

A NOTE ON TRUSTS

The requirements for a valid trust are;

- (i) the founder must have intended to create a trust,
- (ii) the founder must have expressed his intention in such a way that it places an obligation on the trustees,
- (iii) the trust property must be defined with reasonable certainty,
- (iv) the trust beneficiaries must be ascertained or ascertainable,
- (v) the trust object must be lawful.

One of the greatest misconceptions is that having a trust deed that contains the above elements means that you have an operational trust. Its important to ask yourself the following questions related to the administration of the trust:

		Yes	No
1.	Do the letters of authority of the trust reflect the current trustees?		
2.	Have the trustees read the trust deed?		
3.	Does the trust have a bank account?		
4.	Do the trustees hold trustee meetings?		
5.	Do all the trustees participate in trust decisions?		
6.	Are all the decisions made by the trustees recorded?		
7.	Are all loans, rental agreements etc recorded in writing?		
8.	Are distributions only made to the named or class or beneficiaries as per the trust deed?		
9.	Is the trust registered with SARS?		
10.	Has the Settlor divested himself of the trust assets?		

Why is the administration of the trust so important?

In general, a trust is a legal institution in which a person, the trustee, subject to public supervision, holds and administers property separately from his own, for the benefit of another person. A trustee could be a beneficiary of a trust. As such he acts in two capacities. A trustee does not act in his private capacity but holds an office.

It is one of the cornerstones of the trust idea that there must be a separation of management, ownership and enjoyment. This means that the founder must divest himself of ownership of property, and hand it over to the trustee who must administer the property for the benefit of the nominated beneficiaries.

In the light of cases such as:

- *FNB v Stephanus Britz & 6 others as well as Land and Agricultural Bank v Parker: where a trust is not run correctly, the court will treat the trust assets as those belonging to the planner;*
- *Steyn & others NO v Blockpave (Pty) Ltd: a trust requires the full and complete participation of all its trustees to function legally;*
- *Badenhorst v Badenhorst: where a trust assets are not separate from those of the planner, the court will look through the assets of the trust and deem them to be those of the planner when making a redistribution order in terms of section 7 (3) of the Divorce Act.*

All the above cases therefore illustrate that where there is no clear separation of control from enjoyment, trust assets, could be regarded as your assets and could form part of your estate for the purposes of;

- (i) Section 7(3) of the Divorce Act,
- (ii) Section 3(3)(d) of the Estate Duty Act,
- (iii) Calculating the Accrual value in terms of Section 3 of the Matrimonial Property Act, and
- (iv) Attachment by creditors in terms of the Insolvency Act.

Acting as trustee/s

The risk of the trust assets being regarded as personal assets can be reduced by implementing tighter controls with regard to the management of the trust going forward. The following summary of trustee duties taken from - **Wills and Trusts by van der Westhuizen and Pace** – may provide some guidance.

Trustee duties can be divided between, common law, and statutory duties.

Common law duties

In terms of our common law trustees should always:

- (i) Act in good faith – This means that they give full effect to their fiduciary duties. They have to act as a person who administers the affairs of another. This entails dealing more carefully with trust property than one would deal with one's own property.
- (ii) Act jointly – when dealing with trust assets contractual powers must be exercised by all trustees acting together.
- (iii) Observe the trust deed – A trust is a creature of the trust deed. Trustees have to act within the confines of the trust deed. Trustees can as a consequence only concern themselves with the interests of the trust and the beneficiaries of the trust. They have no obligation toward third parties.
- (iv) Take possession of the trust property - trust property is held separately from a trustee's personal estate.
- (v) Make the trust property more productive – the trustees undertake duties of management. It is their duty to see that a reasonable return is obtained on the capital belonging to the trust.
- (vi) Keep the trust property separate – The trust property should not be blended with the trustee's personal property or with the property of other trusts or persons.
- (vii) Act impartially – A trustee, must as far as possible, avoid a position where private interests conflict with his duty as a trustee. Where a trustee is also a beneficiary, the act/s of the trustee/s will be subject to closer scrutiny.
- (viii) Deal with the trust fund and transfer income and capital to beneficiaries – A trustee must pay income and transfer capital to the person entitled to it.
- (ix) Preserve the trust property – In general a trustee is under a duty to conserve the trust property – but may deal with the property where the trust deed authorizes it.
Account to beneficiaries – The trustees must maintain an accurate account of their administration of the trust assets

Statutory Duties

The statutory duties of trustees are determined by the Trust Property Control Act, 57 of 1988 (the Act).

In terms of the Act trustees must;

- (i) Lodge the trust deed as well as any amendments with the Master of the High Court (Section 4).
- (ii) Furnish the Master with the address of all trustees and notify the Master by registered post within 14 days of any change of address (Section 5).
- (iii) Give security to the Master unless exempted (Section 6).
- (iv) Obtain authority to act as trustee before performing any act as trustee (Section 6).
- (v) Act with care, skill and diligence in the affairs of the trust (Section 9). This section confirms the trustees' common law duties. A trust deed cannot exempt or indemnify a trustee against liability for breach of trust.
- (vi) Open a bank account (Section 10).
- (vii) Register the trust property and keep the trust property identifiable as such (Section 11).
- (viii) Account to the Master if called upon to do so (Section 16).
- (ix) Keep safe custody and control of documents of the trust (Section 17).

Acting as trustee/s

An independent trustee is a trustee who is not a beneficiary or family member of any beneficiary. **It is advisable to always have a trustee who can be seen as "independent"**. If there is no independent trustee, it is easy for one of the trustees (often the Donor) to control the trust property as his own property and for his own benefit. If the authorities, creditors or any third party is of the opinion that a trustee has too much control in a trust, the assets of the trust can be deemed to be the personal assets of such person.

Servo Consult (Pty) Ltd can act as an independent trustee ensuring your trust complies with the necessary legislative requirements as well as providing you with advice on how to optimally structure each transaction within the trust.

Contact our offices on (021) 492 5094 / info@servofs.co.za for more information.