

THE AUTOMATED PERSONAL ASSISTANT

Chapter 2.8

Considerations for Trusts

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What is a trust?

A trust an entity that is recognised in South Africa. A trust structure typically involves three parties:

The founder (the owner of the property that is transferred into the trust);

The trustees (administer the trust in line with the provisions of the trust deed); and

The beneficiaries (who get something out of the trust)

A trust therefor is created to hold assets for the benefit of certain persons or entities.

A trust is not a juristic (legal) person but there are times when, in terms of certain laws, a trust is regarded as having a separate legal identity (for example for tax purposes in terms of the Income Tax Act). Without legal personality, a trust does not have legal standing and therefore the trust itself cannot sue or be sued, which has its advantages (and disadvantages).

Assets can be transferred into a trust by sale, donation or on death in terms of a will (probably the founder's will). A trust could therefore be established in terms of a will (this is called a testamentary trust) or a trust deed (this is called an inter vivos or a living trust).

Types of Trusts

There are two main types of trusts in South Africa, and trusts are described according to when they are created:

An **inter vivos trust** is created while the founder of the trust is still alive. Therefore, a trust deed is used to create this type of trust.

It is important for the trust deed to clearly set out the aims and objectives of the trust, who the beneficiaries are, the trustees and their responsibilities, the rules for the distribution of the holdings of the trust, the length of time that the trust is operational and how it should be wound down, and how changes to the operation of the trust need to be effected.

A **testamentary trust** comes into existence upon the passing away when the person that wishes to establish the trust has passed on (he is known as the testator). The will sets out the assets to be transferred to the trust and the conditions that apply to the trust. The requirements for the trust deed for an inter vivos trust also apply to a testamentary trust, however generally, the terms of this trust cannot be amended unless by the Courts. A testamentary trust could be either give the trustees discretion on how the holdings of the trust are allocated to the beneficiaries, or the trustees are not given any discretion at all.

Advantages and Disadvantages of a Trust

The trust structure can have tax advantages if you stay in line with the tax laws, including income tax, capital gains tax and estate duty. A trust can last a long time and out-live the founder, beneficiaries and trustees. Assets remain intact and are protected (especially during marriage disputes or from creditors) and are prevented from being squandered.

However, it is costly to set up and administer a trust. One needs to prepare and file financial statements and tax returns on an annual basis and make provisional tax payments, amongst other compliance obligations. Changes in trust laws also make the establishment of a trust uncertain for future years.

Trusts as a Financial and Estate Planning Tool

Depending on what you want to do with a trust, consider all scenarios before a trust is established to ensure that the trust is fit for purpose. You do not want to be “ruling from grave” with onerous and complex provisions in the testamentary trust – much to the detriment of beneficiaries and administration challenges for trustees.

Once your life file is set up, and your will finalised with the conditions for an testamentary trust, it is important to consider whether you would like to have a discussion with the family to go through the provisions of the will and the trust provisions to ensure everyone is clear on the trust structure.

Seek professional advice

A trust structure is administrative to get started and best set up with the help of a specialist. It may cost a bit, but if you are set on this type of structure, getting in professional help will give you peace of mind.

Let's chat on any aspect of this bonus

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