



## What is a Trust?

A trust is an agreement between an owner of assets, and trustees. In terms of this agreement, the trustees undertake that they will administer the trust's assets with the necessary care, to the beneficiaries' benefit. It's an efficient and flexible way to ensure that assets are looked after. It also ensures that assets are objectively managed and controlled by the appointed trustees, in the best interests of the beneficiaries.

The concept of a trust originated in the Middle Ages. A landlord would leave his assets and servants to a trusted person for as long as he was away hunting, or fighting a war. The trusted person (or trustee) had full control of the assets until the landlord's return. This system still applies, in principle, to this day.

Protecting your loved ones' financial interests is extremely important in the planning of your estate. You want to be sure that your family – especially minors – will be looked after, and that your estate and income tax obligations are kept to a minimum, so that your heirs can enjoy your estate's full benefits.

A trust's administration must be transparent – appointing the right trustees is as important as appointing the right executor. You have to trust that your chosen trustees will always act in your beneficiaries' best interests, and that the trust will be managed in accordance with legislative requirements.

## Types of Trusts

There are various types of trusts, each suited to a specific set of circumstances.

- Testamentary trust
- Living trust

## Testamentary trust (mortis causa)

Testamentary trusts are the most common trusts in use. They are especially suited to the protection of minors and other dependants who aren't able to look after their own affairs. A testamentary trust is a trust created in terms of your will and comes into effect after your death.

The trust is administered by trustees appointed in terms of the will, and usually terminates after a



predetermined period or at a determined event, e.g. a minor turning 21 or the death of an income beneficiary.

Assets that form part of an estate may be transferred to a testamentary trust.

You form a testamentary trust by placing a trust clause in your will. This clause serves the same purpose as a trust deed. The testator will appoint the trustees in his will. They then apply for a letter of authorisation at the same office of the Master of the High Court as where the estate is registered.

A testamentary trust may be either a discretionary or vested trust.

- **Discretionary trust**

Payment of income and/or capital is subject to the discretion of the trustees and all non-allocated income is taxable in the hands of the trust. Capital beneficiaries may only be determined at a later stage.

- **Vested trust**

The income and capital have been allocated to the beneficiaries. Any income is taxable in the hands of the income beneficiary, who may also be the capital beneficiary. A capital beneficiary thus gets immediate property rights, subject to the terms of the will or trust.

## **Living trust (inter vivos)**

A living or inter vivos trust comes into being during the lifetime of the settlor or founder, with the signing and registration of a trust.

A living trust is formed as an arrangement between the founder/settlor and the trustees. The founder/settlor is the person that takes the initiative to create a trust.

The interested parties in a living trust are: the founder/settlor; the trustees; the persons or company appointed to take control over the assets and take responsibility for the administration and management thereof; and the person or beneficiaries who, in terms of the trust act, are entitled to the income and/or capital of the trust.



After signature of the trust deed, the trust is registered with the Master of the Supreme Court, in whose jurisdiction most of the assets are situated or where the administration is to take place.

A living trust can take several forms:

- **Family trust**

A family trust comes into being through an agreement between the founder and the trustees. Assets are sold to the trust and a loan account (debt) is created, or assets can be donated, but with donation tax implications.

- **Charitable trust**

A charitable trust is a particular kind of trust that may be classified as non-taxable in terms of the Income Tax Act. Capital loans are made to a trust. The trust is structured in such a way that it pays no income tax. The trustees then make donations to charities, schools, churches, etc. on your behalf, according to your wishes. Because there is no income tax applicable, the trustees can make large donations.

- **Umbrella trust**

An umbrella trust is linked to a pension-, provident-, retirement annuity- or preservation fund as well as group schemes. The trustees of the fund/scheme obtain an additional option to, in specific cases, transfer the death benefits to the trust, for management to the benefit of the beneficiaries.

- **Guardian's trust**

Guardian's trusts are created as an alternative for monies due to minors that must, under certain circumstances, be paid into the Master of the Supreme Court's Guardians' Fund. Examples of such monies are proceeds from policies and cash inheritances for which no provision was made through the setting up of a trust. This trust is authorised to receive, and to manage any benefits accruing to minors from the Guardian's Fund. It is a safe alternative for the Guardian's Fund to pay benefits due to the child into the trust rather than to the remaining guardian, who may not necessarily act in the best interests of the child.



- **Special trusts**

Special trusts, which are taxed at the same rate as a natural person, may only be created for the benefit of a person suffering from serious mental illness, as described in the Mental Illness Act, Nr 18 of 1973, or who suffers from a serious physical disability. Testamentary trusts benefiting any living family member, of whom the youngest turns 21 in a tax year, may in certain cases also be classified as a special trust.

## **Role and Appointment of Trustees**

The Trust Property Control Act contains provisions with which all trustees must comply. Non-compliance with these provisions may lead to criminal sanction.

Although it's generally accepted that there will be at least three trustees, two are perfectly sufficient. A trust company may well act as the only trustee.

## **Duties and responsibilities**

Trustees must always act objectively and in the interests of the beneficiaries. This duty of care would include:

- Secret profits - trustees may under no circumstances make secret profits or speculate with trust assets.
- Negligence - trustees must ensure that they have the necessary expertise and show due care when dealing with the trust assets.
- Good faith - the trustees must always act in good faith.
- Compliance with the trust deed - trustees are legally bound and obligated to execute the stipulations of the trust deed or the will (in which the aims as well as the powers and responsibilities of the trustees are explained).

## **Administration of a Trust**

### **The administration of a trust entails:**

- receiving and controlling trust assets
- making investments according to the stipulations of the trust deed, the needs of the beneficiaries and investment objectives
- making regular maintenance payments to beneficiaries



## **In terms of the law, trustees are expected to report to:**

- Fellow trustees, beneficiaries and guardians of minor children
- The South African Revenue Service
- The Master of the High Court (if so requested)

Lastly, the administration of a trust entails that trustees must provide advice to fellow trustees and beneficiaries. While the trustees ultimately remain responsible for the administration of the trust, they may outsource this function, usually to a reputable trust company.

## **Costs**

### **Certain fees are payable for the founding and management of a trust:**

- Set-up fee, for the establishment and registration of a trust (for a living trust only).
- Acceptance fee, for receiving and protecting trust assets.
- Management fee, calculated as a percentage of the assets under management, collected on an ongoing basis.
- Distribution fee.