



TRUSTS & ESTATES LAW





PRACTICE OVERVIEW

A wealth of knowledge and relevant practical experience are essential considerations when selecting a firm or individual to represent you and your family in critical matters like trust and estate administration.

Cliffe Dekker Hofmeyr's (CDH) Trusts & Estates practice devotes its experience, energy and creativity to counselling individuals and families on protecting wealth. Our experienced lawyers concentrate exclusively on formulating and implementing creative and proactive strategies to transfer resources and preserve capital for clients and their families.

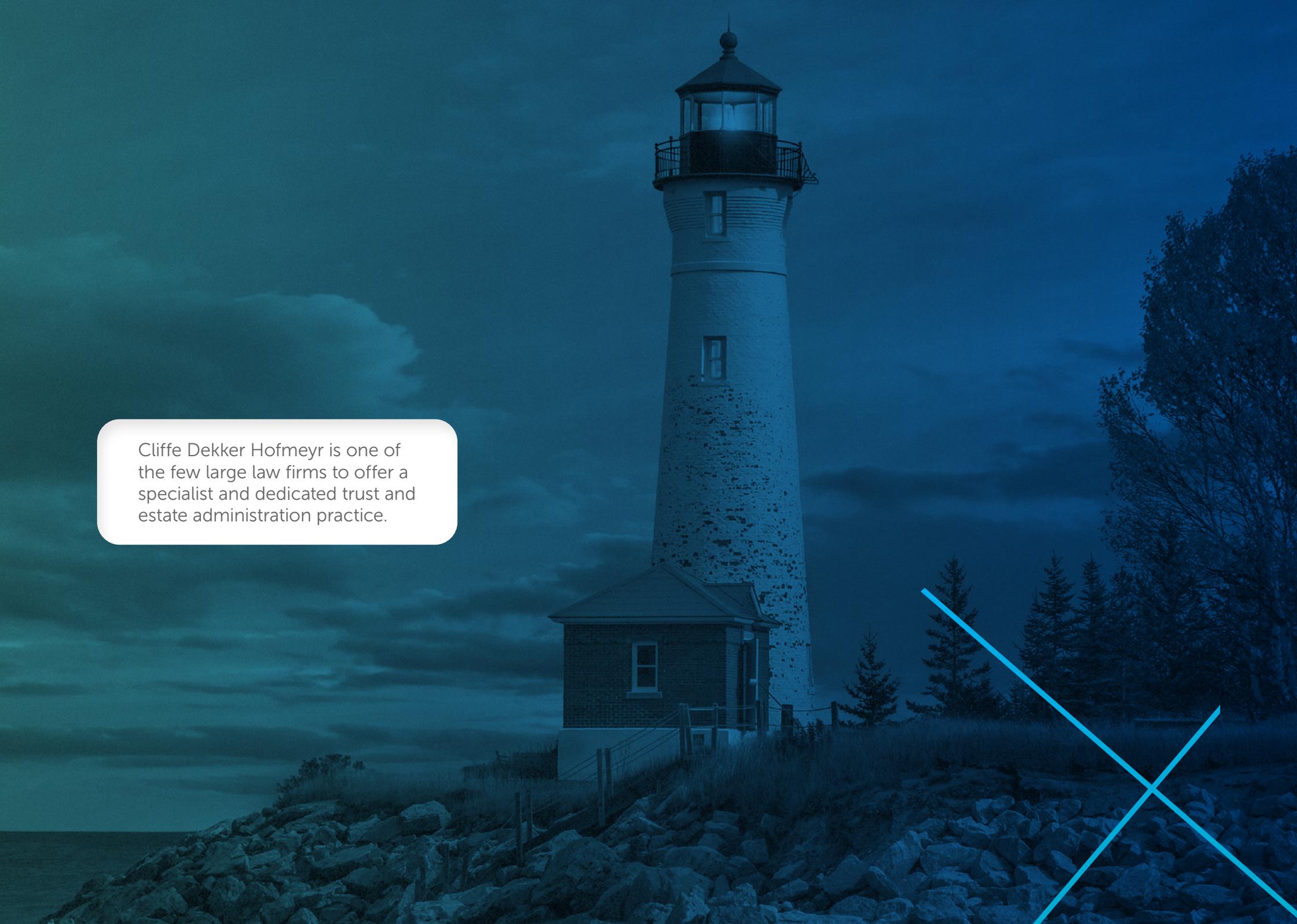
When you consult a lawyer it is important to ensure that every aspect of your estate will be handled professionally and with personal attention to every detail.

Our lawyers know how to approach complex issues creatively, with your interests in mind, and how to protect you against future legal problems.

Having a relationship of confidence and trust with the person who will be your executor and trustee is very important. We work hard to maintain the high level of trust our clients place in our services.

CDH is one of the few major law firms in Johannesburg and Cape Town that still offers a dedicated Trusts and Estates administration service.

CDH offers a wide range of legal services. In addition to trust and estate administration, we provide broader legal expertise, independence and objectivity, as well as expert tax planning services.



Cliffe Dekker Hofmeyr is one of the few large law firms to offer a specialist and dedicated trust and estate administration practice.



OUR SERVICES

Estate Planning

Estate planning involves the application of recognised techniques to protect, preserve and grow an individual's estate during and after their lifetime.

Estate planning is a multi-faceted exercise that requires the professional input of a number of interrelated disciplines, such as lawyers, financial planners, insurance and assurance brokers and tax experts.

Estate planning is also an ongoing process and there are certain recognised stages in a person's personal and business life that require them to reassess their estate plans, such as:

- The start of a relationship union or marriage
- The birth of a child or children
- The termination of a relationship or divorce
- A new business venture
- Retirement
- Disability
- Acquiring or selling a major asset
- A change in financial circumstances (inheritance and insolvency)
- Emigration and relocation

Some important and well-known techniques a professional estate planner employs are:

- Antenuptial contracts
- Post-nuptial contracts
- Inter-spouse donations
- Family loans
- Income splitting mechanisms
- Inter vivos trusts
- Testamentary trusts
- Disability and life cover
- Partnership agreement cover
- Key man agreement cover
- Offshore investments
- Last will and testaments
- Appointment of executors and trustees
- Inflation-beating or inflation-saving mechanisms

OUR SERVICES...continued

Antenuptial Contracts

Due consideration must be given to the legal basis of a marriage. Unfortunately, parties often overlook this.

In essence there are three matrimonial regimes:

- Community of property
- Antenuptial contract
- Antenuptial contract including accrual

We can help you understand the benefits and disadvantages of the various regimes and assess your situation, and we can provide the necessary guidance if you decide on an antenuptial contract. We will also draft and effect its registration in the Deeds Office.

Formation and Registration of Inter Vivos Trusts

Inter vivos trusts and offshore trusts remain the most valuable mechanisms to protect and grow assets.

Inter vivos trusts are often recommended for saving on estate duty, but there are other reasons, such as:

- To protect your assets from creditors or relationship claims
- To provide continuity after death
- To protect your assets if a beneficiary is a minor or is disabled

However, an inter vivos trust is not suitable for every individual or family.

Trusts are not favoured by the authorities, and the South African Revenue Service (SARS) and courts are increasingly scrutinising them.

It is imperative that the form and governance of your trust is above reproach. We encourage you to conduct a legal audit from time to time to ensure that the most recent laws and techniques are incorporated.

A Will – A Must Have Item

Having a professional will prepared is an unpleasant grudge purchase for many people, and one which is often put off.

But a will is an important legal document that has a significant impact on how your family, or those dearest to and dependant on you, live after you die.

A lifetime of economic toil and prudence can be undone by not having a will.

The task of drafting an appropriate, viable and valid will should be entrusted to the care of a seasoned practitioner because, unlike most other errors, this is one that cannot be remedied.

A will should be reviewed and updated from time to time.

A change in your personal and financial circumstances should automatically trigger a review.

Tax legislation or decisions made by the courts also impact on wills and estate planning.

The team has experience in managing deceased estates, ensuring that your will is prepared thoroughly and effectively.



OUR SERVICES...continued

When drafting a will we pay attention to the following:

- Your unique personal and family circumstances
- Particular obligations you may have (eg divorce order and dependants)
- Tax efficiency – we will advise on the capital gains and estate duty implications of your current estate plan and use techniques to manage or reduce the tax
- The liquidity of your estate – we will make recommendations on improving your estate so as to avoid the unnecessary realisation of assets

Testamentary Trusts

Testamentary trusts are created in a person's will and only come into effect upon the death of that person. The will then operates as the trust deed spelling out the terms of the trust. The terms would state for whom and under what circumstances beneficiaries are to benefit and when the trust is to terminate.

There are various reasons and circumstances to consider when deciding whether to create a testamentary trust, some relating to family issues and others to monetary and tax considerations.

As a preliminary caution, we recommend that the trust structure is not used to allow the deceased 'to rule from the grave' or too restrictive in respect of its control mechanisms.

We recommend a flexible structure that is adaptable to circumstances which the testator might not know about at the time of their death.

Circumstances where a testamentary trust would make sense are:

Minority or Youthfulness

At the time of the testator's death, their beneficiaries are minors (under the age of 18), or are of age but lack the necessary maturity or experience to take full responsibility of a sizeable inheritance.

This would often be the case where children or grandchildren inherit instead of their predeceased parents.

This type of trust usually terminates when the individuals reach a certain age. Depending on the size of the inheritance, the individuals may have access to capital and the termination may be staggered.

Disability

A testator may wish to or have an obligation to provide for a beneficiary who has a physical or mental impediment which renders the beneficiary unable to manage his or her own affairs. A trust is then set up to provide either partially or fully for the individual's maintenance and other requirements for the duration of their life or the impediment.

Skipping a Generation

A trust can be created to benefit grandchildren or a subsequent generation as the ultimate beneficiaries.

This allows the generations in between to have limited access to the trust funds and avoids unnecessary estate duty.

Obviously, factors such as the age of the next generation and their current financial standing and means will be important in the decision to create an intervening trust.

OUR SERVICES...continued

Section 4A – Estate Duty Abatement

It is not uncommon for a testator to wish to leave a large portion or entire estate to their surviving spouse, but depending on the size of the estate and other factors, this may not be the most sensible approach.

Although the estate of the first dying in such circumstances will not attract estate duty, the estate of the second dying could be subject to substantial estate duty.

The s4 Estate Duty Act (s4A) abatement (currently R3,5 million) can be used to overcome this, by leaving this amount to beneficiaries other than the surviving spouse.

Financial constraints may dictate that the testator does not nominate other beneficiaries directly.

A solution is often to place an amount equal to the s4A abatement in a trust for the discretionary benefit of the surviving spouse and, usually, any of the deceased's children. In this way the survivor has access to such funds for maintenance while the estate of the first dying enjoys the s4A abatement.

The residue of the estate is then usually transferred to the surviving spouse.

The viability and practical application of such a trust must be discussed thoroughly with the testator and estate planner to ensure envisaged results are achieved.

In particular, the need for such a structure must be reviewed in light of recent amendments to the Estate Duty Act, which introduced the so-called 'portable spousal deduction'.

This deduction essentially allows any unused abatement to be rolled over to the surviving spouse so that on the latter's death, the total abatement (currently R7 million) is available. While this would appear to reduce the need for a testamentary trust, the further benefits, ie the pegging of the assets in light of their future growth, as well as other considerations, may render the use of a testamentary trust imperative.

Conflicting Claims

A testator may be confronted with competing or conflicting claims or demands on his or her estate; in such circumstances a trust may be an ideal and viable solution.

An example of a conflicting claim is in the case of a family flowing from a second or subsequent marriage.

In such cases, the testator may wish to preserve the capital of his or her estate for the benefit of ultimate beneficiaries while at the same time making provision for a surviving spouse during their lifetime.

The choice of a firm but fair trustee in such circumstances is imperative.

Estate Administration

Estate administration takes longer and involves more work and skill than most people are aware of. It is important to appoint a credible and experienced executor or agent. Our team will keep your creditors and beneficiaries informed of progress and explain the process in detail.

OUR SERVICES...continued

Our services include the following:

- Assessing the validity of the will
- Interpreting the will and explaining its application to the interested parties
- Identifying the assets in the estate, placing values on the assets and, where necessary, taking physical control
- Identifying and making contact with the creditors, and assessing the liabilities of the estate
- Determining the solvency and the liquidity levels of the estate
- Realising assets
- Finalising and lodging the outstanding income tax returns with SARS as required.
- Calculating the base costs of assets and the capital gains or losses in respect of the assets held by the deceased
- Calculating estate duty and claiming the relevant rebates
- Placing the debtors and creditors adverts in the local press and Government Gazette, arranging for the opening of the estate late banking account
- Complying with the Master of the High Court's requirements
- Communication with the beneficiaries
- Drafting the liquidation and distribution accounts and arranging for the accounts to lie open for public inspection
- Settling the obligations of the estate and payment of creditors
- Transferring the remaining assets to the beneficiaries
- Transferring the immovable property at the Deed's office
- Drafting and preparing redistribution agreements
- Obtaining the Master's discharge on finalisation of the estate

Trust Governance and Administration

In cases where an inter vivos trust is created and assets are transferred to it, or a testamentary trust is created in a will, we can help by:

- Advising on registering trusts and appointing trustees
- Providing bespoke training to trustees and corporate administrators to ensure compliance with the relevant trust documentation and legislation
- Advising on governance issues to ensure that the trustees are at all times acting in accordance with the relevant trust deed and the laws, which are onerous in respect of individuals acting in a fiduciary capacity
- Preparing all documents to comply with the Trust Property Control Act
- Administering the trust as a trustee or agent to ensure compliance with all formalities and regulations, preparing the necessary trustee resolutions, attending the trustee meetings and communicating with the relevant parties

OUR SERVICES...continued

Contentious Estates

Estates are not always smooth sailing and there may be problems in respect of the will or the estate administration. When problems arise, we can:

- Bring an application or action to declare a will invalid for want of compliance with the formalities of the Wills Act
- Have the will set aside in cases where testators lack testamentary capacity or where others exert undue influence
- Bring an application to have a will declared valid for estate administration purposes under s2(3) and s2A of the Wills Act
- Bring an application to rectify a will to ensure the intention of the deceased is effected
- Bring a claim for interim maintenance for the spouse and children of a deceased in terms of s26A of the Administration of Estates Act
- Bring an application to remove a delinquent executor
- Process a claim by a surviving spouse in terms of the Surviving Spouse Maintenance Act
- Assist with the resolution of disputes among beneficiaries

Curatorship Applications and Administration

A power of attorney automatically ceases when the person who granted the power no longer has full mental capacity.

The Law Commission has recommended the introduction of an 'enduring power of attorney', which will remedy the current shortfall in our law.

In the interim the only lawful solution to the situation where an individual has lost their legal capacity but has assets and liabilities that need to be managed, is to bring an application to have the person placed under curatorship or administration in terms of the Mental Health Care Act. Once appointed, the curator will take control of the person's assets and control and administer them for the benefit of the individual concerned.

The administrative hurdle and regulations of appointment are onerous and the Master will generally insist that an attorney or trust company be appointed as curator.

We offer curatorship and administration services, which include preparing the annual curatorship account.



**OUR
SERVICES**

 Estate Planning	 Antenuptial Contracts	 Formation and registration of Inter Vivos Trusts
 Wills	 Testamentary trusts	 Estate administration
 Trust governance and administration	 Contentious estates	 Curatorship applications and administration

Estates are not always smooth sailing and there may be problems in respect of the will or the estate administration.

OUR TEAM

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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