who are not in a certain occupation from the administration of deceased estates.[37] The question of such a restriction in the economic sphere has, however, already been dealt with by the Constitutional Court. The case of *S v Lawrence* dealt with certain individuals who, in contravention of The Liquor Act[38], sold alcoholic drinks after 20:00 and on a Sunday.[39] The appellants contended that the provisions of the Liquor Act under which they were tried in Court were inconsistent with section 26 of the Constitution which provides that everyone shall have the right to freely engage in economic activity. The Court consequently had to interpret the right to freedom of economic activity. The Court found that an economic restriction or a regulation limiting certain work to only certain persons with certain qualifications is constitutional as long as it is not done arbitrarily.[40] Applying this principle laid down by the Court to Regulation 910, one can conclude that restricting the work of administering deceased estates to competent persons with the

35 S 94(1) of Act 28 of 2014.
36 *Meyerowitz on Administration of Estates And Their Taxation* (2010) 8-3 n1.
37 South African Law Reform Commission: Discussion Paper 110 *Administration of Estates* (Oct 2005) para 5.3.4 29.
38 S 88 of Act 27 of 1989.
39 1997 4 SA 1176 (CC) para 6.
40 Para 33. The court gives the example of doctors or lawyers who need the appropriate qualifications to practice as such.

proper training and skills is not arbitrary. However, Regulation 910 is not consistent. It does not restrict the administration of deceased estate to only professionals but makes provision for laypersons to administer deceased estates too – this certainly drives Regulation 910 into the range of being arbitrary,[41] and consequently possibly unconstitutional. Should it ever be found by a competent Court that Regulation 910 is in fact unconstitutional, on which ever grounds, it will obviously affect the applicability thereof. However, until such time that a Court makes a finding on this, the constitutionality of Regulation 910 remains moot and consequently remains applicable.

3 Who may liquidate and distribute a deceased estate?

Regulation 910 states, as a general rule, that only attorneys, notaries, and conveyancers may liquidate or distribute the estate of a deceased person.[42] The Regulation, however, then proceeds to list the exemptions hereto, consequently providing a *numerous clausus* list of individuals who may see to the administration of a deceased estate.[43] Each one will henceforth be discussed in detail below.[44]

3 1 Attorneys, notaries and conveyancers

Regulation 910 limits the liquidation and distribution of deceased estates to attorneys, notaries and conveyancers as defined in Act 23 of 1934 (replaced by Act 53 of 1979 and subsequently also replaced by Act 28 of 2014). The Legal Practice Act qualifies any attorney, advocate, notary, or conveyancer who has been admitted by the High Court in terms of any act must be regarded as having been admitted and

41 South African Law Reform Commission: Discussion Paper 110 para 5.3.5 30.
42 S 2.
43 S 3 and s 4.
44 It is important to note that Regulation 910 does not regulate to whom letters of executorship may or may not be issued, but only regulates who may see to the work of administrating the estates of deceased persons. When a person is appointed as the executor of a deceased estate he my only see to the liquidation and distribution of such an estate if he is person mentioned in Regulation 910. If someone is appointed as an executor but is not a person as mentioned in Regulation 910, such person should find the assistance of a person mentioned in Regulation 910 and appoint such person as his/her agent to see to the administration of the deceased estate.

authorised to practice in terms of the said act.[45] The repealed Attorneys Act had a similar provision.[46] Therefore whether a person was admitted as an attorney, notary, or conveyance in terms of Act 23 of 1934, or in terms of Act 53 of 1979, or in terms of Act 28 of 2014, such person is permitted to continue to practice as such. "Attorney" is defined by the Legal Practice Act as "a legal practitioner who is admitted and enrolled as such under this Act"; "Notary" is defined as "any practicing attorney who is admitted and enrolled to practice as a notary in terms of this Act"; and in the same vain "conveyancer" is defined as any practicing attorney who is admitted and enrolled to practice as a conveyancer in terms of this Act".[47] Regarding why Regulation 910 would distinguish between attorneys, notaries and conveyancers is unclear, seeing that one can only be admitted as a notary or conveyancer if one is also an attorney.

Interestingly, it has been suggested that under the new Legal Practice Act, that makes provision for a new kind of advocate who may practice with a trust account, that provision must be made that such advocates must be allowed to be admitted as notaries and/or conveyancers.[48] Should this in the future be the case that advocates can be admitted as notaries or conveyancers, the effect thereof will be that such an advocate will then *ipso facto* be allowed to administer the estates of deceased persons, as Regulation 910 provides that notaries and conveyancers may do so. On the other hand, it has been contested that it will be detrimental to the legal fraternity if advocates were to be allowed to administer deceased estates as they mostly do not have noteworthy training or specialised knowledge of the administration of deceased estates.[49]

---

45 S 114(1) of Act 28 of 2014.
46 S 86(1) of Act 53 of 1979.
47 S 1 of Act 28 of 2014.
48 Mosoane "Trust account advocates – can they be admitted to the roll of notaries and conveyancers (March 2019) *DR* 19.
49 South African Law Reform Commission: Discussion Paper 110 *Administration of Estates* (Oct 2005) para 5.3.14 32. It must be noted that this discussion paper was published before Act 28 of 2014 was promulgated and consequently before trust account advocates existed.

3 2 Exemptions

3 2 1 A board of executors

The first exemption listed in section 3 of Regulation 910 is a board of executors. A "board of executors" means a board of executors which was, on the 27th day of October 1967, licenced as such under the Licences Act,[50] and carrying on business of which a substantial part consisted of the liquidation and distribution of the estates of deceased persons.[51] In respect hereof the Licenses Act required any board of executors to take out a separate licence in each province in which it carried on such occupation, whether or not it had a place of business therein.[52] The Licenses Act could be repealed by any of the then provincial councils, and it was in fact so repealed by all four of the then provincial councils.[53]

The extent to which a board of executors are exempted from the prohibition to liquidate and distribute deceased estates is qualified, in that it does not include a board of executors in which a banking institution acquired a financial interest otherwise than in exchange or substitution for any such interest held by such banking institution.[54] A financial interest means:[55]

> "…any interest in the shares, share capital or assets of a board of executors or trust company by virtue of which any person having such interest is likely, directly or indirectly, to share in any pecuniary benefit obtained by such board of executors or trust company from the liquidation or distribution of the estates of deceased persons by such board of executors or trust company or by any person in the service of such board of executors or trust company but does not include any interest held by any banking institution except where that institution is by reason of the fact that it holds such interest entitled either alone or together with one or more other banking institutions holding such interest, to

---

50 Act 44 of 1962.
51 S 1(ii) of Regulation 910.
52 S 4(b) of Act 44 of 1962, read with Schedule 2, Part 2, Item 6 thereto.
53 S 27(1) of the Registration and Licensing of Businesses Amendment Ord 19 of 1972 (Cape); S 47(1) of the Licences and Business Hours Ord 11 of 1973 (Natal); S 45(1) read with Schedule 2 of the Licences Ord 8 of 1972 (Orange Freestate); S 67(1) of the Licences Ord 19 of 1974 (Transvaal).
54 S 1(ii) of Regulation 910.
55 S 1(iii) of Regulation 910.

exercise directly or indirectly more than 25 percent of the voting rights in the board of executors or trust company concerned or to receive directly or indirectly more than 25 percent of the distributable profits of such board or company."

In the same vein Meyerowitz states that where a banking institution can receive a share of the distributable profits or exercise voting rights, whether directly or indirectly, through another person, it will in any event be deemed to share in the pecuniary benefits of such board of executors or trust company.[56]

3 2 2 A trust company

This exemption relates to a trust company, which may only liquidate and distribute the estate of a deceased person if it was so licenced on the 27th day of October 1967.[57] What has further been stated above regarding a board of executors, applies *mutatis mutandis* to a trust company.

3 2 3 A public accountant and auditor

Regulation 910 exempts from the prohibition to liquidate or distribute the estate of a deceased person "any public accountant as defined in section 1 of the Public Accountants' and Auditors' Act, 1951 (Act 51 of 1951), and registered as an accountant and auditor under that Act".[58] Act 51 of 1951 was repealed and replaced by the Public Accountants and Auditors Act 80 of 1991, which was repealed and replaced by the Auditing Profession Act 26 of 2005. A "public accountant" as referred to in Regulation 910 must be construed as a reference to any person who is engaged in public practice meaning the practice of a registered auditor who places professional services at the disposal of the public for reward.[59]

[56] 8-3 n3.
[57] S 1(vi) of Regulation 910.
[58] S 3(3) of Regulation 910.
[59] S 1 of Act 26 of 2005.

3 2 4 A licenced broker as on 27 October 1967

This exemption in Regulation 910 relates to any person, other than a banking institution, who was on 27 October 1967 licenced as a broker under the Licenses Act, 44 of 1962, and who carried on business predominantly consisting of the liquidation and distribution of deceased estates.[60] The Licenses Act required any broker to take out a separate licence in each province in which it carried on such occupation, whether or not it had a place of business therein. It stated that every person who carried on the business of undertaking the administration of deceased estates should require the requisite licence. [61]

3 2 5 Any banking institution registered as such on the 27th day of October 1967 and nominated in a will

In terms of Regulation 910 any banking institution, registered as such (or provisionally registered as such) on the 27th day of October 1967 which itself, or through one of its officers, or through one of its directors has been nominated by the deceased's will as an executor, which will is accepted by the Master, is exempted from the prohibition against the liquidation and distribution of a deceased estate.[62] The limitation for a bank to administer a deceased estate is therefore that it must be nominated as such in a will. A banking institution does not include a board of executors or trust company which was, on 27 October 1967, registered (or provisionally registered) as a banking institution.[63]

3 2 6 A trade union representative

Excluded from Regulation 910's prohibition is any person in the full time service of a registered trade union; this exemption, however, only applies in so far as such person is liquidating or distributing the estate of a deceased person who was at the time of his death a member of such trade union (or the spouse of such member)

[60] S 3(4) of Regulation 910.
[61] S 4(b) of Act 44 of 1962, read with Schedule 2, Part 2, Item 7 thereto.
[62] S 4(4) of Regulation 910.
[63] S 1(1)(i) of Regulation 910.

and as long as he does not do so for or in expectation of any direct or indirect reward.[64]

3 2 7 A natural person nominated by a will

It is important to note that all persons mentioned thus far has been professionals who has the necessary training and skillset to partake in the business of liquidating and distributing deceased estates. The persons forthwith mentioned does not necessarily have such training or skillset.

Regulation 910 provides that any natural person who has been nominated as an executor in a will is exempted from the prohibition against the liquidation and distribution of a deceased estate. This exemption is however qualified only in so far as such nominated executor is personally liquidating or distributing the estate.[65] It is clear that this exemption does not apply to executors dative[66] but only to executors testamentary. An executor testamentary will receive the grant of letters of executorship upon written application to the Master of the High Court, if he has been nominated in a will which has been registered and accepted by the Master.[67]

From the above it is clear that notwithstanding any lack of training in the liquidation and distribution of an estate that an individual might have, if such natural person has been nominated to act as an executor testamentary, then he is exempted from the prohibition provided for in Regulation 910. This is echoed in the Chief Master's Directive where it states that:[68]

> "Note that, **amongst other exemptions**, where an executor has been nominated in a valid will and is going to administer the estate personally, he/she is EXEMPTED from the requirement to appoint an agent – offices may thus not

[64] S 4(6) of Regulation 910.
[65] S 4(1) of Regulation 910.
[66] S 18(1) of the Act regulates the appointment of executors dative.
[67] S 14(1) of the Act.
[68] Chief Master's Directive 2 of 2015 n29.

insist on him still obtaining the services of an agent where he/she indicated that he will not make use of such.

However, you may, of course, make the nominated, lay executor aware of the fact that he/she needs to comply with the act and can be held personally liable for any wrong distributions etc., hence it might be better to obtain the assistance of a professional person – but should he still insist that he can and will do it himself, we cannot insist on an agent being appointed." (Emphasis as per the said directive).

From this it can deduced that the Master is aware of the fact that the possibility exist that a "layperson" can take appointment as executor, and that the Master's hands are tied in this situation. As such there is nothing that the Master can do to prevent the appointment of such layperson. The only recourse the Master have is to give the lay executor a stern warning to be aware that their actions have consequences.

3 2 8 A surviving spouse or persons related by consanguinity

The final exemption applicable relates to the surviving spouse or any person related by consanguinity or affinity to the deceased, up to and including the second degree, in so far as he is liquidating and distributing the estate.[69] The second degree would include grandparents, parents, children, grandchildren, brothers, sisters, and their spouses.[70] It is important to note that this exemption is not limited to situations where such surviving spouse or person related by consanguinity is nominated testamentary, but it will also apply to the appointment of an executor dative. The only limitation to the appointment of the surviving spouse or person related by consanguinity is that he must liquidate and distribute the estate personally.

It is submitted that there is no qualification to this category of executor, and that it is not required that the surviving spouse or person related by consanguinity be a

[69] S 4(3) of Regulation 910.
[70] Meyerowitz 8-3.

professional or independent person in the business of liquidating or distributing estates.

3 2 9 The effect of Regulation 910 on small estates

It warrants mentioning that Regulation 910 is not applicable to estates which are administered under the directions given by the Master under section 18(3)[71] of the Act.[72]

4 Who may not liquidate and distribute a deceased estate?

Regulation 910 provides a general prohibition on the liquidation and distribution of deceased estates and then gives the exceptions thereto; although it seems at first glance as if Regulation 910 will regulate who may not administer a deceased estate, it, however, succeeds only in listing the persons who may liquidate and distribute a deceased person's estate. Notwithstanding this, certain persons are barred, either relatively or absolutely from being granted letters of executorship, and consequently they may not liquidate and distribute a deceased person's estate. The Act stipulates that the Master shall not grant letters of executorship to any person who is incapacitated from acting as an executor.[73] These persons will be discussed below in more detail.

4 1 Minors

The Act is unclear as to whether a minor may be appointed as an executor.[74] Meyerowitz considers a minor to be under a disability and that they consequently cannot act in a fiduciary capacity.[75] He relies on the *Walsh*[76] case in which the Court

---

71 S 18(3) of the Act states that the Master may dispense with appointing an executor where the value of the estate does not exceed the amount (currently R250 000) as determined by the Minister by notice in the gazette from time tot time, and give directions as to the manner which such estate shall be liquidated and distributed.

72 S 8 of Regulation 910.

73 S 14(1) of the Act.

74 Boezaart *Law of Persons* (2010) 59.

75 8-4.

refused to sanction the nomination of a minor as executor. Cameron *et al*, however, is of the stark contrasting opinion and states that a minor's disability does not automatically entail that he is incompetent to act in a fiduciary position. They criticise Meyerowitz and state that the *Walsh* case merely shows that the Court has a discretion, which may be exercised to refuse the confirmation of the appointment of a minor as an executor as was done in the said case.[77] Boezaart confirms the uncertainty regarding the competency of a minor to take appointment as an executor in a deceased estate. She, however, is of the opinion that the *Walsh* case is fair in that a minor's limited capacity to act should disqualify him from administering an estate, but that such minor's parent or guardian may be appointed in his stead.[78]

It is, however, interesting to note that minors are prohibited to act as trustee for an insolvent estate.[79] The Master has however in terms of a Chief Master's Directive given direction on this issue and stated that a person that is legally incapacitated, such as a minor, may not act as an executor in a deceased estate.[80]

4 2 A mentally disordered person and prodigals

Meyerowitz opines that both mentally disordered persons and prodigals under curatorship are incapacitated from taking appointment as executors. He extends this even further to persons who, even if they have not been declared as incapable of managing their own affairs but is factually mentally disordered, are incapacitated to act as an executor.[81] Regarding prodigals, Cameron *et al*, contradicts this and states that in theory a prodigal person can in fact hold office as executor, notwithstanding their disability. They, however, qualify this in discussing the appointment of a prodigal as trustee, that such appointment will be subject to the

---

[76] *In re Walsh's Estate* 1888 9 NLR 168.
[77] *Honoré's South African Law of Trusts* (2018) 245 n307.
[78] *Law of Persons* (2010) 59.
[79] S 55 The Insolvency Act 24 of 1936.
[80] Para 7.10(a)(v), Chief Master's Directive 2 of 2015.
[81] 8-4.

terms of the curator's appointment.[82] This logic can certainly be extended to the office of the executor as well. Cameron *et al* is, however, silent on the issue of mentally disordered persons.

4 3 Insolvents persons

Cameron *et al* state that insolvents can in principal be executors.[83] Meyerowitz confirms this. He, however, qualifies this in stating that the Master may refuse to make such an appointment until such an insolvent finds security to the satisfaction of the Master.[84]

4 4 Persons who take part in the execution of the will

The Wills Act provides that any person who participates in the execution of a will, in that he signs a will as a witness, or he signs a will in the presence and by direction of the testator, or he makes any handwritten portion of the will, or the spouse of such persons, shall be disqualified to receive any benefit from that will.[85] The nomination in a will as executor is considered a benefit and therefore such nominated executor is barred from being appointed as the executor.[86] The Wills Act does, however, provide that a person disqualified from taking appointment as executor under these conditions may approach the Court to have him declared competent to receive such benefit.[87] It further provides that a person is still competent to receive a benefit under a will if such a person would have been an intestate heir of the deceased, if the testator had died intestate, in so far as such benefit's value does not exceed the value of the intestate share such person would have received in terms of the law regulating intestate succession.[88] It is not

[82] 245.
[83] 245.
[84] 8-4.
[85] S 4A(1) of Act 7 of 1953.
[86] S 4A(3) of Act 7 of 1953.
[87] S 4A(2)(a) of Act 7 of 1953.
[88] S 4A(2)(b) of Act 7 of 1953.

necessary to obtain a Court order for this exception to apply, however this exception only applies to inheritance and not to the fee an executor, trustee, or guardian is usually entitled to.[89] In contrast, however, if a Court finds a person competent to inherit in terms of section 4A(2)(a) of the Wills Act the inheritance is not limited to his intestate portion.[90] Meyerowitz is of the opinion that although a person may be disqualified to be appointed as an executor testamentary where he wrote or witnessed a will, he may still, however, be appointed as an executor dative should he receive such nomination.[91]

4 5 The Master

No Master may, in his official capacity as Master, be appointed as an executor in a deceased estate.[92]

5 The interplay between Regulation 910, the Act, and Chief Master's Directive 2 of 2015

With the exception of "persons nominated in a will" and "a surviving spouse or persons related by consanguinity", the persons who may liquidate and distribute a deceased person's estate are in all instances individuals in a professional capacity and in the business of administering estates with the necessary skillset and training.

This aspect of Regulation 910 was considered very important to the Law Society of South Africa (herein after referred to as "LSSA"). In a letter from the LSSA directed to the Office of the Chief Master, whereby they were invited to give comments on a request by The South African Institute of Professional Accountants (herein after referred to as "SAIPA"), that paragraph 3 of Regulation 910 be amended to include their members as persons exempted from the prohibition, the LSSA opposed this

[89] De Waal and Schoeman Malan *Law of Succession* (2015) 122 - 123.
[90] De Waal and Schoeman Malan 124.
[91] 8-6.
[92] S 99 of the Act.

request.[93] The reasons given for the objection was that such an amendment would not be in the public interest and that "the liquidation and distribution of the estate of deceased persons is a branch of fiduciary law which requires specialist knowledge and training".[94] The LSSA then proceed to list the degrees required, the training and examinations that professional accountants as members of SAIPA had to go through to become a member, but noted that there is no compulsory requirement to pass either an examination or compulsory training in the administration of deceased estates.[95] It is clear from the above that the objection pertains to the fact professional standards need to be maintained, and that a certain skillset and the necessary training is required to administer a deceased estate. Over and above this, professionals are in most instances individuals who are independent outsiders. It is therefore unclear why "persons nominated in a will" and "a surviving spouse or persons related by consanguinity" is included in Regulation 910.

Chief Master's Directive 2 of 2015,[96] at first glance, creates the impression that the Master's practice is to either appoint the persons mentioned in Regulation 910 as the executor of a deceased estate, or alternatively to require that where a layperson has been nominated to be appointed as executor, that such person must appoint an agent with "the necessary capabilities and trustworthiness to assist him/her with the administration of the deceased estate".[97] This boils down to only the individuals mentioned in Regulation 910 that may be appointed as agents, seeing that the said Regulation prohibits any other persons from liquidating and distributing deceased estates.[98] Although Chief Master's Directive 2 of 2015 does not provide a definition for the term "layperson" it can be adduced from the wording of the said Chief Master's Directive that it refers to persons who does not have "the necessary

---

93 South African Law Society *Comments by the Law Society of South Africa (LSSA) with regard to the proposed amendment of Regulation 910* (27 Aug 2010), para 2 1.

94 South African Law Society *Comments by the Law Society of South Africa (LSSA) with regard to the proposed amendment of Regulation 910* (27 Aug 2010), para 5 1.

95 South African Law Society *Comments by the Law Society of South Africa (LSSA) with regard to the proposed amendment of Regulation 910* (27 Aug 2010), para 7 2.

96 Chief Master's Directive 2 of 2015 – Appointment of Executors and/or Master's Representatives in Deceased Estates by the Master. Herein after referred to as "Chief Master's Directive 2 of 2015".

97 Para 7.10(a)(iv).

98 Meyerowitz 12-21.

capabilities and trustworthiness". The effect hereof is that all estates will always be administered by the persons mentioned in Regulation 910, whether it is that the said persons will be appointed as the executor or as the agent to assist the executor.

If the above was the end of the matter, there would for all intents and purposes not have been any issue regarding the appointment of executors regarding laypersons that is to be appointed as executor to require that such person must obtain the services of an agent to assist them. However, in a contentious footnote, Chief Master's Directive 2 of 2015 qualifies the above by stating that in instances where a person is nominated in a will and will administer the estate personally, he is exempted from the requirement to appoint an agent.[99] Effectively any layperson can be nominated in a will to see to the liquidation and distribution of a deceased person's estate, and the Master cannot insist that the lay executor must obtain the services of a professional agent. A layperson is therefore given authority to deal with estate assets and execute the duties of the executor. The duties of an executor are to obtain possession of the assets of the deceased person, including rights of action, to realise such of the assets as may be necessary for the payment of the debts of the deceased, taxes, and the costs of administering and winding up the estate, to make those payments, and to distribute the assets and money that remain after the debts and expenses have been paid among the legatees under the will or among the intestate heirs on intestacy.[100] It would seem that these stringent duties of an executor was kept in mind by the legislator when Regulation 910 was written by providing that it was mostly independent professionals who could administer the estate. It is therefore strange to consider that the legislator also provided that these duties can willy nilly be given to a layperson to execute. The South African Law Commission described Regulation 910 as not having "a consistent approach to ensure that the public is protected" and in reference to the appointment of the spouse of the deceased or any person related within the defined degrees of consanguinity that "it is purely incidental if such person has any idea how to

[99] Chief Master's Directive 2 of 2015 n29.
[100] *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (AD) para 35.

administer an estate".[101] Regulation 910 does not promote the protection against losses in the estate, on the one hand individuals nominated in a will qualifies to administer the estate, but banks which exposes the estate to barely any risk are excluded in certain instances.[102]

To exacerbate the situation, the Act stipulates that when a parent, a child or surviving spouse is nominated by will to be an executor, such parent, child or surviving spouse is under no obligation to find security to the satisfaction of the Master for the proper performance of their functions.[103] The Act, Regulation 910 and Chief Master's Directive 2 of 2015 combined, enable immediate family members to be appointed as a lay executor without the assistance of an agent (who has the skill set and knowledge to administer and estate) and without providing security to the Master. This indivertibly leaves the beneficiaries and the creditors of the estate, who has a real interest in the liquidation and distribution thereof at great risk of suffering at the hands of the lay executor's incompetence.

It is submitted that the legislator needs to intervene to remedy the appointment of lay executors who are appointed without the assistance of an agent and without providing security for the proper performance of their duties. At a conference which was attended by the Master, the Chief Master stated that upon amending Regulation 910, the criteria that would be used to accredit a person to administer the estate of a deceased person, such person: [104]

> "should have a tertiary qualification, must belong to a professional body and that this professional body must require continuous professional development from its members and where there is an indemnity and a backup in the event of wrong doing so that we can minimize the risk so that we can entrust the administration of estates to people who are competent and capable".

---

[101] South African Law Reform Commission: Discussion Paper 110 *Administration of Estates* (Oct 2005) para 5.3.2 29.
[102] South African Law Reform Commission: Discussion Paper 110 *Administration of Estates* (Oct 2005) para 5.3.5 30.
[103] S 23(2)(a) of the Act.
[104] Kriel "Trusts discussed at FISA conference" (Oct 2016) *DR* 13.

It is clear that the Master recognises the need for competent and capable persons to administer deceased estates. This has, however, not yet been realised. As such the need persists.

6 Conclusion

It was shown in this chapter that, notwithstanding the repeal of the act under which Regulation 910 was made, it is still applicable to this day. This is due to the fact that each act that repealed the former act made provision that the regulations made under the former act would continue to be of force. Thereafter it was indicated who may and who may not liquidate and distribute deceased estates. Each class of persons mentioned were precisely defined to make it very clear exactly who Regulation 910 refers to. It was pointed out that most individuals referred to in Regulation 910 are professionals with the proper training to see to the administration of deceased estates. The only exceptions hereto are the spouse of the deceased or any person related within the defined degrees of consanguinity and persons nominated in a will. It is squarely in these exceptions wherein the weakness of Regulation 910 is found, seeing that any proper training in the administration of deceased estates, will be purely coincidental. It was highlighted that where Regulation 910 is read together with the Act and Chief Master's Directive 2 of 2015 that these exempted persons can be appointed as an executor by the Master without the assistance of a professional agent to assist with the administration of the estate and without finding security for the proper performance of their duties effectively leaving the estate in the hands of a layperson to deal with the assets to the possible detriment of the heirs or the creditors.

CHAPTER 3: THE INDEPENDENT EXECUTOR

1 Introduction

This chapter will consider what an independent executor is. A short exposé on where the office of the executor finds its roots from will be looked at. It will be considered whether, historically, the executor stood independent from the heirs and the creditors of a deceased estate. Then case law regarding executors who did not act independently will be scrutinised. Finally, seeing that the right to freedom of testation is arguably constitutionally entrenched, does this right encompass in it the right to choose one's own executor to administer one's estate upon death? This chapter will consider whether a limitation on the right to nominate an executor testamentary is a limitation to testamentary freedom. This chapter will answer research questions two and three.

2 A historical overview of the office of executor

Although testamentary dispositions can be traced back to millennia before Christ,[105] the office of the executor can unfortunately not be traced back as far as one might desire.[106] The origin of wills amongst the Romans is found in "universal succession", which happens when one individual "is clothed with the legal clothing –rights, duties and liabilities – of another."[107] This principle aim under Roman law was universal succession, which secured the privilege and continuation of a Roman household.[108] Only later on did the execution and significance of the testator's intention play a role.[109] The principle of universal succession continued into Roman Dutch law and consequently formed part of our common law.[110] In South Africa, however, the different provinces promulgated their own legislation which was based mainly on the

[105] It bears mentioning that this dissertation does not consider the historical background of the whole law of succession, but focuses mainly on the historical background of the office of the executor.
[106] McGregor "The evolution of the executor" 1936 *SALJ* 32.
[107] De Bruyn *The Opinions of Grotius* (1894) 169
[108] De Bruyn 170
[109] De Bruyn 169
[110] De Waal and Schoeman Malan *Law of Succession* (2015) 10.

English Wills Act of 1837,which was eventually replaced by the current Wills Act.[111] Cape Ordinance 10 of 1833 replaced the system of universal succession with the English system of executorship.[112] With the introduction of the executor into our law (and the doing away with universal succession), the heir no longer steps into the shoes of the deceased whereby the assets and liabilities devolve unto him upon death. The assets and liabilities now comprises the deceased's estate which stands to be administered by the executor.[113] Consequently, an heir does not become owner of inherited assets immediately after the death of the deceased, but merely obtains a claim against the executor.[114] However, seeing that universal succession no longer exists in our law, this naturally raises the question of who is the owner of the estate assets upon death. It seems the best explanation is that the executor becomes the owner of the assets *nomine officio.*[115] However, it must also be kept in mind that the Court has stated in *Van Den Bergh v Coetzee* that:[116]

> "…the executor does not step into the shoes of the deceased on his death; he does not succeed to the person of the deceased. He is simply required to administer and distribute his estate under the provisions of the Administration of Estates Act 66 of 1965."

The Court clarified the situation in the case of *Mills v Hoosen*[117] by stating that a deceased estate has no legal personality, it merely consists of an aggregate of assets and liabilities, which vests in the executor, and "he alone has the power to deal with the totality of the estate's rights and obligations".[118]

---

111 Act 7 of 1953. Jamneck *et al The Law of Succession in South Africa* (2018) 3.

112 Van Der Linde "'Bequest of a business concern together with all its assets and liabilities: some comments [Discussion of Gradus v. Sport Helicopters also known as Sport Aviation (19879/2008) 2012 Zawchc 365 (28 November 2012)]," 2014 *Stell LR.* 99 103.

113 Van Der Linde *Stell LR 99 104.*

114 *Greenberg v Estate Greenberg* 1955 3 SA 361 (AD) 365. See also De Waal and Schoeman-Malan 10 and Van Der Linde *Stell LR 99 103.*

115 De Waal and Schoeman-Malan 11.

116 2001 4 SA 93 (T) 95.

117 2010 2 SA 316 (W).

118 2010 2 SA 316 (W) 319. This has also been confirmed in the case of *Booysen v Booysen* 2012 (2) SA 38 (GSJ) para 15 where the court stated that a deceased estate does not have a separate legal persona, It is merely represented by the executor who is the only person who may deal with the estate assets.

However, the heir under universal succession and the office of the executor is distinguishable from each other. McGregor states that, the furthest back that he can trace something similar to the office of the executor in Roman law relates to where someone has been nominated by a testator through whose instrumentality he wishes to secure the release of people in captivity. This testamentary nominated person could lay claim to the legacy or *fideicommisum* and give effect to the testator's wishes.[119] Interestingly if there were no such nomination the most reverend Bishop in the testator's city was entitled to lay the claim.[120] Under Roman Dutch law, regarding the legacy to the poor or redemption of the captives the execution of these dispositions would depend on the executor of the testament, or other person to whom the testator had explained and instructed his intention, and when no such nomination was made and it was not safe to trust the testamentary heir, then a judge would give the necessary directions.[121] From the above it seems that there were indeed something akin to both an executor testamentary and executor dative. McGregor further explains that in Germanic private law we find the legal figure of the office of the trustee[122] which was in service of the testator during the 1100's and 1200's. They had to liquidate the estate and see to the distribution. This carried over to English law where the institute of the trust was developed.[123] It is important to keep in mind that Roman Dutch law has elements of Roman and Germanic law.[124] Although the office of executor was substantially unknown to Roman law, it was retained in Germany and in other countries – consequently the executor testamentary is not of Roman law origin.[125]

It is, however, unsure where the executor's powers stemmed from, some equated the office of the executor as a mandate of the testator, while others as a mandate of the heirs. It was, however, clear that it was "precisely his independence in relation to

[119] 1936 *SALJ* 32 33.
[120] 1936 *SALJ* 32 33.
[121] McGregor 1936 *SALJ* 32 33.
[122] Translated from the German word "Truehänder".
[123] McGregor 1936 *SALJ* 32 34.
[124] Jamneck *et al* 3. See also *Goosen v The Master* 1917 CPD 189 192 where Kotze J states that the theory that origin of the executor stems from Germanic law is more acceptable.
[125] McGregor 1936 *SALJ* 32 35.

them [the heirs] that was the essence of his office".[126] In the case of *Goosen v The Master,* in examining the history of the office of the executor it is stated that "...even when dealing with the legal position of an executor-testamentary under the existing French and Dutch codes, continental lawyers ... are not quite sure of their ground. Most of them apparently fail to recognize that the executor holds an office *sui generis".*[127] This case further explains that the Roman-Dutch legal writers who dealt with this subject, who equated the executor to a procurator or agent, was in fact not correct, seeing that the "executor, like a trustee, and unlike an agent, has no principal".[128] McGregor, in considering the German law states that:[129]

> "the executor has always been a trustee ('Truehänder') in the sense of Germanic law, and is such to-day; that is, he is not a representative of another's right, but trustee … of the testator endowed with independent rights, who exercises such rights in his own name although in the interest of the heirs."

It is interesting to note the independence of the executor, from a historical point of view, being neither an agent of the heirs nor acting as a mandate of the testator. This very independence of the executor from a historical point of view, is echoed by Blakeslee, in stating that for generations it was considered accepted practice that large estates would almost always be handled by able lawyers or business men; this was up until the time of the world war.[130] He considered the qualities that an executor should poses honesty, loyalty, and first-class business ability.[131] Although these qualities do not necessarily testify of the independence of an executor, it does speak to the fact that an executor should not be a lay person. Under Roman Dutch

---

[126] McGregor 1936 *SALJ* 32 36.

[127] 1917 CPD 189 193.

[128] 1917 CPD. 189 194. See also Meyerowitz *Meyerowitz on Administration of Estates And Their Taxation* (2010) 12-18 where it is stated that "An executor is not a mere procurator or agent for the heirs but is legally vested with the administration of the estate. A deceased estate is an aggregate of assets and liabilities and the totality of the rights, obligations and powers of dealing therewith, vests in the executor, so that he alone can deal with them. He has no principal and represents neither heirs nor the creditors of the estate...".

[129] 1936 *SALJ* 32 36.

[130] "Choosing an executor" 1930 *Lincoln Law Review* 21. Note that Blakeslee does not suggest that after the world war the office of the executor became less independent, but rather that such work is no longer reserved for lawyers or businessmen, but now formed part of the ambit of the banks and trust companies who intensely campaigned to be appointed as executors or trustees.

[131] Blakeslee 1930 *Lincoln Law Review* 21 23.

law the heir had the responsibility to administer the estate of a deceased person[132] seeing that the property vested in the heir immediately upon the deceased's passing, however the law evolved so that the executor eventually assumed the functions of the heir and that they cannot claim the estate until it has been administered.[133]

From the above the following two factors seem clear: firstly, where the history of the executor could be traced, the source if his powers were independent from all role players in a deceased estate, and secondly that the office of the executor was often equated to the office of the trustee.

3 Case law on the independence of executors

Henceforth case law which deals with executors who did not act independently will be examined; in other words, case law on the inverse of the independent executor will be examined. The below cases mostly deal with the removal of executors who did not act independent in their office as executor. One can easily deduce what an independent executor should be, by examining what he should not be.[134]

The matter of *Barnett v Estate Beattie*[135] dealt with a deceased who was a Scottish businessman who had a farming venture in the then Rhodesia with his partner. Although the partnership devolved before the death of the deceased, the partnership was not yet liquidated by the time of his passing. The deceased's Scottish trustees were slack to deal with his Rhodesian assets, and consequently no executor was appointed. The respondent then took it upon himself to take appointment as executor, seeing that he wished to see the partnership estate wound up. He then lodged a claim against the estate for £2,963[136] – consequently making him a creditor

[132] Cameron *et al Honoré's South African Law of Trusts* (2018) 123.
[133] Cameron *et al* 126-127.
[134] The cases will be dealt with in the chronological order. Unfortunately this dissertation cannot deal with cases which deals specifically with what an independent executor should look like. This is due to a lack of case law on the meaning of an independent executor. At least the cases below gives a clear indication of how an executor should act.
[135] 1928 CPD 482.
[136] 1928 CPD 482 483.

and executor. The applicants, being the Scottish trustees, brought an application for his removal as executor based on the allegation that there was a serious conflict between his personal interests and his interest as executor. The Court found that "at common law the court has a right to remove an executor if his personal interests are in entire conflict with the interests of the estate".[137] The Court consequently confirmed the removal of the respondent as an executor. It is interesting to note that this matter was decided long before the Administration of Estates Act[138] was enacted, which statutorily makes provision for the powers of the Court to remove an executor.[139] The Act, however, does not replace or repeal the common law, and consequently this common law power of the Court still exists today.[140]

In the case of *Harris v Fisher*[141] the appeal Court had to decide on a matter where the surviving spouse was a co-executor of an estate as well as the trustee of a *mortis causa* trust, and the income beneficiary of the said trust. The *mortis causa* trust was the sole heir of the estate. The surviving spouse was a co-executor of the estate together with an attorney. She gave her father power of attorney with regards to her capacity as executrix. The deceased owed an amount of £9,372 to a company of which he was also a shareholder. It was decided to declare a dividend in the company in the exact amount of £9,372, the purpose of which was to extinguish the debt by set-off. The surviving spouse, *ex post facto,* argued that the dividend was as an income to the estate and consequently for her benefit, *in luie* of the fact that she was the income beneficiary.[142] The Court held that in the special circumstances of the case, the dividend declared was not income within the meaning of the will but that it was always intended to set-off the debt. Her appeal was dismissed. Of importance to this dissertation, however, is the *ratio* of the Court finding that,

[137] 1928 CPD 482 485.
[138] The Administration of Estates Act 66 of 1965. Hereinafter referred to as "The Act".
[139] S 54(1)(a) of the Act.
[140] *Webster v Webster* 1968 3 SA 386 (T) 388C-D the court remarks "…onder die gemene reg en ingevolge die gewysdes onder die ou Boedelwet 24 van 1913, is die hof nou gemagtig kragtens artikel 54(1)(a)(v) van die huidige Boedelwet om 'n eksekuteur te verwyder…".
[141] 1960 4 SA 855 (A).
[142] 1960 4 All SA 437 (A) 438.

although the surviving spouse was a beneficiary, she stood in a fiduciary position towards the heirs; the appellate division then proceeded to state that:[143]

> "If the trustee is also a beneficiary and he acts in such a way as to benefit himself at the expense of the other beneficiaries, his acts will be narrowly scrutinized."[144]

and

> "Executors or administrators will not be permitted, under any circumstances, to derive a personal benefit from the manner in which they transact the business or manage the assets of the estate."[145]

From the above it is clear that being a beneficiary and an executor or trustee, as the case may be, does not *per se* disqualify such a person from his office, but that his acts will be "narrowly scrutinised". Such an executor should not derive any personal benefit from his office. This was the first time that the appeal Court made a judgement regarding the impartiality that an executor must exercise.

In *Judin v Jankelowitz*[146] the Court dealt with an urgent application by an executor to interdict the respondents from alienating certain property and to deliver possession of a certain immovable property to the executor. The respondents, however, in a counter application sought the executor's removal.[147] The executor-applicant was the deceased's son. During his lifetime, the deceased had an extramarital affair with the respondent's mother, which lead to both of their ultimate divorces, subsequent to which they got married to each other.[148] The deceased, in his will, left all of his assets to his new wife, consequently disinheriting the applicant. She was also the beneficiary of some Investec policies.[149] The surviving spouse was appointed as the executrix but subsequently also passed away. The two

[143] 1960 4 All SA 437 (A) 442.
[144] The appeal court here confirmed the finding of the lower court in the matter of *Colonial Banking and Trust Co. Ltd.*v *Estate Hughes and Others*, 1932 AD 1 16.
[145] The appeal court here followed a passage from Story *Commentaries on Equity Jurisprudence as Administered in England and America*, (1846) 212.
[146] 2010 JOL 26471 (SG).
[147] Para 1.
[148] Para 3.
[149] Para 5.

respondents – her two children – were the only heirs of her estate. Ultimately they were the indirect beneficiaries of the first dying's estate.[150] The relationship between the applicant and the respondents were always sour. Unbeknownst the the respondents, the applicant applied to be, and was, appointed as the executor. He then proceeded to claim the monies from the policies back to estate stating that it should never have been paid to her directly. He also averred that the surviving spouse did not take adequate or proper steps to wind up the estate.[151] The Court confirmed that hostility between the parties is no reason for the removal of the applicant as an executor.[152] However, the Court noted that the applicant had an agenda; he hoped to purchase and obtain for himself assets in the estate. This attitude, the Court said, had the consequence that it cannot be said that the applicant is impartial in relation to the management of the estate, when he seeks to impose a pre-emptive right in respect of certain assets of the estate. The Court emphasised that it does not regard this as misconduct, but only as undesirable[153]. The Court consequently made an order for the removal of the applicant as the executor. It is interesting to note that the Court noted *obiter,* that it is desirable that the Master should appoint an executor that is neither the applicant nor the respondents.[154] Although the Court does not use the words "independent executor" or "independent outsider", the effect hereof is that the Court requested the Master to appoint an independent person as the executor, who was neither the applicant nor the respondents.

In the case of *Van Niekerk v Van Niekerk*[155] the former wife of the deceased was in terms of the deceased's will, appointed as the executrix and stood to benefit as the sole heir of his estate. The deceased, however, remarried subsequent to his divorce. The applicant, being the surviving spouse, had two claims against the estate of her late husband: the first for half of the estate in terms of their marriage in

[150] Para 7.
[151] Para 9.
[152] Para 15. It is interesting to note that the court comes to this conclusion by relying the case of *Sackville West v Nourse* 1925 AD 516. This case dealt with hostility between trustees and beneficiaries, however the court applied this principle to the current case dealing with an executor and heirs.
[153] Para 17.
[154] Para 17.
[155] 2011 2 SA 145 (KZP).

community of property[156] and the second[157] for maintenance in terms of the provisions of the Maintenance of Surviving Spouses Act.[158] The respondent, being the former wife, stoutly resisted both claims. If the respondent is successful in resisting the claims, it offers significant financial benefit to her as sole heir.[159] The applicant sought to have the respondent removed as executrix due to her unreasonably resisting the claims. The respondent argued that, unlike the *Barnett v Estate Beattie* case where the executor also lodged a claim against the estate and where his interests clashed with that of the estate and beneficiaries, here the executrix did not lodge any claim, she was in fact protecting the very interests of the estate and herself as sole heir.[160] The Court stated that it is the duty of the executor, in terms of the Act, to consider claims against the estate and to either admit or reject the claims. These powers must be exercised "…*bona fide* and with a measure of objectivity".[161] The abuse of this power, aimed at personal enrichment, is not proper and is ground for such executor's removal. The crux of the Court's finding is found in the the statement that "the office of the executor should not be used in order to pursue a personal agenda."[162]

The Court found that, indeed the facts were distinguishable from the *Beattie*-case, however that the respondent is incapable of adopting a fair minded and impartial approach in considering a significant claim against the estate. Her conduct was directed at securing her own financial gain, and therefore lacks the capacity to execute the duties of an executor[163]. She was consequently removed as such.

---

[156] It bears mentioning that, notwithstanding the court calling the half share of the survivor of a marriage in community of property a "claim", it is trite that this is not a claim against an estate upon dissolution of the marriage, but rather the effect of the marital regime *ex lege.* For a full discussion on the division of an estate of spouses married in community of property, see *Ex Parte Menzies et Uxor* 1993 3 SA 799 (C) 815.

[157] Para 2.

[158] 27 of 1990.

[159] Para 3.

[160] Para 6.

[161] Para 11.

[162] Para 12.

[163] Para 28.

In the matter of *Reichman v Reichman*[164] two brothers were at odds with each other regarding the administration of their deceased mother's estate. The applicant was the son of the deceased. The other son was the executor and the respondent. There were disputes between the brothers regarding moneys received during the deceased's lifetime, and whether such monies should be regarded as gifts or loans, and consequently be included in the liquidation and distribution account or not. The applicant contended that the monies given to the respondent were in fact loans, whereas the respondent contended that the monies were gifts from the deceased. There was further a dispute regarding a document which purported to be a will, singed the day before her death, in which the deceased bequeathed everything to the respondent. The executor instituted a separate action to Court in which he, in his capacity as executor sought an order that the said document purporting to be a will was valid, consequently making him the only heir. The Court held that the executor has a duty to recover assets for the benefit of the heirs, including debts owing to the estate, and that the respondent had a conflict in his personal interest with this exact duty by warding of the allegations of a loan to him from the estate. He further has a personal interest in the litigation regarding the validity of the purported will. The Court stated that the respondent is allowed to take all necessary steps to protect his personal interests, but that it is improper to use his office as executor in order to pursue such interests.[165] The Court found it undesirable that the respondent continues in the office of executor and stated that "…it is desirable that the executor of the estate should be independent of the two factions in the family of the deceased...".[166] Interestingly, the Court opined that if the Act permitted it, the Court would considered as a solution to the dispute, to direct the Master to appoint an independent co-executor Unfortunately, however, the Act does not confer such a power onto the Court.[167] Lastly, the Court remarked that the respondent could have resigned as executor and proposed that the children of the deceased "...jointly approach the Master to appoint an independent executor to deal with the disputes

[164] 2012 4 SA 432 (GSJ).
[165] Para 11.
[166] Para 20.
[167] Para 21.

and to wind up the estate".[168] It is imperative to note that this was the first time that the Courts used the phrase "independent executor". The Court placed much emphasis on the need for such an independent executor.

The case of *Erasmus v Jacobs*[169] was an application to remove the executor. The executor (being the respondent) was the deceased's son and the applicant was the executor's sister. The applicant argued that the respondent was "…not a fit and proper person to be responsible for the administration of the estate; and that an independent executor should be appointed…".[170] They were both the only heirs of their deceased mother's estate in equal shares. During her lifetime the deceased concluded a sale agreement for the sale of a farm to a company of which the respondent was the only director.[171] The applicant contested that the respondent, through his company, concluded the agreement in a dishonest manner, in that he had a conflict of interest, the will of the deceased was concealed from her until after the deceased's death, the sale price was suspiciously low, and the deceased had Alzheimer's disease long before her death and she was consequently not of sound mind when the agreement was concluded – the applicant, however, failed to provide any evidence to this effect.[172] The respondent contested that the agreement was concluded three years before the deceased's death, that the applicant was aware thereof, and that the application for his removal was merely because of her dissatisfaction with the sale agreement.[173] The Court found that it could not on any grounds find that the respondent acted dishonestly or in an untrustworthy manner, seeing that the agreement was concluded before he took office as executor and that no evidence was put before it to come to another conclusion.[174] The executor was consequently not removed. It is interesting to note the following from this case: firstly, that the Court in essence upheld the *Harris v Fisher* finding, in that the Court did not *mero moto* consider the respondent to be biased merely due to the fact that

[168] Para 22.
[169] 2012 JOL 29455 (FB).
[170] Para 2.
[171] Para 3.
[172] Para 6.
[173] Para 10.
[174] Para 17.

he was also a beneficiary but that his actions were “narrowly scrutinised”. Secondly, it is interesting to note that the Court used the phrase “independent executor”. Although this phrase was not defined in any manner in this case, a logical explanation would be that it would have been someone who could independently from both heirs investigate the sale of the farm. Lastly, seeing that the Court based its finding on the fact that the agreement was concluded before the death of the deceased, one cannot help but wonder what judgement the Court would have made if the sale was in fact concluded after the deceased’s death. Certainly then the facts would have fallen in the ambit of the *Van Niekerk v Van Niekerk* case, and the Court would have found that the deceased was attempting to secure his own financial gain.

Lastly, the case of *Casino Retail (Edms) Beperk v Fourie*[175] bears mentioning. This was an application by an intervening party to intervene and oppose an application for the sequestration of a deceased estate, where the executrix committed an act of insolvency.[176] The executrix was the deceased daughter. The applicant contended that it was imperative that a trustee be appointed to deal with the estate independently[177] in the interest of the creditors and that the intervention of an independent and competent third party is required to deal with the estate.[178] The Court consequently proceeded to surrender the estate in terms of the Insolvency Act.[179] Although this matter does not, *per se,* deal with a conflict of interests an executor might have in an estate, it is still fascinating to note that the Court evaluated the independence of an executor to deal with creditors claims against the estate, and consequently surrendered the estate so that an independent trustee could evaluate the said claims.

From the above discussion of cases it is clear that the Courts have hinted towards the want for a figure such as an independent executor. One can deduce that an independent executor is a person who has no conflict between his personal

[175] 2012 JDR 2101 (GNP).
[176] Para 1.
[177] Para 5.3.
[178] Para 22.
[179] 24 of 1936.

interests and his interests as an executor.[180] This conflict of interests includes: (1) instances where an executor himself is a beneficiary and derives a benefit at the expense of the other beneficiaries;[181] (2) where the executor is also a beneficiary he should not derive a benefit at the expense of the creditors;[182] (3) even if he is not a beneficiary he should not pursue a personal agenda;[183] and (4) the estate should not have a possible claim against the executor in his personal capacity.[184] If any of the above criteria is present, a person will have a conflict of interest and should not be appointed as the executor of a deceased estate.

4 Freedom of testation

4 1 The act of testation

In a recent meeting held between the Law Society of the Northern Provinces and the Master, the Acting Chief Master made the very contentious statement that:[185]

> "…it was agreed by the Master's office that the Master had no authority to insist on the appointment of an agent in terms of Deceased Estates Act[186] and that *there was freedom of testation and that the testator could appoint or nominate any person he felt comfortable with*." (own emphasis added)

Freedom of testation is the right and freedom of any person to dispose of his assets in a will upon his death as he sees fit.[187] The Court has described the right to freedom of testation as "…one of the founding principles of the South African law of

[180] Discussion on *Barnett v Estate Beattie* above, 35 of this dissertation.
[181] Discussion on *Harris v Fisher* above, 36 of this dissertation.
[182] Discussion on *Van Niekerk v Van Niekerk* and *Casino Retail (Edms) Beperk v Fourie* above, 38 of this dissertation.
[183] Discussion on *Judin v Jankelowitz* above, 37 of this dissertation.
[184] Discussion on *Reichman v Reichman* above, 40 of this dissertation.
[185] Minutes of a meeting between the deceased and insolvent estates committee of the Law Society of the Northern Provinces and the Master held on Friday, 31 Aug 2018 at 10:00 at the offices of the Master in Pretoria. These minutes were approved on 26 April 2019.
[186] Although the acting chief master referred to the "Deceased Estates Act", there does not exist such an act in South Africa. One can only assume that the Acting Chief Master meant to refer to the Administration of Estates Act.
[187] Davis *et al Estate Planning* (2019) 3.1A.

testate succession…".[188] The right to freedom of testation has been described as a wide concept.[189] Du Toit contends that, notwithstanding the fact that the Constitution contains no express guarantee of private succession, it still guarantees the right to freedom of testation in an indirect manner.[190] The property clause in the Constitution ensures that no person may be arbitrarily deprived of their property.[191] Du Toit argues that, due to the fact that "property" has to be accorded its traditional common law meaning it encompasses not only ownership, but all the rights that are inherently part of ownership – this will include the right to dispose of an asset. Consequently the right to private ownership and the accompanying *ius disponendi* enjoys constitutional protection. Testamentary freedom is founded squarely on the *ius disponendi.* Therefore the property clause in the constitution guarantees the right to freedom of testation.[192] The right to freedom of testation is also constitutionally guaranteed in the right to human dignity, in that each living person is allowed the peace of mind of knowing that their last wishes will be respected after their death.[193] It must be noted that the right to freedom of testation is not infallible – it is trite that this right may be encroached upon in certain circumstances, such as claims for maintenance by minor children or the surviving spouse of the deceased.[194]

From the above, the impression is created that a testator has a right to freedom of testation, and seeing that such a right is constitutionally entrenched, a testator has a constitutional right to nominate in his will the executor of his estate upon his ultimate demise. This is, however, concluded on the incorrect premise that the right to freedom of testation contains in it also the right of a testator to nominate his chosen executor. The right to dispose of one's property upon one's death, and the right to nominate an executor in one's will, are in fact two very different concepts.

---

[188] *In re BOE Trust Ltd NNO* 2013 3 SA 238 (SCA) para 26. See also Du Toit "The limits imposed upon freedom of testation by the boni mores: lessons from common law and civil law (continental) legal systems" 2000 *Stell LR* 358.

[189] Roux "Testators should be careful what they wish for" (Sep 2012) *DR* 30.

[190] "The Constitutionally bound dead hand – The impact of constitutional rights and principles on freedom of testation in South African law" 2001 *Stell LR* 222 233.

[191] S 25(1) of The Constitution of the Republic of South Africa.

[192] Du Toit 2001 *Stel lLR* 222 234.

[193] *In re BOE Trust Ltd NNO* 2013 3 SA 238 (SCA) para 27.

[194] For an exhaustive list and full discussion on the circumstances where the right to freedom of testation can be limited see Davis *et al* 3.1A.

4 2 Executors testamentary

Section 14(1) of the Administration of Estates Act[195] provides that the Master shall, subject to the Master's discretion and the provisions contained in the Act, grant letters of executorship to a person who has been nominated in a will, upon the written application of such person. This section clearly creates the right for a testator to nominate in his will a person whom he would wish to be the executor of his estate upon his death. This right to nominate and choose one's own executor is, however, distinct from the right to freedom of testation. The emphasis in freedom of testation is found in the testator's freedom to deal with his assets.[196] Put differently, it deals with the right of a person to choose his own legacies and bequests. A mere wish of a deceased does not constitute the exercise of the act of testation.[197] The nomination in a will of an executor, although statutorily enforceable, is a mere wish of a testator.[198] The appointment, or the refusal of such an appointment, as the case may be, is done by the Master.[199] Pace and Van Der Westhuizen states that:[200]

> "…the testator does have the freedom to nominate an executor as he wishes in terms of section 14 of the Administration of Estates Act, but this does not form part of his act of testation or then his freedom of testation as the appointment of an executor … does not form part of the act of testation which only deals with the assets (estate) of the testator."

From the above it is clear that, although a testator has the freedom to nominate an executor and this right is enforceable in terms of the Act, such a nomination is clearly distinct from the right to freedom of testation[201] and consequently is not

---

[195] The Administration of Estates Act 66 of 1965. Hereinafter referred to as "The Act".
[196] Pace and Van Der Westhuizen *Wills and Trust* (2018) A2.
[197] This refers to the act of disposing property by will.
[198] Pace and Van Der Westhuizen A52.
[199] Another example of a wish in a will that is statutorily protected, but remains only a mere wish of a testator, is found in s 27(1) and (2) of the Children's Act 38 of 2005 which provides for a single parent to appoint in his will a guardian for his minor children upon his death.
[200] A2.
[201] It is interesting to note that a will will not fail due to the fact that no disposition of property is mentioned therein. For example, a will may make no disposition of property and do nothing more than nominate an executor who would then follow the statutory rules of intestate succession to distribute the estate. See s 1(4)(a) of The Intestate Succession Act 81 of 1987 and Thomas "Appointment of executor"

constitutionally protected in the same manner as freedom of testation. Even if the right to nominate an executor formed part of the right to freedom of testation, the right to freedom of testation is not infallible, and can also be limited in favour of public policy.[202]

It is therefore contended that, should the law be amended to provide that, going forward, only independent persons may be appointed as executors, this limitation (or narrowing in) of a testator's right is not an infringement on his right to freedom of testation. The above principle can easily be seen in the law of trusts. A founder of a trust can appoint who ever he so wishes as the trustees of the trust. This right is found in the freedom of a person to contract with whom ever he wishes.[203] The Court, however, in *Parker,*[204] had no issue to limit (or narrow in) this right by creating the requirement that in family trusts an independent trustee must hold office as trustee. The same should therefore hold water for the appointment of executors in deceased estates.

Currently, testators spend most of their attention on how their assets must be distributed upon their untimely demise but gives hardly any thought to whom should give effect to these testamentary dispositions. The selection of an executor is an important part of the estate planning process, and the selection should be done carefully.[205] Certainly, if the law should change to require the appointment of an independent outsider as the executor, testators will start to intently apply their minds when it comes to the nomination of the fiduciary who will administer their estates.

5 Conclusion

From a historical point of view, the office of the executor has always stood independent from the heirs and the creditors. It finds its roots in the office of the

---

1921 *Wills, Estates, and Trusts: A Manual of Law, Accounting, and Procedure, for Executors, Administrators, and Trustees* 85.

[202] Wood-Bodley "Freedom of testation and the bill of rights: Minister of education v Syfrets Trust LTD No" 2007 *SALJ* 687 691.

[203] Cameron *et al* 211.

[204] 2004 3 SA 486 (SCA) para 35.

[205] Lombard and Gother "Choosing your executor and trustee" 1983 *Probate Notes* 246.

trustee. From the case law examined it is clear that the Courts have the power to remove an executor where there is a conflict of interest between his personal affairs and that of his office as executor. In more recent cases the Courts repeated the retort that, in instances where there is a conflict of interest, an independent executor is the desired solution to solve the problem, however that the Courts lack such a power to direct that an independent outsider be appointed to administer the estate.

Further hereto the the right to freedom of testation was perused along with the right to nominate an executor in one's will. It was pointed out that although freedom of testation is constitutionally protected, the right to nominate an executor does not form part of freedom of testation, and consequently does not equally enjoy constitutional protection. It was shown that, should the law be amended to provide that only independent executors may be appointed as such, that such a narrowing in of the right to choose one's executor does not infringe on the right to freedom of testation

CHAPTER 4: THE APPOINTMENT OF TRUSTEES COMPARED WITH AND APPLIED TO THE APPOINTMENT OF EXECUTORS

1 Introduction

In this chapter case law on independent trustees will be examined. The purpose is to show how the legal principles pertaining to the administration of trust and the appointment of trustees can be applied to the administration of estates and the appointment of executors. The comparison will imply the need for the appointment of independent executors. This chapter will also scrutinize the forms which must be lodged with the Master to apply for appointment as an executor or trustee, respectively, and these forms will be compared with each other. This chapter will answer research questions four and five.

2 Case law on independent trustees

Although the Courts have not said a lot regarding an independent executor[206], it has given very clear guidelines regarding the independent trustee. Henceforth cases regarding the independent trustee will be discussed.[207]

In the *Nieuwoudt v Vrystaat Mielies*[208] matter one of two trustees signed a contract binding the trust while the other trustee was unaware of this.[209] The trust deed empowered the trustees to authorise one trustee to sign documents on behalf of all the trustees, this power however was not exercised.[210] The founder and his wife were the only trustees and the only income beneficiaries.[211] Harms JA drew attention to a "newer type of trust" where assets are placed in a trust for estate planning purposes "while everything else remains as before".[212] He warned

[206] For a discussion of case law on the independent executor see Chapter 3 para 3 above.
[207] It is unnecessary for purposes of this contribution to discuss the facts of the cases in great detail seeing that this dissertation deals with the issues pertaining to executorship and not with that of trustees.
[208] 2004 3 SA 486 (SCA).
[209] Para 2 and para 5.
[210] Para 6.
[211] Para 17.
[212] Para 17.

outsiders who deals with trusts to be careful and that "[a]lthough someone in the position of the first appellant may be personally liable for a breach of a warranty of authority, this may, depending on the circumstances, be of little solace."[213]

The case of *Land and Agricultural Bank v Parker*[214] is considered the *locus classicus* regarding the appointment of an independent trustee. This case dealt with a family trust (the respondent, through its trustees) which owed an amount of over R16 000 000 to a bank (the appellant).[215] The trustees were all beneficiaries of the trust and the remaining beneficiaries were all family members of each other. This case raised questions regarding the abuse of the trust form and the use of the trustee's powers. The Court remarked that:[216]

> "The core idea of the trust is the separation of ownership (or control) from enjoyment. Though a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another."

The Court considered the *Nieuwoudt* case and found that control and enjoyment should function separately thereby securing the independence of the trustee's judgement.[217] The Court noted that the lack of separation of control and enjoyment is especially prevalent in family trusts[218] and that in the present case the founder was a trustee, and the trustees and their descendants were the only beneficiaries and that "in such a trust there is not functional separation of ownership and enjoyment."[219] The effect was that such trustees cannot properly exercise their primary responsibility towards outsiders to comply with the formalities and the stipulations of the trust deed, where the beneficiaries are also trustees this duty is often neglected.[220] The Court then made the remarkable statement that upon making appointment of a trustee, the Master should ensure that there is adequate

[213] Para 24.
[214] 2004 4 All SA 261 (SCA).
[215] Para 1.
[216] Para 19.
[217] Para 22.
[218] Para 25.
[219] Para 29.
[220] Para 33.

separation of control and enjoyment in family trusts. This can be achieved by insisting on the appointment of an "independent outsider".[221] Such an independent outsider will ensure that:[222]

> "The trust functions properly, that the provisions of the trust deed are observed, and that the conduct of trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the trust deed can be scrutinised and checked."

The Court laid down in no unclear terms, that where the trustees are also beneficiaries that such persons cannot be considered to exercise an independent judgment and that an independent trustee is then required. This will ensure the proper functioning of the trust and that the required independence will be exercised. The purpose of this requirement is pre-emptive in nature, in that the independent trustee requirement attempts to curb the abuse of the trust once the administration commences.[223] The Master has interpreted the *Parker* decision in Regulation 2 of 2017 when appointing a trustee in a family trust, the appointed family member is by the mere virtue of their blood relation to the deceased not considered an independent outsider.[224]

In an application that an attorney be struck from the roll of attorneys, in the matter of *Cape of Good Hope v Randell*[225] the Court was faced with the question regarding a conflict of interest of an attorney who was a trustee, member and vice-chairman of a governing body of a school.[226] The respondent made a secret profit from a sale of immovable property, orchestrated by the powers he had in the different capacities as trustee of the trust, vice chairman, and his personal capacity, amending a trust deed and imposing himself as a beneficiary.[227] The Court found that he acted in a dishonest manner, breached his fiduciary duties, and placed himself in a position

---

[221] Para 35.
[222] Para 36.
[223] Smith "*Parker, life partnerships and the independent trustee*" 2013 *SALJ* 527 533.
[224] Chief Master's Directive 2 of 2017 – *Trusts : Dealing With Various Trust Matters* para 3.8 (i).
[225] 2015 4 All SA 173 (ECG).
[226] Para 16.
[227] Para 28.

where he was in conflict with his duties to the school. The Court proceeded to summarise what a fiduciary duty is:[228]

> "A fiduciary duty can only arise in circumstances where the legal convictions of society recognize and give legal protection to a relationship between two or more persons in which one or more person/s stand in a position of trust to another person or class of persons. If such a person acts in breach of the trust placed in him or her by the other person, he or she acts in breach of his or her fiduciary duty and is in law held to have acted wrongfully or unlawfully."

The Court proceeded to state that any person who finds themselves in a fiduciary position must act in the best interest of the beneficiary and may not act to their own advantage.[229] The Court concluded that, by allowing himself to be appointed as a beneficiary his personal interests were in conflict with his duties as trustee, and consequently he could not remain a trustee.[230]

The above discussion makes it apparent that the Courts noted that often in trusts where the trustees are also the beneficiaries, outsiders should be careful.[231] There is not a separation of control and enjoyment of the assets. The Courts consequently proceeded to employ the Master to ensure that an independent outsider takes appointment as a trustee in such trusts.[232] Further hereto, where a person acts in a fiduciary position, such person should act in the utmost good faith.[233]

3 Applying legal principles pertaining to trusts on executors

On the one hand the Courts have indicated the need for an independent executor where it comes to deceased estates; on the other hand the Courts have implemented rules relating to the appointment of an independent trustee in family trusts. Can the legal principals laid down for trustees be applied to executors? At first

[228] Para 44.
[229] Para 47.
[230] Para 50.
[231] Discussion on *Nieuwoudt v Vrystaat Mielies* above, 48 of this dissertation.
[232] Discussion on *Land and Agricultural Bank v Parker* above, 49 of this dissertation.
[233] Discussion on *Cape of Good Hope v Randell* above, 50 of this dissertation.

glance it would seem that the answer would be a definite no; this is due to the fact that the definition of "trust" in the Trust Property Control Act[234] specifically excludes "…any person as executor … in terms of the provisions of the Administration of Estates Act…".[235] This exclusion in the Trust Property Control Act, however, is not so much an exclusion from the legal principals relating to trusts, but rather relates to the act of administrating a deceased estate. Put differently, its aim is not to exclude the legal principals relating to the fiduciary office of the trustee from that which can be applied to the office of the executor, but rather just to state that a deceased estate cannot be administered in terms of the rules set out in the Trust Property Control Act, but that it must still be administered in terms of the rules set out in the Act. It is true that trustees and executors are two completely different offices with different objectives,[236] however, both are fiduciary in nature and consequently, in that sense, are similar. This is exemplified by Cameron *et al*, in a discussion relating to the similarities and differences between trustees and executors. The learned writer lists numerous differences between the two offices, however, these differences seem superficial at most.[237] The differences and similarities listed relates to the administrative functions of the offices of trustee and executor. It does not relate to the fiduciary duties of the two offices. After all, the same Cameron *et al* states that "an executor of the estate of a deceased person is a trustee in a wide sense."[238]

When considering the authorities, one cannot help but notice how often the office of the trustee and the office of the executor are compared to one another, and how often the Courts have borrowed from the law of trusts to make findings relating to the

[234] Act 57 of 1988.
[235] S 1 of Act 57 of 1988.
[236] *Ex Parte Holmes* 1949 2 SA 327 (N) 332.
[237] *Honoré's South African Law of Trusts* (2018) 131 - 133. The differences and similarities mentioned are: (1) the Master's power to appoint an executor dative and a like power to appoint trustees where there is a vacancy; (2) the Master's power to revoke letters of executorship or letters of authority in certain circumstances; (3) the requirement for security; (4) an executors powers are defied by law, whereas a trustees powers depends on the trust instrument; (5) the executor's fees are commissioned on the assets and income of the estate, as opposed to a trustee's fees which is determined by the trust instrument; (6) both have a duty to receive funds in a separate bank account.
[238] 126. The writers do, however, state that in a narrow sense executors and trustees are distinct from each other.

laws of estates. From a historical point of view, McGregor explains how the office of the executor emanated out of the office of the trustee,[239] and states that "the executor has always been a trustee ('Truehänder') in the sense of Germanic law, and is such to-day…".[240] The *Van Niekerk* case makes it very apparent that one can borrow from the law of trusts and apply it to deceased estates: the Court states that "[b]ut in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust" and "if satisfied that the continuance of the trustee would prevent the trusts being properly executed" the Court may remove such trustee.[241] The Court then states, in no unclear terms, that ""[t]hese principles are equally applicable to the removal of an executor".[242] The Court proceeds to equate these two offices a second time: in discussing the broad principles relating to the removal of a person from his office as trustee, the Court applies this to the office of the executor. The Court considers the law of trusts and then states that "in the context of the administration of an estate that relates to…" thereby applying the law of trusts to executors. [243] The Court does recognise that the office of the executor and that of the trustee differ from one another "slightly", but states that the reason for this has to do with the objectives they have. A trustee administers the trust assets in accordance with the objectives defined in the trust deed, whereas an executor administers the assets for the objectives defined in the Act.[244] The same sentiment is seen in the *Reichman* case, where the Court examines numerous cases relating to the conflict of interests of executors of deceased estates and trustees of trusts and applies those principles to the executor.[245]

Seeing that the Courts have not hesitated to apply the laws relating to trusts to that of deceased estates, it would certainly not seem absurd to apply the rules relating to the appointment of trustees to the appointment of executors. This rings especially

[239] "The Evolution of the Executor" 1936 *SALJ* 32 34.
[240] 1936 *SALJ* 32 36.
[241] 2011 2 SA 145 (KZP) para 7.
[242] Para 7.
[243] Para 9.
[244] Para 10.
[245] 2012 4 SA 432 (GSJ) para 14.

true considering that the cases dealing with the removal of executors related to the conflict of interests that executors might have. And in the same manner the argument behind the appointment of an independent trustee also dealt with the conflict of interests that the trustees might have.

The Court emphatically stated that for family trusts an "independent outsider" is required, where the trustees were all beneficiaries and the beneficiaries were all related to one another.[246] If this principal is applied to executors, one can conclude that an executor must be an independent outsider where the beneficiaries are all related to one another and where the executor is also a beneficiary (alternatively an independent co-executor is required). An independent outsider for trusts will not necessarily have to be a professional person.[247] Consequently, an independent executor does not have to be a professional person but someone with the proper realisation of the responsibilities of executorship in order to ensure that the estate is administered properly, that the provisions of the Act are observed, and that the conduct of the co-executor who lack a sufficiently independent interest in substantive and procedural requirements of the administration of the estate can be scrutinised and checked. This will pre-emptively aim to prevent the abuse of the office of the executor once the administration of the estate commences. The Master, however, in family trusts, considers mere blood relation as reason for not being an independent outsider.[248] Applied to executors it can be argued that mere blood relation to the deceased should be reason not to be appointed as an executor.

This principle is, however, contrasted by Regulation 910 that states that the surviving spouse or persons related by consanguinity, most probably a layperson, may take appointment as an executor, and further that where they are nominated in a will they do not require the assistance of an agent and is not required to give

[246] *Land and Agricultural Bank v Parker* 2004 4 All SA 261 (SCA) para 35.
[247] *Land and Agricultural Bank v Parker* 2004 4 All SA 261 (SCA) para 36. The court stated that such an independent trustee is "someone who with proper realisation of the responsibilities of trusteeship accepts office in order to ensure that the trust functions properly, that the provisions of the trust deed are observed, and that the conduct of trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the trust deed can be scrutinised and checked."
[248] Chief Master's Directive 2 of 2017 – Trusts : Dealing With Various Trust Matters para 3.8 (i).

security to the satisfaction of the Master. Therefore a person without the proper realisation of the responsibilities of executorship and without a sufficient independent interest in the substantive and procedural requirements of the administration of the estate is given charge to deal with the assets. Effectively there is a disparity in the law relating to the appointment of executors when compared to the appointment of trustees. It is for this very reason that the legislator needs to intervene to remedy the appointment of lay executors who are appointed without the assistance of an agent and without providing security for the proper performance of their duties.[249]

4 Comparing the different forms to be lodged with the Master for appointment of trustees or executors – lessons to be learned.

The Master requires that certain forms must be completed and certain documents be placed before it for appointment as executor; these documents are referred to as "the reporting documents" and the forms issued by the Master is connoted by a "J" and a number following it. The reporting documents include the death notice(J294), the death certificate, the deceased's identity document, the will, proof of marriage (if applicable), a divorce order (if applicable), a next of kin affidavit(J192), a reporting affidavit, an inventory(J243), nominations for the executor, acceptance of trust as executor(J190)[250], the identity document of executor, and security(J262) (if applicable).[251] Of all these documents the only one that contains information of the executor is the "acceptance of trust as executor (J190)" form, attached hereto and

[249] For a discussion on Regulation 910 and the prejudices created by the appointment as executor of the close family members of the deceased see Chapter 2, para 5.

[250] In the case of an estate administered in terms of s 18(3) of the Act, an "undertaking and acceptance of Master's directions (J155)" form is lodged in the stead of the 'acceptance of trust as executor(J190)' form.

[251] S 7, Chief Master's Directive 2 of 2015. In line herewith para 1.3.1 of the preamble of this Chief Master's Directive states that "the chief master recognises that the procedures and forms used in the appointment of administrators of estates need to be standardized…".

marked as Annexure "A".[252] The other forms all relate to information of the deceased.

From the J190 form it is easy to see what information, relating to the executor, is before the Master upon making appointment. Most information on this form relates to the executor's personal details (such as full names, identity number, address/domicilium citandi et executandi, contact information, and relationship to deceased), and the deceased's details (such as full names, date of birth, date of death, identity number, income tax number, residential district, and name of surviving spouse). None of the information before the Master indicates in any manner whether the executor who stands to be appointed as such is in any manner independent. The only information provided herein, which can indicate some degree of independency to the estate, relates to the relationship that the to-be-appointed executor had to the deceased. From this the Master can determine the familial relationship which the executor had with the deceased and see –testate or intestate – whether such person stands to inherit from the estate. Conversely, the Master, at the time of making the appointment, does not know to what degree the estate assets will be separated from the executor's personal agenda. In other words, the forms do not allow for the Master to have information before it to probe whether the executor is also a creditor of the estate, or whether the estate possibly have a claim against the executor, or whether he can exercise a discretion in an unbiased manner. A saving grace on this form is the fact that the executor needs to declare that he "…understand[s] the duties and penalties applying to the office of the executor which has been explained…" to him. This, however, seems to rather shift the onus on to the executor himself to determine whether he is independent; it still does not place the Master in a position to investigate more closely the circumstances under which the executor is to be appointed.

Juxtaposed to the above, are the forms that must be lodged with the Master upon appointing trustees in *inter vivos* trusts. In order for the Master to issue the letters of

[252] As obtained from the Master of the High Court's official website on 31 Aug 2019 at http://www.justice .gov.za/ master/m_forms/J190.pdf.

authority in trusts, and especially family trusts, the Master requires that certain forms and documents should be lodged with it: the trust registration form (J401), the beneficiary declaration (J450), security (if applicable), payment of Master's fees, acceptance of auditor (J405)(if applicable), the acceptance of trusteeship (J417), the identity documents of all trustees, and a sworn affidavit by the independent trustee. Although the J401 contains a short summary of the information on the trustees (type, name and surname, and identity number), the acceptance of trusteeship form (J417) and the affidavit by the independent trustee contain most of the information required to make appointment of a trustee. The acceptance of trusteeship, attached hereto and marked as Annexure "B", is a very comprehensive form that asks pertinent questions relating to the independence of the trustee. This acceptance of trustee form was amended by the Master pursuant to Chief Master's Directive 2 of 2017 to make a real inquiry into where the trustee stands in his relation to the trust and the beneficiaries. The Master, in interpreting the suggestion made in the *Parker*-case that the Master should ensure that there is adequate separation of control and enjoyment in family trusts which can be achieved by insisting on the appointment of an "independent outsider",[253] seems to have elevated the suggestion to a legal requirement.[254] The whole purpose of the acceptance of trusteeship form seems to radiate around the Master's enquiry in to whether the trustee is independent, or not. The acceptance of trusteeship form reflects on the trustees personal details (full names, identity number, addresses, contact information), but then proceeds to provide to the Master information which addresses the issues raised in the *Parker*-case, such as whether the trust is a business family trust,[255] whether the intended trustee is an independent trustee, whether the intended trustee is also a beneficiary, whether the intended trustee is related to any of the beneficiaries or trustees, and whether all the beneficiaries are related to one another. The Master further requires the independent trustee to lodge with it a separate affidavit wherein he confirms

[253] Para 35.
[254] Smith 2013 *SALJ* 527.
[255] Para 3.8(i) of Chief Master's Directive 2 of 2015 defines "business family trust" as a trust with the following combined characteristics: a) the trustee have the power to contract with independent third parties, thereby creating trust creditors; and b) the trustees are all beneficiaries; and c) the beneficiaries are all related to one another.

under oath, that he has no family relation or connection, blood or other, to the trustees, beneficiaries, or the founder.[256] Attached hereto and marked as Annexure "C" is the affidavit by the independent trustee. It is clear that the forms to be lodged with the Master for the appointment of a trustee is geared towards an enquiry into the independence of a trustee, to enable the Master to apply its mind and exercise it's discretion properly when appointing a trustee.

It is interesting to note, when the Master appoints a trustee or liquidator in an insolvent estate an affidavit of non-interest, attached hereto and marked as Annexure "D", must be lodged with the Master wherein the trustee or liquidator must declare that 1) he has no direct or indirect fiduciary duty in the affairs of the debtor; 2) that he is not the director, employee, auditor, attorney or shareholder of the debtor, nor the agent, manager, member, bookkeeper, creditor or debtor of the aforementioned; 3) that his appointment does and will not create a conflict of interest; 4) that he will be in a position to carry out his duties in an impartial and independent manner; and 5) that should any of the above be compromised that he must inform the Master accordingly and tender his resignation.

From the above it is clear that for the fiduciary positions of trustee of a trust and trustee or liquidator of an insolvent estate, an affidavit confirming the independence is required. However no such similar form is required upon the appointment of an executor. This lack of enquiry into the independence of an executor exists, notwithstanding, on the one hand, the fact that the Courts have removed executors for not being independent and stated that there is a need for independent executors, and on the other hand, the fact that the law of trusts can be applied to the executors, seemingly creating a requirement for appointment of independent executors. It seems that the Master has a more relaxed approach when appointing executors as compared to the appointment of trustees.

[256] The "sworn affidavit by independent trustee" form.

5 Conclusion

When it comes to the appointment of trustees in trusts, the Courts have directed that an independent trustee is required in family trusts where all the trustees are beneficiaries and all the beneficiaries are related to one another. It was shown how the principles relating to the appointment of trustees can be extended to the appointment of executors, thereby creating the need for an independent executor to be appointed in deceased estates. It was pointed out that even though both the office of an executor and the office of a trustee are fiduciary in nature and deals with the administration of assets of another person, the Master has a relaxed approach when appointing executors in comparison to the appointment of trustees.

CHAPTER 5: CONCLUSION

1 Introduction

From the outset, this dissertation has sought to analyse and comment on the persons who may administer deceased estates, and specifically to analyse whether a person with an interest in the deceased estate should be competent to be appointed as the executor.

This was initially achieved by identifying and scrutinising the person who may liquidate and distribute deceased estates. This dissertation critically analysed the fact that, firstly, the surviving spouse and persons related within the defined degrees of consanguinity and, secondly, persons nominated in a will, may administer deceased estates, notwithstanding the lack of training such individual may have. These individuals may take appointment as executors without the need of an agent to assist and without the need to provide security to the Master for the proper performance of their duties. There is a need for intervention by the legislator to remedy the appointment of lay persons as executors with an interest in the estate.[257]

A further enquiry was launched into what an independent executor is. The office of the executor was scrutinised from a historical point of view, where it was found that although estate administration was originally found in the concept of universal succession, it was later replaced by the English concept of an executor. Historically, this office always stood independent from the heirs and the creditors, and finds its

[257] See Chapter 2 for detailed discussion of the current legal dispensation regarding who may and who may not administer deceased estates.

roots in the office of the trustee. Some Court cases were discussed where it was shown that Courts are not shy to remove an executor from his office where he has a conflict of interest in the estate, this includes being a beneficiary and deriving a benefit at the expense of other beneficiaries, being a beneficiary and deriving a benefit at the expense of creditors, being a debtor of the estate, and pursuing a personal agenda. The Courts have mentioned that there is a need for an independent executor. It was further found that, in the event that the legislator where to remedy the appointment of executors by limiting it only to the appointment of independent executors, that such a limitation will not infringe on a person's right to freedom of testation, and will consequently not infringe on any constitutional rights a person might have.[258]

Lastly this dissertation analysed the appointment of trustees, and specifically the requirement created by the Courts for the appointment of an independent trustee in family trusts. It was shown how this same principle can be extrapolated to the appointment of executors thereby creating the requirement for an independent executor. The office of the executor is, after all, a trustee in the wide sense. Where all the beneficiaries are related to one another and the executor is also a beneficiary, the executor must be an independent outsider (alternatively an independent co-executor should be required). Hereafter the forms required by the Master for appointment of executors and trustees, respectively, were analysed. It was shown that the Master has very strict requirements and does a thorough investigation for the appointment of trustees and the independent trustee. This is juxtaposed by the forms required for the appointment of executors, where the Master has a very relaxed approach, and does no enquiry into the executor's independence.[259]

From the examinations above it became apparent that the current method of appointing executors is in need of reform, in order to proactively ensure the protection of the estate, rather than having to remove an executor *ex post facto.*

[258] See Chapter 3 for an in-depth discussion on the independent executor.
[259] See Chapter 4 for a discussion on the independent trustee requirement in family trusts, how the Master has implemented it, and how this can be applied to executors.

2 Recommendations

The Master plays a very important role in the lives of people who live on after the death of a loved one. The Master has a duty to protect the interest of the heirs and creditors alike. The ability of the Master to deliver an efficient and effective service must be enhanced. The Master must be placed in a position to act proactively in the appointment of independent executors, rather than retroactively expecting the aggrieved party to approach the Court for the removal of an executor who has an interest in the estate.

The Chief Master has recommended that, in the review of Regulation 910, the legislator should make a new regulation similar to Regulation 910, to govern who may administer estates. The criteria that should be required to accredit a person to administer a deceased estate should be that (1) such person must have a tertiary qualification; (2) must belong to a professional body; and (3) that such professional body requires continual professional development from its members. This way the Master can ensure that the administration of estates are entrusted to competent and capable person.[260]

The Law Reform Commission has recommended that the entirety of Regulation 910 must be repealed. The Commission recommends that section 13 of the Administration of Estates Act[261] must be amended to require that each and every executor should be required to provide security to the satisfaction of the Master, except if the executor is or will be assisted by an Attorney, an accountant or auditor, a board of executors or trust company, any bank, or such category of persons that the Minister may exempt by notice in the Government Gazette. The Commission further suggests that the Master must keep a record of persons who has previously failed in their duties to administer an estate, and may refuse to give further appointments to such person unless security is provided.[262]

---

[260] Kriel "Trusts discussed at FISA conference" (Oct 2016) *DR* 13.
[261] The Administration of Estates Act 66 of 1965. Hereinafter referred to as "The Act".
[262] South African Law Reform Commission: Discussion Paper 110 *Administration of Estates* (Oct 2005) para 5.3.25 35.

My recommendation is as follows. Both the Chief Master and the Law Reform Commission have merit in their recommendations. Both recommend that the administration of the estate should only be done by professional persons with the necessary capabilities to see to the administration of the estate. I agree with this. This effectively removes the current position whereby a spouse, person related by consanguinity or person nominated in a will can administer an estate. Their recommendations, however, lose sight of the fact that such persons who assist the executor, ultimately just act as agents for a principal, being the executor. If the principal executor does not act independently, no agency can go beyond the scope of the principal's delegation. Consequently the agent can just act on instruction of the principal.

A three prong approach is therefore recommended. Firstly, the executor who stands to be appointed must also be investigated in order to determine whether such person has a conflict of interest with the estate, the heirs, or the creditors. This can be done in a similar fashion as with the appointment of trustees, where it is required in the lodgement forms that the independent trustee must make an affidavit setting his interests and his blood relation. This can *mero moto* apply to executors. The forms required by an executor to take appointment as such must in no unclear terms require the executor to state his interest in the estate. Should the executor later become aware of such interest, this must be reported to the Master. Should it later come out that the executor gave false information, this should be ground for his immediate removal as executor by the Master. If it is determined that an executor who wishes to be appointed is in fact not independent, he should either waive his nomination as executor, or an independent co-executor must be appointed.

Secondly, once it is determined that the executor is in fact an independent outsider, but lacks the necessary capabilities to administer the estate, then he should be assisted by a capable agent. Such an agent should be a person as recommended by either the Chief or the Law Reform Commission. Both of their recommendations require that the administration of an estate is done by persons who have the

necessary skills and capabilities to administer an estate. This recommendation is wholly supported.

Thirdly, the Master must still have the discretion to require security from the executor for the proper performance of his duties, if it is of the opinion that there is good reason therefore.[263]

If the above approach is followed, this will ensure that the executor, or at least a co-executor, is an independent outsider, and that such executor is assisted by a person with the required skill set and capabilities to administer an estate.

3 Concluding remarks

It is clear that intervention by the legislator is required. Both the Chief Master and Law Reform Commission seem to be in agreement that estates should only be administered by professional persons. It is, however, worrisome that neither has made any recommendations regarding the qualities required of the executor who is to be appointed. It is submitted that the legislator should not intervene only on the issue of who may administer the deceased estate, but also on who may be appointed as the executor, and that provision should be made that such an executor should be an independent outsider.

Word count: 20 544

[263] This provision is similar to s 23(2) of the Act in terms of which the Master may require security if the estate of the executor has been sequestrated, or if he committed an act of insolvency, or if he resides out side or South Africa, or if there is any good reason therefor.

LIST OF ABBREVIATIONS

Chief Master's Directive 2 of 2015	Chief Master's Directive 2 of 2015 – Appointment of Executors and/or Master's Representatives in Deceased Estates by the Master.
DR	De Rebus
LSSA	Law Society of South Africa
Regulation 910	Regulations Prohibiting The Liquidation or Distribution of Estates of Deceased Persons By Any Person Other Than an Attorney, Notary, Conveyancer or Law Agent, NO R910 (*Gazette* 2080 dated 22 May 1968) as amended by R1013 (*Gazette* 2439 dated 20 June 1969), and R1376 (*Gazette* 3227 dated 13 August 1971)
SALJ	The South African Law Journal
Stell LR	Stellenbosch Law Review
The Act	The Administration of Estates Act 66 of 1965

BIBLIOGRAPHY

Case register

Barnett v Estate Beattie 1928 482 (CPD)	9, 35, 39, 43
Casino Retail (Edms) Beperk v Fourie 2012 JDR 2101 (GNP)	42, 43
Erasmus v Jacobs and another 2012 JOL 29455 (FB)	9, 44
Ex Parte Menzies et Uxor 1993 3 SA 799 (C)	39
Greenberg and others v Estate Greenberg 1955 3 SA 361 (AD)	32
Harris v Fisher NO 1960 4 SA 855 (AD)	36, 41, 43
In re BOE Trust Ltd NO and others 2013 3 SA 236 (SCA)	44
In re Walsh's Estate 1888 9 NLR 168 (N)	23, 24
Judin NO (In his capacity as duly appointed Executor in the Estate of the Late Harold Montague Judin) v Jankelowitz and another 2010 JOL 26471 (GSJ)	9, 37, 43
Land and Agricultural Development Bank of SA v Parker and others 2004 4 All SA 261 (SCA)	9, 49, 50, 51, 54
Law Society of the Cape of Good Hope v Randell 2015 4 All SA 173 (ECG)	50, 51

Legislation

The Licenses Act 44 of 1962

Attorneys, Notaries and Conveyancers Admission Act 23 of 1934

Attorneys Act 53 of 19

Legal Practice Act 28 of 2014

Auditing Profession Act 26 of 2005

Childrens Act 38 of 2005

Liquor Act 27 of 1989

Regulations Prohibiting The Liquidation or Distribution of Estates of Deceased Persons By Any Person Other Than an Attorney, Notary, Conveyancer or Law Agent, NO R910 (*Gazette* 2080 dated 22 May 1968) as amended by R1013 (*Gazette* 2439 dated 20 June 1969), and R1376 (*Gazette* 3227 dated 13 August 1971)

Chief Master's Directive 2 of 2015 – Appointment of Executors and/or Master's Representatives In Deceased Estates By The Master

Chief Master's Directive 2 of 2017 – Trusts : Dealing With Various Trust Matters

Registration and Licensing of Businesses Amendment Ordinance 19 of 1972 (Cape)

Licences Ordinance 8 of 1972 (Orange Free state)

Licences and Business Hours Ordinance 11 of 1973 (Natal)

Licences Ordinance 19 of 1974 (Transvaal)

Cape Ordinance 10 of 1833

Handbooks

Meyerowitz D *Meyerowitz on Administration of Estates And Their Taxation* 2010ed Cape Town: Meytax Publishers cc 2010

Pace RP and Van Der Westhuizen WM *Wills and Trust* 2018ed Durban: LexisNexis Publishers 2018

Cameron E, De Waal M, Wunsh B and Solomon P *Honoré's South African Law of Trusts* 6ed Capetown: Juta & Co Ltd 2018

Boezaart LC *Law of Persons* 5ed Claremont: Juta & Co Ltd 2010

Davis DM, Beneke C and Jooste RD Estate *Planning* 2019ed Durban: LexisNexis Publishers 2019

De Waal MJ and Schoeman Malan MC *Law of Succession* 5ed Capetown: Juta & Co Ltd 2015

Story J *Commentaries on Equity Jurisprudence as Administered in England and America* 4ed Boston: Press of Thurston, Torry and Co. 1846

De Bruyn DP *The Opinions of Grotius* London: Stevens and Heynes Law Publishers 1894

Jamneck J, Rautenbach C, Paleker M, Van Der Linde A and Wood-Bodley M *The Law of Succession in South Africa* 3ed Capetown: Oxford University Press 2018

Articles

Van Der Linde A "Bequest of a business concern together with all its assets and liabilities: some comments [Discussion of Gradus v. Sport helicopters also known as Sport Aviation (19879/2008) 2012 Zawchc 365 (28 November 2012)]," 2014 *Stell LR* 99

McGregor AJ "The evolution of the executor" 1936 *SALJ* 32

Blakeslee HD "Choosing an executor" 1930 *Lincoln Law Review* 21

Du Toit F "The limits imposed upon freedom of testation by the boni bores: lessons from common law and civil caw (continental) legal systems" 2000 *Stell LR* 358

Du Toit F "The constitutionally bound dead hand – the impact of constitutional rights and principles on freedom of testation in South African law" 2001 *Stell LR* 222

Lombard JJ and Gother RE "Choosing your executor and trustee" 1983 *Probate Notes* 246

Wood-Bodley M "Freedom of testation and the Bill of Rights: Minister of Education v. Syfrets Trust LTD No" 2007 *SALJ* 687

Mosoane S "Trust account advocates – can they be admitted to the roll of notaries and conveyancers" March 2019 *DR* 19

Kriel K "Trusts discussed at FISA conference" October 2016 *DR* 13

Roux E "Testators should be careful what they wish for" September 2012 *DR* 30

Thomas C “Appointment of executor” 1921 *Wills, Estates, and Trusts: A Manual of Law, Accounting, and Procedure, for Executors, Administrators, and Trustees* 85

Smith BS “Parker, life partnerships and the independent trustee” 2013 *SALJ* 527

Other

Guest EA *Today and Tomorrow*, Chicago: Reilly & Lee Company 1942

South African Law Reform Commission, Discussion Paper 110 *Administration of Deceased Estates* Pretoria October 2005

South African Law Society *Comments by the Law Society of South Africa (LSSA) with regard to the proposed amendment of Regulation 910* Pretoria 27 August 2010

Minutes of a meeting between the deceased and insolvent estates committee of the Law Society of the Northern Provinces and the Master held on Friday, 31 August 2018 at 10:00 at the offices of the Master in Pretoria

ANNEXURE "A" – J190

J190

REPUBLIC OF SOUTH AFRICA

Complete in duplicate

ACCEPTANCE OF TRUST AS EXECUTOR

Estate No. .....

A. I (full names and surname) .....

Residential address..... Business address.....

.....

.....

.....

Telephone number(s) ..... Telephone number(s) .....

....

Identity No. ..... Relationship to deceased.....

(An originally certified copy of the applicant's Identity Document must accompany this form)

hereby apply for appointment as Executor in the estate of:

Full names and surname.....

Date of birth ..... Date of death .....

Identity No. ..... Income tax ref. No.....

District in which deceased normally resided.....

Name of surviving spouse (in case of deceased having been a married woman)

.....

B. For the purpose of this executorship I declare the following:

- I choose *domicilium citandi et executandi* for the purpose of service of process of court, writs of execution and the receipt of all notices contemplated in the Administration of Estates Act, No. 66 of 1965 (as amended), at (not P.O. Box number):

  .....

- I understand the duties and penalties applying to the office of Executor which have been explained to me.
- I am not an unrehabilitated insolvent. Nor have I at any time committed an act of insolvency. [Note section 8 of the Insolvency Act, No. 24 of 1936 (as amended)].
- A Bond of Security to the value of **R**..... for the full value of the estate is attached.
- I am exempt from furnishing security.
- I am permanently residing in the Republic of South Africa, and I undertake to advise the Master of the High Court immediately should my estate or that of a person who has signed as surety for the Bond of Security be sequestrated, or commit an act of insolvency, or should I proceed to reside outside the Republic of South Africa.
- The name and address of my agent is.....

  .....

- I fully understand that my appointment of an agent does not release me from my responsibilities as required by law.

C. Signed at.....on ..... year .....

....

Applicant Name and Surname ***Applicant Signature***

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

ANNEXURE "B" – J417

J417

REPUBLIC OF SOUTH AFRICA

ACCEPTANCE OF TRUSTEESHIP BY TRUSTEE
(Inter-Vivos Trust)

I (Full names and surname) .....

ID / Passport No: ☐☐☐☐☐☐☐☐☐☐☐☐☐

Representative of Organisation (If Applicable) .....

Registration Number (If Applicable) .....

Hereby apply for authority in terms of Section 6(1) of the Trust Property Control Act, 1988 (Act 57 of 1988) to act as trustee of the Trust known as:

.....

I choose the following address for the purposes of Section 5 of the Trust Property Control Act, 1988 (Act 57 of 1988):

Domicillium Citandi et executandi (physical address)	**Postal Address**
.....	.....
.....	.....
.....	.....
.....	.....
Tel:	Cell: .....

E-mail: .....

1.	Is this a family business trust? (If, yes an independent trustee must be appointed. If no independent trustee is appointed furnish us with a motivation for non-appointment of an independent trustee)	**Yes** ☐	**No** ☐
2.	I am an Independent Trustee? (If, yes complete attached sworn Affidavit)	**Yes** ☐	**No** ☐
3.	Is trustee also the beneficiary?	**Yes** ☐	**No** ☐
4.	Is trustee related to any beneficiary or trustee?	**Yes** ☐	**No** ☐
5.	Are all the beneficiaries related to one another?	**Yes** ☐	**No** ☐

Profession and or business occupation of the trustee: .....

Previous practical experience in trust administration: Mention any specific cases.

.....

.....

.....

.....

Will exercise direct special personal control to maintain accurate trust records? **Yes** ☐ **No** ☐

* *Each Trustee must submit a separate Acceptance of Trusteeship by Trustee form*
** *Please attach an original certified copy of your ID Document not older than three months.*

DECLARATION BY TRUSTEE

I am qualified to act as trustee and do not find myself in any of the circumstances mentioned in Section 20(2) of the Trust Property Control Act, 1988 (Act 57 of 1988), which will justify my removal and undertake to inform the Master immediately should any such circumstances arise.

Thus I declare the following:

- Trustee ever been convicted of any offence of dishonesty or sentenced to prison without a fine option? **Yes** ☐ **No** ☐
- Trustee ever been declared insolvent? **Yes** ☐ **No** ☐
- Trustee ever been removed from office in respect to any appointment as a Trustee? **Yes** ☐ **No** ☐
- Trustee ever been declared mentally ill / incapacitated? **Yes** ☐ **No** ☐

Provide reason if any of the above was answered YES:

.....

.....

.....

- Trustee has knowledge and understands the law of trust? **Yes** ☐ **No** ☐
- Trustee is aware of the fiduciary duties and responsibilities? **Yes** ☐ **No** ☐
- By accepting the position of trustee, you are exposing yourself to civil and criminal actions in terms of section 9 of the Trust Property Control Act, 1988 (Act 57 of 1988) **Yes** ☐ **No** ☐
- By accepting the position of trustee, you are exposing yourself to removal action by the Master for failure to comply with any lawful request of the Master including a request to account in terms of section 16 of the Trust Property Control Act, 1998 (Act 57 Act of 1998) **Yes** ☐ **No** ☐
- Trustee will exercise direct special personal control to maintain accurate trust records **Yes** ☐ **No** ☐

Provide reason if any of the above was answered NO:

.....

.....

.....

UNDERTAKING

I undertake to inform the Master should there be any changes in the capital/income beneficiaries in this Trust

I undertake to instruct the Auditor to furnish The Master, when requested to do so, with any information which the Master may require in connection with the affairs of the Trust.

Signed at …… on the.....day..... Month.....Year.....

……..

Signature of Trustee

I certify that on the …… day …….. Month ……Year at …… and in my presence the deponent signed the Acceptance Of Trusteeship by Trustee and declared that she knows and understand the contents hereof, has no objection to taking this oath and considers the oath to be binding on her conscience, and I further certify that the requirements of Regulation GN R1258 of 21 July 1972, amended by GN R1648 of 19 August 1977, and as further amended by GN R1428 of 11 July 1980, and as further amended by GN R774 of 23 April 1982 in terms of Section 10 of the Justices of the Peace and Commissioners of Oaths Act, Act 16 of 1963 have been complied with in all respects.

.....

Commissioner of Oath

* *Each Trustee must submit a separate Acceptance of Trusteeship by Trustee form*

** *Please attach an original certified copy of your ID Document not older than three months.*

ANNEXURE "C" – SWORN AFFIDAVIT BY INDEPENDENT TRUSTEE

the doj&cd
Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

SWORN AFFIDAVIT BY INDEPENDENT TRUSTEE

I (Full names and surname) ……

ID / Passport No: ……

Representative of Organisation (If Applicable) .....

Registration Number (If Applicable) .....

As independent trustee I declare and undertake the following:

1. I am qualified to act as trustee and do not find myself in any of the circumstances mentioned in Section 20(2) of the Trust Property Control Act, 1988 (Act 57 of 1988), which will justify my removal and undertake to inform the Master immediately should any such circumstances arise.
2. I undertake to inform the Master should there be any changes in the capital/income beneficiaries in this Trust.
3. I undertake to furnish the Master, when requested to do so, with any information which the Master may require in connection with the affairs of the Trust.
4. That I have no family relation or connection, blood or other, to any of the existing or proposed Trustees, beneficiaries or founder of the trust.
5. That I am competent to scrutinize and check the conduct of the other appointed trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the Trust instrument.
6. I have no reason to conclude or approve transactions that may prove to be invalid, because I am knowledgeable in the law of trusts.
7. That I do not have any interest in the Trust as a beneficiary.
8. That I was never disqualified by the Trust Property Control Act, 1988 from acting as a Trustee

Signed at …… on the.....day..... Month.....Year.

_____
TRUSTEE

I certify that on the ……day……Month……Year and in my presence the deponent signed the Affidavit and declared that he/she knows and understand the contents hereof, has no objection to taking this oath and considers the oath to be binding on his/her conscience, and I further certify that the requirements of Regulation GN R1258 of 21 July 1972, amended by GN R1648 of 19 August 1977, and as further amended by GN R1428 of 11 July 1980, and as further amended by GN R774 of 23 April 1982 in terms of Section 10 of the Justices of the Peace and Commissioners of Oaths Act, Act 16 of 1963 have been complied with in all respects.

_____
COMMISSIONER OF OATH

ANNEXURE "D" – AFFIDAVIT OF NON INTEREST

the doj & cd
Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

AFFIDAVIT FOR APPOINTMENT AS TRUSTEE /LIQUIDATOR

IN THE MATTER OF: ……..
("the Debtor")

MASTER'S REF NO: ……..……..……..……..……

I, the undersigned, ……..
(Full Names and Surname)

Id No/Passport No: ……..……..……

(I am aware that in exercising his discretion whether or not to appoint me, the Master of the High Court will be guided by what I depose to herein):

declare under oath/affirm that:

I choose the following addresses for the purpose of the service of any notices or for the service of any legal process:

Domicillium citandi et executandi **(Physical Address)**	**Postal Address**
……..……..	……..……..
……..……..	……..……..
……..……..	……..……..
……..……..	……..……..
Tel: ……	Cell No: ……..……

Email: …… ……

A. **Should I be appointed by the Master of the High Court, I confirm that**:

1. I have knowledge and understand the Law of Insolvency;
2. I confirm and undertake that I will exercise control of the administration of the estate of the abovementioned Debtor;
3. I am aware of my Duties and Responsibilities as an Insolvency Practitioner;
4. I am fully aware that I am Jointly and Severally liable for the administration of the abovementioned Estate;
5. By accepting the position as Provisional Trustee/Liquidator, I am exposing myself to removal action by the Master for failure to comply with any lawful request of the Master;
6. The Master of the High Court may claim from me in respect of any loss or damage as may be suffered by the Estate or by any person by reason of the fact that I have failed to perform properly my function/s as Trustee/Liquidator or because of any maladministration on my part;

B. **Non Interest**

1. I am a fit and proper person to take the appointment as Provisional Trustee /Liquidator, in the estate of the abovementioned Debtor and that I have no direct, or indirect or fiduciary interest of whatsoever nature of the affairs of the Debtor;

2. I am not disqualified in terms of Section 55 of the Insolvency Act, or Section 372 of the Companies Act or Section 76 of the Close Corporations Act 69 of 1984 from taking the aforesaid appointment;

3. I am neither the Director, Employee, Auditor, Attorney or Shareholder (listed companies excluded) of the Debtor nor the Agent, Manager, Member, Bookkeeper, Creditor or Debtor of the aforementioned;

4. As far as I am aware, my appointment does and will not create any conflict of interest between my duties and obligations as Provisional Trustee/Liquidator in the estate of the Debtor and the interest of the general body of creditors and I undertake to disclose to the Master of the High Court, any information where the absence of a conflict cannot be clearly demonstrated;

5. I state that I shall be in a position and be able to carry out my duties and obligations in an impartial and independent manner and in the interests of the general body of creditors of the estate and that as far as I am aware no facts exist which could affect or influence my impartiality, independence and integrity;

6. I acknowledge that should anything compromise or detrimentally affect my position of independence, detachment or impartiality, I undertake to immediately inform the Master thereof and accordingly tender my resignation as Trustee/Liquidator;

_____

SIGNATURE

I hereby certify that the Deponent has acknowledged that he/she knows and understands the contents of this affidavit which was signed and sworn to before me at_____on this _____ day of _____ 20_____, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

_____

COMMISSIONER OF OATHS