PROTECTED & MANAGED

Trust Guide 2023

The facts, the figures

Nolands
AUDIT • ADVISORY • LAW

The attitudes of revenue authorities around the world toward tax governance and tax risk management have changed as authorities are increasing their scrutiny of the approach taxpayers are taking to their tax affairs.

This has been aided by new technology and automatic exchange of information agreements. Revenue authorities from different countries routinely share information on their taxpayers with each other.

There is no longer an option for taxpayers other than adopting a conscientious and proactive approach to managing their tax risks.

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INTRODUCTION

This guide is designed to help anyone involved with a trust understand the key elements of forming and administering a trust in South Africa.

Anyone thinking of setting up a trust needs to make sure that they are creating a valid legal structure, and also understand the nature of the trust, the duties of trustees, the rights of beneficiaries and the recent legislative amendments affecting trusts in South Africa.

Some points to consider when setting up a trust:

The most important consideration is whether the founder/donor is willing to relinquish direct control over assets transferred to the trust. If not, the trust may be regarded as a front (sham) or alter ego of the founder, and the protection and planning opportunities afforded by transferring the assets to the trust may be lost. Another important consideration will also be how to get any growth assets from an estate planning point of view into the trust.

Other considerations are:

- Whether the trust fits into the overall estate plan.
- The trust should not primarily be used to mitigate paying taxes.
- Whether the benefit of the trust justifies the costs and administration involved in keeping the trust compliant.
- Whether to appoint an independent trustee.
- Loans made by individuals and companies to trusts.

Trust law in South Africa:

The rules of South African trust law originate from a mixture of English, Roman-Dutch and South African law. It is possible in South Africa to have a valid verbal / oral trust agreement which has not been reduced to writing. These oral / verbal trust agreements are governed by the common law (this is a body of law developed by South African judges and courts). Although the registration of a written trust deed with the Master of the High Court does not impact on the legality of the trust deed, section 6(1) of the Trust Property Control Act (no.57 of 1988), as amended, [and hereinafter referred to as the Trust Property Control Act], states that no person may act as a trustee without the proper authorisation from the Master of the High Court. This authorisation is in the form of Letters of Authority. Accordingly, in most cases, a written trust instrument is created, and registered at the applicable Master of the High Court's office in South Africa. This written trust instrument is automatically governed by the Trust Property Control Act, which forms the framework in which trusts operate, and regulates most aspects relating to a trust's administration.

Legal status of trusts in South Africa:

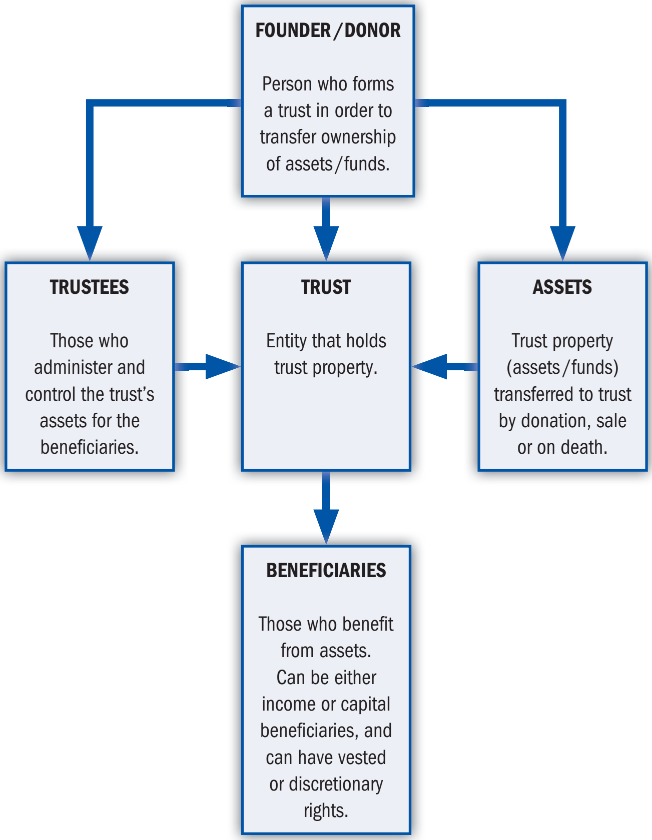
A trust in South Africa does not have a separate legal personality and is not treated as a separate juristic person that can be owned, sold, or transferred. It does not have a separate legal personality, because it is simply an accumulation of assets. Any property held in trust is held by the trustees in their capacity as trustees, and cannot be "owned" by the trust itself. Trust property may be movable or immovable, and may include contingent interests in property. Such property is to be administered or disposed of by a trustee in terms of the deed.

Notwithstanding this, there are certain pieces of legislation in South Africa that treat a trust as having a seperate legal personality – such as the Deeds Registry Act (no.47 of 1937), Transfer Duty Act (no.40 of 1949), Value Added Tax Act (no.89 of 1991), Income Tax Act (no.58 of 1962) and the Insolvency Act (no.24 of 1936), as amended. The Companies Act (no.71 of 2008), in its definition of a "juristic person", includes a trust (irrespective of whether or not it was established within or outside of South Africa).

ESSENTIAL REQUIREMENTS FOR A VALID TRUST

- The founder must have a serious intention to create a trust.
- The key element of the trust arrangement is the transfer of control of the trust assets from the founder to one or more trustees, who hold the trust assets, not in their personal capacities, but for the benefit of the trust beneficiaries. The trust is essentially an arrangement that allows someone to hold assets for the benefit of the trust beneficiaries. The Trust Property Control Act defines a trust as "...a structure into which property is transferred, which is then administered by trustees, on behalf of one or more beneficiaries, in accordance with the trust instrument...".
- The trust property must be clearly identified.
- The trust object (which could be personal or impersonal) must not be vague, but must be clearly stated and lawful.
- There must be a binding obligation on the trustee(s) to administer and manage the trust property.
- The trustees must be authorised and have legal capacity (for example, in South Africa, when you turn 18, you are free to contract and conduct your own affairs without your parent or guardian's assistance).
- There must be at least one beneficiary.
- The trust beneficiaries must be clearly identified or easily identifiable.
- Note that the Trust Property Control Act does not specify the requirements or procedures required for the formation of a valid trust in South Africa. The Master of the High Court might have issued Letters of Authority, and assigned a registration number to the trust, but this does not necessarily make the trust valid. Usually the validity of a trust instrument is only tested by its creditors, or the South African Revenue Service (hereinafter referred to as SARS), or by a spouse in a divorce case.

STRUCTURE OF A TRUST



TRUST INSTRUMENT

Where the founder of a trust has decided to set up a trust and have the arrangement reduced to writing, a trust instrument is created. This is the trust's constitutional document, which defines the framework in which the trust must operate, including its powers and limitations.

All actions and decisions taken by the trustees must thus be made in reference to the trust deed, the Trust Property Control Act, and South African case law.

The trust instrument must clearly establish a separation between the right to control the trust assets, which is held by the trustees, and the right (whether vested or contingent) to benefit from the trust assets, which is held by the beneficiaries.

Section 1 of the Trust Property Control Act states that the trust instrument is either the:

- Written agreement, called the Trust deed – which creates an inter vivos/living trust, or
- Last Will and Testament – which creates a testamentary trust, or
- A court order, according to which a trust is created.

Some of the items specified in the trust instrument include:

- The name of the trust, the founder, and the trust's aims and objectives.
- The names of the beneficiaries and whether they are to be income or capital beneficiaries (or both).
- The names and identity numbers of the first trustees, and the minimum number of trustees who are required to administer and manage the trust assets.
- The rights and obligations of the trustees, including their powers and duties.
- The remuneration of trustees, as well as the requirements for the reimbursement of their expenses.
- Requirements for meetings of trustees, such as quorum and voting, and their ability to delegate their powers in certain circumstances.
- Rules and restrictions regarding the distribution of income and capital.
- The duration and procedure on termination of the trust.
- The procedure to be followed if the trust needs to be amended.

TYPES OF TRUST

There are various ways of describing trusts or trust types in South Africa, and they are not necessarily mutually exclusive. Therefore, depending on how the trust is structured, there may be overlaps, and a trust may be categorised, for example, as a discretionary, inter vivos, family trust. Some of the various types or categories of trust (which may overlap with each other) are described below.

Ownership Trust – Section 1(*a*) of the Trust Property Control Act describes such a trust as "the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument, for the benefit of the person or class of persons designated in the trust instrument, or for the achievement of the object stated in the trust instrument." These are the typically discretionary family trusts.

Bewind Trust – Section 1(*b*) of the Trust Property Control Act refers to such a trust as "the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument, or for the achievement of the object stated in the trust instrument". These are vested trusts, where the assets belong to the beneficiaries, but are managed by the trustees.

Curatorship Trust: Similar in structure to a bewind trust, except that the assets are administered on behalf of a beneficiary who does not have the capacity to manage his/her own affairs.

Trusts are also described according to when they are created

Inter Vivos (Living) Trust: This is a trust created during the founder's lifetime. It is established by a trust deed which sets out who the founder, trustees and beneficiaries are, defines the powers and duties of trustees and how and when the trust is to be wound up. The founder may also be co-beneficiary and/or trustee. The founder usually donates assets to the trust.

There are various kinds of inter vivos trusts that can be set up, depending on their purpose, for example, family trusts, charity trusts (formed with an impersonal object), empowerment or employee trusts and business trusts.

An inter vivos trust can be structured as either a vested or discretionary inter vivos trust. Discretionary trusts are the more common form of inter vivos trust, where the vesting of benefits or assets in the beneficiaries is done at the discretion of the trustees.

Inter-vivos trusts are ideal for keeping growth assets (shares, investments, immovable property) out of an estate planner's estate, and as a means of protecting assets from generation to generation.

Testamentary (Mortis Causa) Trust:

Testamentary (Will) trusts are created by a trust clause in a Last Will and Testament, in which the testator bequeaths assets to the trust and stipulates the terms and conditions which will apply to the trust.

A testamentary trust only comes into existence upon death of the testator. If, for any reason, the Will is invalid, the trust will not come into effect (the Master of the High Court therefore has the power, in this case, to declare a testamentary trust invalid – unlike an inter vivos trust, where the Master of the High Court has no such power).

Testamentary trusts are geared towards protecting the interests of minors and other dependants who cannot look after their own affairs. Assets that form part of an estate may be moved to the testamentary trust and sometimes include limited rights such as a usufruct (temporary right to use/benefit from trust assets).

The appointed trustees administer the trust in terms of the Will until the trust terminates, usually after a predetermined period or at a determined event, such as a minor turning eighteen or the death of an income beneficiary.

Generally, the terms of a testamentary trust cannot be amended, but the Trust Property Control Act does give the Court certain powers to amend a trust deed, in certain specific circumstances.

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

Main Differences Between Inter Vivos and Testamentary Trusts		
	Inter Vivos Trust	**Testamentary Trust**
Formation	During lifetime of founder	After death of testator by Executor(s)
Instrument	Trust deed	Last Will and Testament
Flexibility for amendments	Flexible	Not flexible
Assets transferred into trust (trust capitalised)	During lifetime	After death in terms of Last Will and Testament
Master of the High Court	Letter of Authority	Letter of Authority

Trusts are also described according to the rights given to beneficiaries

Discretionary Trust: This type of trust gives the trustee(s) discretionary powers as to how and when and how much to allocate of the income or capital of the trust to the beneficiaries.

The beneficiary does not have a vested right to the income until the trustees have exercised their discretion, and paid over the benefit to the trust beneficiary, but only have contingent rights to the income, assets or net trust capital of the trust. A contingent right is a right that depends on a future event or the performance of an action by the trustees, such as the decision to make a distribution.

The trustees may also be given discretion to nominate income and / or capital beneficiaries from a group, as long as a "class" of potential beneficiaries has been named, as well as how and when and the ratio of any such award is given.

In the event of a beneficiary's death (or insolvency) before the trustees have exercised their discretion, nothing can be held in that beneficiary's estate or pass to his heirs or creditors.

Vested (Vesting) Trust: Here the trustees are not given any discretion in the deed, and the beneficiaries and their benefit(s) are fixed and predetermined.

The beneficiary has a vested right to the income and capital of the trust, which cannot be contested by anyone else.

In the event of the death of the beneficiary prior to payment, the deceased beneficiary's interests are transmissible to his heirs, and these must be included in his estate for estate duty purposes.

Trusts can also be described according to the purpose for which they are formed

- **Asset-Protection Trusts:** Asset-protection trusts include a wide range of legal structures which are set up in an attempt to mitigate the effects of taxation, divorce and bankruptcy on the beneficiary. Any form of trust which provides for trust property to be held on a discretionary basis falls within this category, e.g. a family trust which is designed to secure the interests and protect the property of a group of family members.
- **Family (Private) Trusts:** These can be testamentary or inter vivos trusts. Their main objective is the protection and maintenance of trust property, for the benefit of minor children, or family relations of the founder.
- **Empowerment / Employee Trusts:** These are inter vivos trusts formed to empower staff and give them the chance of meaningful participation and "ownership" in the business venture.
- **Offshore Trusts:** The term offshore trust describes a trust which is set up in a tax haven jurisdiction. In South Africa the term includes any non-South African or non-resident trust that has its place of effective management outside of South Africa. There are both tax advantages and disadvantages with regards to offshore trusts and in South Africa there are both general and specific anti-avoidance provisions that can negatively impact the use of offshore trusts.
- **Business / Trading Trusts:** These are inter vivos trusts formed to carry on the business with a profit incentive. The trustees should be independent of the beneficiaries. Business Trusts:
    - May be either public or private.
    - Beneficiaries enjoy limited liability trading.
    - Administration is less complex and less expensive than a company or close corporation.

- Trustees may each individually face personal liability in the event of recklessness or failure to exercise reasonable care and skill.
- **Charitable Trust:** This is a trust set up for charitable purposes and may qualify for exemption from income tax and Capital Gains Tax provided that:
  - It carries on an approved public benefit activity.
  - It is registered as a Public Benefit Organisation by the SARS Tax Exemption Unit.
  - Donations to a charitable trust which fulfils the regulatory requirements will also be exempted from donations tax.
- **Special Trust:** There are two types of special trust in South Africa, as follows:

  (a) Special Trust Type A – this is a testamentary or inter vivos trust created solely for the benefit of a person(s) with a mental or physical "disability" as defined in section 6B(1) of the Income Tax Act (no.58 of 1962).

  (b) Special Trust Type B – this is a testamentary trust created in terms's of a deceased's Last Will and Testament solely for the benefit of a person(s) who is a relative of the person who died, and who are alive on the date of death of that deceased person (including those conceived but not yet born), and the youngest of the beneficiaries is younger than 18 years on the last day of the year of assessment.

  These trusts are treated differently for taxation purposes, as is set out in more detail on page in the chapter on Special Trusts.

All trusts need to register with SARS, regardless of whether the trust has any transactions and / or assets.

The trustee (if there is only one trustee), or one of the trustees (if there is more than one trustee), will be the representative taxpayer for the trust, and will need to be registered as such with SARS.

SARS is tightening its supervision of trusts in South Africa, and to this end, various measures were introduced by them during February 2023.

AMENDMENTS TO THE TRUST PROPERTY CONTROL ACT: 1 APRIL 2023

The General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act (no. 22 of 2022) came into force on 1 April 2023, and amends the Trust Property Control Act [as well as the Nonprofit Organisations Act (no.71 of 1997), the Financial Intelligence Centre Act (no.38 of 2001), and the Companies Act (no.71 of 2008)]. It is hereinafter referred to as "the Amendment Act".

The amendments to the Trust Property Control Act are significant – the intention is to increase the disclosure requirements on trustees, to prevent the misuse of trusts, and to combat money laundering, terrorist financing and other financial crimes.

The amendments comprise:

- The insertion of the definition of "accountable institution"
  - having the same meaning as defined in section 1(1) and Schedule 1 to the Financial Intelligence Centre Act. An accountable institution includes, amongst others, attorneys, estate agents, a banking institution, long term insurers and investment brokers.
- Increased disclosure requirements for trustees in relation to an accountable institution
  - the Amendment Act provides that a trustee must disclose their position as trustee to any accountable institution with which the trustee engages in that capacity and must make it known to the accountable institution that the relevant transaction or business relationship relates to trust property [*].
  - Section 11 of the Trust Property Control Act provides that a trustee is required to:
    (*a*) indicate clearly in his bookkeeping the property which he holds in his capacity as trustee;
    (*b*) if applicable, register trust property, or keep it registered so as to make it clear that it is trust property;

(*c*) make any account or investment at a financial institution identifiable as a trust account or trust investment;

(*d*) make any other property that does not fall into any of the above-named categories, identifiable as trust property in the best possible manner.

(*e*) The Amendment Act adds an additional requirement, by adding a paragraph (*e*) which provides that a trustee is required to record the prescribed details (still to be prescribed at the date of publication hereof) relating to accountable institutions which the trustee uses as agents to perform any of the trustee's functions relating to trust property, and from which the trustee obtains any services in respect of the trustee's functions relating to trust property [**].

The Regulations provide for the trustees to record the details of accountable institutions as contemplated in section 11(1)(*e*) – these include any accountable institution listed in Schedule 1 of the Financial Intelligence Act, used by trustees to perform any of their functions relating to trust property.

- The insertion of a new definition of "beneficial owner" of a trust
  - the new definition reads as follows:
    '**beneficial owner**', in respect of the provisions of a trust instrument, means–

    (*a*) a natural person who directly or indirectly ultimately owns the relevant trust property;

    (*b*) a natural person who exercises effective control of the administration of the trust arrangements that are established pursuant to a trust instrument;

    (*c*)(i) each founder of the trust; or (ii) if a founder of the trust is a legal person, a person acting on behalf of a partnership or in pursuance of the provisions of a trust instrument, the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person or partnership or the relevant trust property or trust arrangements pursuant to that trust instrument;

(*d*)(i) each trustee of the trust; or (ii) if a trustee of the trust is a legal person or a person acting on behalf of a partnership, the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person or partnership; and

(*e*)(i) each beneficiary referred to by name in the trust instrument or other founding instrument in terms of which the trust is created; or (ii) if a beneficiary referred to by name in the trust instrument is a legal person, a partnership or a person acting on behalf of a partnership or a person acting in pursuance of the provisions of a trust instrument, the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person or partnership or the relevant trust property or trust arrangements pursuant to that trust instrument.

The purpose of creating classes of 'beneficial owners' is to place an obligation on the trustees and the Master to keep records of the individuals who fall within these classes – which records will be useful to combat money laundering and terrorism.

It is important to note that a distinction needs to be drawn between a beneficiary of a trust and the definition of a beneficial owner introduced by the Amendment Act, the latter being introduced for the above-named reasons (a beneficiary is thus just one of the categories of beneficial owner for disclosure purposes as outlined in the paragraph above).

- Specifying information that must be kept by trustees in relation to beneficial owners in relation to trusts
  - Section 11A(1) of the Amendment Act provides, inter alia, that a trustee must:

    (*a*) establish and record the beneficial ownership of the trust;

    (*b*) keep a record of the prescribed information relating to the beneficial owners of the trust (including full name, date of birth, nationality, an official identity document number or passport number, citizenship, residential address, address for notices, other means of contact, tax number (if applicable), class or category of beneficial ownership, the date on which the person became a beneficial owner, and the date on which the person ceased to be a beneficial owner. Where the beneficial owner is a minor, the same information must be provided for the legal guardian of the minor).

(*c*) lodge a register of the prescribed information on the beneficial owners of the trust with the Masters' Office; and

(*d*) ensure that the prescribed information referred to in paragraphs (*a*) to (*c*) is kept up to date [***].

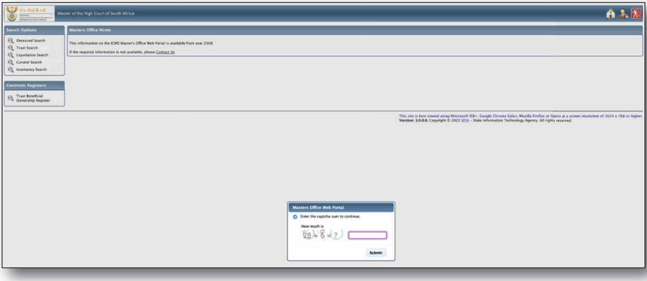
The requirement for trustees to record and disclose this information makes the control and use of trust structures in South Africa more regulated, certain and transparent.

- Requiring the Master to maintain a register containing information relating to beneficial ownership of trusts
  - the Amendment Act also provides, inter alia, that:

    (*a*) the Master must keep a register in the prescribed form containing the prescribed information about the beneficial ownership of trusts.

Electronic register by the Master of the High Court

The Master must keep an electronic register of beneficial owners. Trustees are obliged to submit the beneficial ownership information (see above) to this electronic register. The Master must provide for access to registered users and access for trustees to lodge and update information, upload documents and sign off on the information. This register is already available on the website of the Master of the High Court.



- Both the trustees and the Master are required to provide access to this information regarding beneficial ownership
  - the Amendment Act provides, inter alia, that:

    (*a*) both the trustees and the Master must make the information contained in the register available to any person as prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre.

In terms of the Regulation 3E, access to such information is restricted to various government bodies such as the National Prosecuting Authority, the Independent Police Investigative Directorate, State Security Agency, the Intelligence Division of the National Defence Force, a Special Investigating Unit, the South African Revenue Service, the Financial Intelligence Centre and such other bodies as named in the Regulations. Access could also be granted to a person who is entitled to receive such information in terms of other legislation – these entities would have to request access in writing providing proof that they qualify and designate officials who will have access. The Regulations do not provide for the Master to request feedback or input from the trustees in question, before providing such access.

- Specifying matters that would disqualify a person from being appointed or continuing to act as a trustee
  - the Amendment Act introduces criteria that would disqualify a person from being authorised to act as a trustee, as follows:

    (*a*) is an unrehabilitated insolvent;

    (*b*) has been prohibited by a court to be a director of a company, or declared by a court to be delinquent in terms of section 162 of the Companies Act, 2008 or section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984);

    (*c*) is prohibited in terms of any law to be a director of a company;

    (*d*) has been removed from an office of trust, on the grounds of misconduct involving dishonesty;

    (*e*) has been convicted, in South Africa or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount in terms of section 69 of the Companies Act, 2008, for theft, fraud, forgery, perjury or an offence–

    (i) involving fraud, misrepresentation or dishonesty, or money laundering, terrorist financing or proliferation financing activities as those terms are defined in section 1(1) of the Financial Intelligence Centre Act;

    (ii) in connection with the promotion, formation or management of a company, or in connection with any act contemplated in section 69(2) or (5) of the Companies Act, 2008; or

    (iii) under this Act, the Companies Act, 2008, the Insolvency Act (no. 24 of 1936), the Close Corporations Act, 1984, the Competition Act (no. 89 of 1998), the Financial Intelligence Centre Act, 2001, the Financial Markets Act (no.19 of 2012), Chapter 2 of the Prevention and Combating of Corrupt Activities Act (no. 12 of 2004), the Protection of Constitutional Democracy Against Terrorist and Related Activities Act (no. 33 of 2004), or the Tax Administration Act (no. 28 of 2011);

    (*f*) is subject to a resolution adopted by the Security Council of the United Nations when acting under Chapter VII of the Charter of the United Nations, providing for financial sanctions which entail the identification of persons or entities against whom member states of the United Nations must take the actions specified in the resolution; or

(*g*) is an unemancipated minor or is under a similar legal disability.

The Regulations provide for the Master to establish and maintain a public register of persons disqualified from serving as trustees.

- Foreign trustees
  - the Amendment Act provides that when a foreign trustee is appointed as a trustee ("trustees appointed outside of South Africa") for a South African trust and has to administer or dispose of trust property in South Africa, that trustee may do so, but only if specifically authorised thereto in writing by the Master.
- Specifying certain offences and penalties
  - the Amendment Act provides that:

    (1) If any trustee fails to comply with a request by the Master in terms of section 16 [i.e. a request to account to the Master regarding administration and disposal of property] or to perform any duty imposed upon the trustee by this Act, the trust instrument or by any other law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with the Master's request or to perform the duty.

    (2) A trustee who fails to comply with an obligation referred to in section 10(2) [* above], 11(1)(*e*) [** above] or 11A(1) [*** above] – commits an offence, and on conviction is liable to a fine not exceeding R10 million, or imprisonment for a period not exceeding five years, or to both such fine and imprisonment.

ADVANTAGES AND DISADVANTAGES OF A TRUST

Advantages of a trust

- Continuity – a trust survives the life of an individual (donor/trustee/beneficiary) and can span multiple generations.
- Can protect an individual's assets from creditors and/or matrimonial and relationship disputes.
- Utilisation of services, knowledge and abilities of trustees.
- Custodianship of assets, preventing assets from being squandered.
- Management and control of trust assets – e.g. where there may be several owners of the same asset who cannot agree on how to manage the asset.
- Administration of an asset for charitable purposes.
- Tax benefits can be created by the correct distribution of income and capital gains.
- Estate duty can be minimised or capped because the growth of an asset is no longer in the hands of the founder.

Disadvantages of a trust

- Formation and administration of a trust is costly.
- Ordinary trusts are taxed at a higher rate on income and capital gains tax on distributions, if retained in the trust (not applicable to Special Trusts).
- The possibility of future legislative amendments which may adversely affect the benefit of a trust.
- Administrative and Taxation requirements such as:
  - Legally required to register as a taxpayer, submission of bi-annual provisional tax returns, and annual income tax return.
  - Annual financial statements.
- Onerous duties and increased disclosure requirements of trustees.
- Must be relinquishment of control. SARS may deem income back to the donor of the asset, if there is not adequate relinquishment of control over the asset.
- Funding limitations, as a trust cannot receive an interest-free or low-interest loan without triggering donation tax.

BENEFICIARIES OF A TRUST

The beneficiaries are named in the trust instrument and can be:

- Income beneficiaries (benefit from income derived from trust assets or the use of trust assets).
- Capital beneficiaries (benefit from distribution of a portion or the whole of the capital assets).

The qualifications of beneficiaries

- Any person (unborn or alive) can be a beneficiary of the trust.
- There is no limit to the number of beneficiaries of a trust.
- Persons other than natural persons can be beneficiaries, for example duly registered trusts, juristic persons, associations or classes of beneficiaries – as long as the beneficiary/s are able to be clearly identified, or are readily ascertainable.
- The founder of a trust may also be a trustee or a beneficiary of the trust or both, but he may not be the only trustee.

Beneficiaries must be identifiable or readily ascertainable

- The Trust Property Control Act does not define a beneficiary, however a trust without identified or identifiable beneficiaries is invalid.
- A natural person, as a beneficiary, should be identified by name and preferably an identity number.
- A “class of persons”, as beneficiaries, should be identifiable through the description of such a class, such as “the descendants of....”.
- The trustees should not have the power to appoint any beneficiaries. In a family inter vivos discretionary trust, the beneficiaries should be defined with reasonable certainty and be determined or determinable from objective criteria such as “the children of X”. Phrases such as “those beneficiaries which the trustees will select as they see fit from no defined class” are not permitted.

- In the case of an impersonal trust (such as a charitable trust), the trust object relates to the way in which persons who are to benefit from such a trust (the beneficiaries) are typically described as a class of persons in such a way that they can be objectively determinable, such as “students meeting the following criteria”.

Common clauses relating to beneficiaries in the trust deed

Protection clauses

The trust deed may provide that any amount paid or accruing to any beneficiary under the trust deed shall remain his sole and exclusive property, and no spouse of such beneficiary shall at any time have or obtain a claim or right thereto. The clause may also specifically state that any amounts paid or accruing to a beneficiary shall not fall into the joint estate or any accrual regime of such a beneficiary, whether the marriage be in or out of community of property.

Payments to a minor beneficiary

A trust deed may also include a clause which provides that the trustees will be entitled to make payment of any amount (capital or income) due or payable to a minor beneficiary to the guardian of such a minor child.

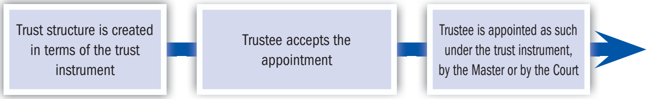
Rights of beneficiaries

- A personal right against the trustee for the trustee’s compliance with his duties.
- Rights in respect of the trust assets/income as stipulated in the trust instrument which can be:
  - Vested rights – assets and/or benefits vest in the beneficiaries, but are administered by the trustees.
  - Discretionary rights – trustees have full discretion to determine benefits of beneficiaries. Thus, the beneficiaries in a discretionary trust have no right to the income/capital until the trustees have exercised their discretion. All they have is a hope of receiving something from the trust, and they will be entitled to any asset/income only once it is distributed by the trustees.

Where a beneficiary accepts the benefits conferred by the trust deed, it can then only be varied with the beneficiary’s consent.

APPOINTMENT AND NATURE OF OFFICE OF A TRUSTEE

- Section 1 of the Trust Property Control Act defines a trustee as "any person (including the founder of a trust) who acts as trustee by virtue of an authorisation under Section 6...." (Letters of Authority).
- A person may not act as a trustee before the date of the Letters of Authority, and any act as trustee before that date is invalid and not rectifiable.



- Section 9(1) of the Trust Property Control Act states that "a trustee shall, in the performance of his duties and the exercise of his powers, act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another." Section 9(2) further states that any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from, or indemnifying him against liability for a breach of trust, where he fails to show the degree of care, diligence and skill as required in subsection (1).
- A natural person or a corporate person may be a trustee.
- The trustee (if there is only one trustee), or one of the trustees (if there is more than one trustee), will be the representative taxpayer for the trust, and will need to be registered as such with SARS.
- Section 12 of the Trust Property Control Act states that trust property shall not form part of the personal estate of the trustee, except in so far as he, as trust beneficiary, is entitled to the trust property. The trust assets therefore do not form part of the trustee's estate in the event of his sequestration.
- The trustee is not personally liable for the debts of the trust.
- At least one independent outsider trustee should be co-appointed as trustee to every trust in which (a) the trustees are all beneficiaries and (b) the beneficiaries are all related to each other.

An independent trustee is a person who cannot benefit from the income or assets of the trust, nor are they related to a beneficiary of the trust.

- A trustee can be a beneficiary of a trust, but a sole trustee may not also be a sole beneficiary of a trust, as a trustee by definition, holds and administers property for some person other than himself.
- A trust may be properly established with only one trustee, and there is generally no upper limit to the number of trustees who may be appointed, and the trust instrument usually specifies the required minimum / maximum number of trustees.

The Master of the High Court may appoint a trustee in certain circumstances

Section 7 of the Trust Property Control Act states that if the office of trustee cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust instrument, after consultation with so many interested parties as he may deem necessary, appoint any person as trustee. In addition, when the Master considers it desirable, he may, notwithstanding the provisions of the trust instrument, appoint as co-trustee of any serving trustee, any person whom he deems fit.

Foreign Trustees

Section 8 of the Trust Property Control Act, as amended, states that a foreign trustee requires specific permission from the Master in writing under section 6, in order to administer or dispose of trust property in South Africa.

Can a trustee bring a legal action on behalf of the trust?

Without a legal personality, a trust does not have legal standing, and therefore the trust itself cannot sue or be sued. The trustees, in their official capacity, however, can sue and be sued – in other words, they act on behalf of the trust, and in this capacity can bring and defend actions concerning the trust.

Disqualification from appointment as a trustee

The Amendment Act amended section 6 of the Trust Property Control Act, to disqualify certain persons to be appointed as trustees.

Rights of Trustees

Right to Remuneration

A trustee is entitled to remuneration as provided for in the trust deed. If no remuneration is provided for in the trust deed, the trustee will still be entitled to reasonable remuneration for the services to be rendered by the trustee. In the event of a dispute, the Master of the High Court may fix the trustee's remuneration.

Right to Make Representation

A trustee who is affected by his proposed removal of office by the other trustees, has the right to make representations with regard to his removal from office. The trustee is entitled to have his representations heard at the meeting which is convened for the purposes of proposing a resolution for the trustee's removal.

Powers of Trustees

The trust deed normally awards wide powers to the trustees in order to ensure proper administration of the trust.

Some examples of powers awarded to trustees include:

- Buying and selling trust property.
- Determining distributions to beneficiaries.
- Hiring and firing professional advisors, tradesmen and contractors.
- Opening/operating bank or building society accounts or facilities.

Trustees are required to exercise their powers independently and objectively.

Trustees hold a fiduciary position and therefore must always exercise their powers to the advantage of the beneficiaries and act within these powers. When trustees act contrary to the provisions of the trust deed, their acts are ultra vires ("beyond their powers") and are therefore invalid.

DUTIES, RESPONSIBILITIES AND OBLIGATIONS OF TRUSTEES

The duties of a trustee can be divided into the following categories:

Obligations in relation to the trust deed

Trustee(s) have an obligation to:

- Lodge the initial trust deed with the Master of the High Court.
- Pay the Master of the High Court's fees.
- Be familiar with the trust instructions including the nature and extent of their powers and duties.
- Lodge amendments to the deed with the Master of the High Court.

Obligations in relation to the trustees

Authority to act – a trustee can only act as trustee once authorised to do so in writing by the Master of the High Court, by way of Letters of Authority.

Notice of address – a trustee must inform the Master of the High Court of his postal and physical address. The Master must be notified of any change of address by registered mail within 14 days of the change.

Exercising discretion – a trustee may delegate tasks, but must make decisions and exercise discretionary powers personally and independently. The trustee is responsible to the beneficiaries for any appointed agent's actions. Where a trustee relies upon a dominant co-trustee and approves of his (wrongful) conduct, he may be removed from office by a court.

Avoid a conflict of interests – a trustee must act in good faith, and at all times avoid any conflict of interests between his personal interests and his official and fiduciary duties to the trust and to the beneficiaries. A trustee may not gain personally from the trust fund (other than reasonable remuneration).

Declare a personal "interest" – a trustee who in any way acquires an interest in an agreement or proposed agreement which has been or is to be entered into with the trust, must immediately declare the nature and extent of this interest in writing to the other trustees (this includes having any relationship, either by blood or by marriage with a person who has such an interest).

Duty of care – a trustee must act with "the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another". Any provision in a trust deed which exempts a trustee from liability for negligence is void and a trustee may be held liable for any losses suffered by beneficiaries if it is found that the trustee did not act with the required degree of care and skill in the administration of the trust assets.

Accountability – a trustee is accountable at all times to the Master of the High Court and to the beneficiaries. If requested in writing to do so (in terms of Section 16) the trustee must give an account of administration and disposal of trust property, provide any relevant book, record, account or document and honestly and truthfully answer any relevant questions by the Master of the High Court. If a trustee becomes aware of any acts or occurrences that may be prejudicial to the rights of the beneficiaries, action must be taken.

Administration – a trustee is also required to adhere to any other specific administrative requirements stipulated in the trust deed, and ensure that he understands the trust deed and the duties that are expected of him in his office as trustee.

Obligations in relation to the trust property

Obtain control of trust property – the trustee must obtain effective control over the trust property as soon as possible after the issue of the Master's Letters of Authority.

Registration and identification of trust property – the trustee must identify the trust property and keep it separate from any personal property. Property (including immovable property and any account or investment at a financial institution) should be registered in the name of the trust. Section 11 of the Trust Property Control Act states as follows:

11. (1) Subject to the provisions of the Financial Institutions (Investment of Funds) Act (no. 39 of 1984), Section 40 of the Administration of Estates Act (no. 66 of 1965), and the provisions of the trust instrument concerned, a trustee shall:

(*a*) indicate clearly in his bookkeeping the property which he holds in his capacity as trustee,

(*b*) if applicable, register trust property or keep it registered in such manner as to make it clear from the registration that it is trust property, (*c*) make any account or investment at a financial institution identifiable as a trust account or trust investment,

(*d*) in the case of trust property other than property referred to in paragraphs (*b*) or (*c*), make such property identifiable as trust property in the best possible manner.

Treatment of immovable property – a trustee must notify all trustees so that a decision may be made in regard to a proposed sale of immovable property held by the trust. A trustee may not withhold information from co-trustees.

Collect debts due to the trust – trustees must collect debts owed in respect of trust property.

Distribute trust income and capital – a trustee must distribute trust income and capital to the appropriate beneficiaries at the time(s) stipulated in the trust deed (where applicable).

Custody of documents – a trustee must keep all documentation relating to the administration of the trust for **five years** after the termination of the trust. Such documents (which includes a document which serves as proof of the investment, safe custody, control, administration, alienation or distribution of trust property) may not be destroyed without the written consent of the Master of the High Court.

Obligations in relation to the finances of the trust

Trust bank account – a trustee must deposit trust monies in a separate account with a financial institution without delay.

Administration – the trustee must administer the trust in terms of the law and the provisions of the trust deed and act with the highest degree of diligence and caution. It is improper for a trustee to borrow trust money.

Trust resolutions and decisions taken by the trustees are required to be documented, and even if all trustees do not agree, and a majority vote is allowed in terms of the trust deed, all trustees still have to sign each resolution of the trust.

Reasonable return on trust capital and investment – a trustee must ensure that a reasonable return is obtained on the trust capital and should ensure that assets are invested productively, wisely and in accordance with sound governance principals.

Bookkeeping, accounting and financial statements – a trustee must keep, at the office of the trust, accounting records that fairly represent the trust's state of affairs and business and explain its transactions and financial position. These records must be available for inspection by any trustee or beneficiary. The trustees are responsible for producing annual financial statements. A trust does not require an audit, unless the Master of the High Court or the beneficiaries request it, or should the trust deed contain a provision requiring an audit.

Asset Register – maintain an asset register for the trust.

Increased disclosure requirements on trustees

The amendments to the Trust Property Control Act are significant – the intention being to increase the disclosure requirements on trustees, mainly in terms of the new Section 11A(1).

The Independent Trustee

The way in which the trust deed is drafted is important, and also the way in which the trust and the trust assets are administered.

It is an abuse of a trust where a person creates a trust, transfers assets to the trust, and then treats the trust assets as though they were his own. The appointment of a truly independent trustee is a true reflection of a founder's intention to create a valid trust. It is thus advisable that at least three trustees, one of whom is completely independent, are appointed to act as such, so that the founder (who may be a trustee and a beneficiary) will have a minority vote.

In **Land and Agricultural Bank of South Africa v Parker (2005)**, the Court suggested that each family trust should appoint an independent trustee. And in March 2017, the Chief Master issued a directive which sets the requirement for the appointment of an independent trustee for all trusts which are defined as "family business trusts".

This is typically a trust set up for the protection of family assets, where the trustees are all beneficiaries, and they are all related. If no independent trustee is appointed for such a family business trust, the Master of the High Court will refuse the registration of the trust.

The Master requires the independent trustee to sign a Sworn Affidavit upon his appointment. The Affidavit requires such a person to declare, under oath, that:

1. He has no family relation or connection, blood or other, to any of the existing or proposed trustees, beneficiaries or founder of the trust.
2. That he is competent to scrutinise 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.
3. That he has no reason to conclude or approve transactions that may prove to be invalid, because he is knowledgeable in the law of trusts.

The independent trustee's function is thus to assist other trustees, who may not be familiar with the legal, tax, accounting and other aspects relating to the trust.

Compliance with legislation

The trustee must ensure that the trust complies with the Trust Property Control Act, and all other applicable legislation (as amended), including, but not limited to, the following:

- The Income Tax Act (no.58 of 1962).
- The Banks Act (no.94 of 1990).
- The Value-Added Tax Act (no.89 of 1991).
- The Financial Institutions (Protection of Funds) Act (no.28 of 2001).
- The Prevention and Combating of Corrupt Activities Act (no.12 of 2004).
- The Financial Intelligence Centre Act (no.38 of 2001).
- The Tax Administration Act (no.28 of 2011).
- Estate Duty Act (no.45 of 1955).
- Protection of Personal Information Act (no.4 of 2013).

Some of the above-named pieces of legislation, in so far as they are applicable to trustees, are discussed in more detail in the Chapter "Other Legislation and Trustees".

Before accepting the appointment as a trustee for a trust, a person should take cognisance of his duties, disclosure requirements, and understand the personal risk in taking up the trusteeship.

LIABILITY OF TRUSTEES

Although a trustee may not act in the capacity of trustee until he has received Letters of Authority from the Master of the High Court, he is still liable for any unlawful act committed in the handling of trust affairs prior to the issue of the letters. Once a trustee has accepted the position and is authorised to act, the trustee must act at all times in the best interests of the trust's beneficiaries and fulfill all duties in terms of the trust deed and the law. If a trustees' actions (alone or with other trustees) contravene either the provisions of the Trust Property Control Act or the trust deed, he and / or they could find themselves personally liable for losses suffered by the trust. An indemnity clause in the trust deed which exempts trustees from liability for breach of trust does not exempt a trustee from actions involving ordinary or gross negligence or intentional wrongdoing. In effect, this means that the personal liability of trustees is more onerous than that of a director of a company in South Africa, as a company may indemnify a director against personal liability.

Criminal liability may be imposed on a trustee who commits a crime in the course of the trust administration e.g. theft or fraud. In addition, the Amendment Act provides that where trustees fail to comply with the disclosure requirements introduced by it, they will commit a criminal offence punishable by up to five years' imprisonment, or a R10million fine, or both.

Trustees are jointly and severally liable for damages, and beneficiaries or third parties (e.g. creditors) who have suffered a loss as a result of breach of trust are entitled to bring a damages claim against the trustees.

Trustees can also be sued for damages by beneficiaries if they act negligently (even if they act in good faith) and / or if they intentionally act wrongfully. A mere omission to act in the interests of the trust (e.g. failure to invest or investing too conservatively resulting in the trust's capital not growing) may be viewed as an act of negligence by the court.

A co-trustee who was not involved with a breach of trust may nevertheless be liable for any wrongful action of another trustee if the "innocent" trustee's ignorance and / or inactivity is causally connected to the damage incurred.

For example: where the “innocent trustee” is aware of a breach of trust by co-trustees but does not report it, or where the “innocent trustee” improperly allows trust funds to remain in the sole control of co-trustees.

Section 19 of the Trust Property Control Act states that if any trustee fails to comply with a request by the Master in terms of Section 16, or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property, may apply to the court for an order directing the trustee to comply with such request or to perform such duty. Section 16 refers to the situation where the Master requests in writing that a trustee shall account to the Master, to his satisfaction, and in accordance with the Master’s requirements, for his administration and disposal of trust property and to deliver to the Master any book, record, account or document relating to his administration or disposal of the trust property, and shall, to the best of his ability, answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property.

The Master may, if he deems it necessary, cause an investigation to be carried out by a fit and proper person appointed by him into the trustee’s administration and disposal of trust property, and shall make such order as he deems fit in connection with the costs of the investigation.

In addition, any person who feels aggrieved by an authorisation, appointment or removal of a trustee by the Master or by any decision, order or direction of the Master made or issued under the Trust Property Control Act, may apply to the court for relief, and the court shall have the power to consider the merits of any such matter, to take evidence and to make any order it deems fit.

Reporting of Irregularities by an Auditor of the trust

If an irregularity in connection with the administration of a trust comes to the notice of a person who audits the accounts of a trust, such a person shall, if in his opinion it is a material irregularity, report it in writing to the trustee/s, and if such irregularity is not rectified to the satisfaction of such person within one month as from the date upon which it was reported to the trustee/s, that person shall report it in writing to the Master of the High Court.

REMOVAL AND TERMINATION OF OFFICE OF A TRUSTEE

Removal from office

A trustee may, on the application of the Master of the High Court or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.

A trustee may also be removed from office by the Master of the High Court under the following circumstances (in terms of section 20 of the Trust Property Control Act, as amended):

- If the person becomes disqualified to be authorised as a trustee in terms of section 6(1A).
- If the trustee failed to give security/additional security within two months of the Master of the High Court's request.
- If the trustee's estate is sequestrated/liquidated, or placed under judicial management.
- If the trustee is declared mentally ill/incapable of managing their own affairs, or if the trustee is by virtue of the Mental Health Care Act, (no. 17 of 2002), detained as a patient in an institution or as a President's patient.
- If the trustee fails to perform satisfactorily any duty imposed upon the trustee by or under this Act, or to comply with the requirements of this Act, or any lawful request of the Master of the High Court.

Termination of office

A trustee can also cease to be a trustee in one of the following ways:

- Death (the trusteeship does not pass to the executor of the trustee's estate).
- Resignation.
- Dissolution of the trust.
- Any other way the trust deed may authorise a trustee's termination of office.

Most trust deeds will set out the circumstances when the office of trusteeship will be vacated – for example, if a trustee should die, resign, or if he shall become unfit or incapable of acting as a trustee, or of unsound mind or mentally incapable of managing his affairs, or if he should become insolvent or go into liquidation, or if he should become disqualified to act as a director in terms of the Companies Act (no.71 of 2008), or if the majority of the trustees require in writing that he resign.

Section 21 of the Trust Property Control Act provides that whether or not the trust instrument provides for the trustee's resignation, the trustee may resign by notice in writing to the Master of the High Court, as well as the the ascertained beneficiaries who have legal capacity, or to the tutors or curators of the beneficiaries of the trust (whichever is applicable).

Should a trustee die or resign, the Master of the High Court requires the **original** Letters of Authority together with the death certificate or resignation letter from the outgoing trustee, as well as a resolution by the remaining trustees accepting and approving the changes to the trusteeship.

Should a trustee be removed from office, the Master of the High Court requires the **original** Letters of Authority, together with the court order or Master's direction, as well as a resolution by the remaining trustees accepting and approving the changes to the trusteeship.

Any change of trustees, for whatever reason, is only of legal force and effect once the original Letters of Authority/Master's Certificate have been amended by the Master of the High Court to reflect that change.

Steps must then be taken to appoint a new trustee, and until the minimum required number of trustees have been formally appointed by the Master of the High Court and amended Letters of Authority/Master's Certificate issued reflecting their names, the trust cannot transact.

Access to Court

Any person who feels aggrieved by an authorisation, appointment or removal of a trustee by the Master of the High Court, or by any decision, order or direction of the Master made or issued under the Trust Property Control Act, may apply to the court for relief, and the court shall have the power to consider the merits of any such matter, to take evidence, and to make any order it deems fit.

OTHER LEGISLATION AND TRUSTEES

- **The Financial Institutions (Protection of Funds) Act (no. 28 of 2001)** – intends to provide for, and consolidate the laws relating to the investment, safe custody and administration of funds and trust property by financial institutions.
- **Income Tax Act (no.58 of 1962)** – defines a trust as "any trust fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a deed of trust or by agreement or under the Will of a deceased person."

The Income Tax Act views a trust as a "person" for tax purposes, and accordingly all trusts must be registered with the SARS. It is the duty of the trustees or representative taxpayer(s) of the trust, to register the trust for income tax purposes.

- Various taxation sections and anti-avoidance measures have been introduced relating to trusts.
- **Estate Duty Act (no.45 of 1955)** – Section 3(3)(*d*) of the Estate Duty Act is relevant where the trust instrument contains a provision that empowers the deceased, immediately before his death, to:
  - Appropriate or dispose of property held in the trust.
  - Revoke or vary the provisions of any donation, settlement, trust, or other disposition made by him to the trust, for his own, or his estate's benefit. In addition, a trust deed may typically contain clauses that attempt to protect the estate planner, such as the inclusion of a casting vote, or a testamentary reservation. Such clauses may compromise him, and the trust property, as a result, may be included in the estate of the deceased as deemed property and attract estate duty. The fact that the deceased had the ability to deal with the assets in the way envisaged in the Act, the day before he dies, will result in the assets being included in the estate of such a person upon death.

Thus, if the trust instrument permits the estate planner to have a casting vote (an extra vote given by a person to decide an issue when the votes on each side are equal, therefore a determining vote), the trust's assets may be included in the estate of the estate planner upon his or her death in terms of the provisions of Section 3(3)(*d*) of the Estate Duty Act, thereby defeating the object of creating a trust in the first place.

- **Protection of Personal Information Act (no.4 of 2013) ("POPIA")** – commenced on 1 July 2020. All business and legal entities, whether owned by individuals, companies, partners, sole proprietors, close corporations, NGO's/PBO's, associations, which includes business trusts, are required to comply with POPIA. The trustees of business trusts are required to adhere to the 8 general conditions for the lawful processing of personal information of its data subjects (whether they are its clients/suppliers or employees), as set out in the Act, which can be summarised as:

  1. Accountability
  2. Processing limitation
  3. Purpose specification
  4. Further processing limitation
  5. Information quality
  6. Openess
  7. Security Safeguards
  8. Data Subject participation

  In addition, when processing the personal information of a minor child (a person below the age of 18 years old), perhaps in the child's capacity as a beneficiary of a trust, a trustee should be cognisant of Section 35 of POPIA, which states that the processing of information about children is only allowed if: (i) it is carried out with the prior consent of a competent person (such as a parent or guardian) (ii) it is necessary for the establishment, exercise or defence of a right or obligation in law (iii) it is necessary to comply with an obligation of international public law (iv) it is for historical, statistical or research purposes or (v) it is of personal information which has deliberately been made public by the child with the consent of a competent person.

- **Value-Added Tax Act (no.89 of 1991)** – a trust must register for VAT if it, as an enterprise, has taxable supplies, goods or services of more that R1 million that are made in any 12-month consecutive period. A trust making taxable supplies of less than R1 million may register voluntarily.
- **The Financial Intelligence Centre Act (no.38 of 2001) ("FICA")**, as amended – some of the FICA documents required for trusts are as follows:
  - Verification of all authorised trustees and beneficiaries (income tax, identity numbers and proof of residential addresses not older than 3 months).
  - Letters of Authority to act as trustees and copy of the trust deed.
  - Resolution authorising trustee to act on the trust's behalf in a property transaction (where applicable).
  - Income tax number of the trust.
  - VAT number of the trust (where applicable).
  - For bond registrations, the financial institution may require financial statements and / or personal suretyship from the trustees.

REGISTRATION AND DEREGISTRATION OF A TRUST

Registration of a trust

An inter vivos trust must be registered at the office of the Master of the High Court in whose area of jurisdiction the greatest portion of the trust assets is situated. If more than one Master has jurisdiction over the trust assets, final jurisdiction will rest with the Master of the office where the trust was first registered.

In respect of a testamentary trust, jurisdiction will lie with the Master of the High Court whose office the testamentary writing (Last Will and Testament) or copy thereof is registered and accepted.

The following documents must be lodged in order to enable the Master to register an inter vivos or testamentary trust, and to issue Letters of Authority to the nominated trustees:

Documents Required by Master to Register the Trust	Inter Vivos Trust	Testamentary Trust
Original trust deed or notarial certified copy thereof	✔	Deceased's Last Will and Testament
Payment of fee	✔	No fees involved
Application form (J401)	✔	✔
Completed Acceptance of Trusteeship (J417) for each Trustee	✔	✔
Acceptance of Auditor Application (J405) forms	✔	✔
Beneficiary declaration form (J450)	✔	✔
Sworn Affidavit signed by Independent Trustee	✔	✔
Trustee(s) Identification – Certified copies of ID / Passport / Organisation Proof of Registration (CK1)	✔	✔

Documents Required by Master to Register the Trust	Inter Vivos Trust	Testamentary Trust
Trustee(s) Representative Identification – Certified copies of ID or Passport (Mandatory for Organisation Trustee(s))	✔	✔
Beneficiaries Identification – Certified Copies of ID or Birth Certificates / Passport / Organisation (CKI)	✔	✔
Bond of security by the trustees – form J344 (if required by the Master)	✔	✔
Statement of case for Master to dispense with security (JM21)	✔	✔
Final Certified Court order (if applicable)	✔	✔

Deregistration of a trust

The Trust Property Control Act makes no provision for the deregistration of a trust. The common law, however makes provision for the termination of a trust by operation of law in the following circumstances:

- By statute.
- Trust objective has been realised.
- Failure of the beneficiary.
- Renunciation or repudiation of rights by the beneficiary.
- Trust assets have been destroyed without fault on the part of the trustee.
- Operation of a resolutive condition.

If a trust can be terminated on one of the above grounds then the Master will deregister a trust. For the termination of a trust the following documents are required:

- The original Letters of Authority.
- A trustee resolution resolving to deregister the trust (where applicable).
- A tax compliance certificate from SARS, indicating tax compliance of the trust.

- Bank statements reflecting a nil balance on the final statement.
- Proof that the beneficiaries have received their benefits.
- A final set of Annual Financial Statements for the trust, reflecting a nil balance sheet (nil assets and nil liabilities).

The first 3 documents listed above must be lodged with the Master of the High Court with whom the trust has been registered. Upon receipt of the same the Master will deregister the trust. Once the Master has confirmed its deregistration, SARS is then notified to remove the trust from its taxpayer database.

TRUSTS AS A FINANCIAL AND ESTATE PLANNING TOOL

Trusts can serve a dual function of protecting assets as well as creating certain taxation benefits.

To protect minor beneficiaries and incapacitated persons

- Setting up a special trust for a mentally disabled or incapacitated person allows for the safe custody of assets while at the same time benefitting from lenient tax treatment from an income tax and capital gains tax perspective.
- Setting up a testamentary trust for the benefit of minor children provides some income tax benefits as well as preventing any funds being held by the Guardian's fund on behalf of the minor.

Protection against creditors

- A discretionary trust may enjoy creditor protection in the case insolvency (subject to insolvency rules).
- Where the asset was transferred to the trust while the founder was solvent it would be difficult for creditors to set aside the trust transaction.
- Where there are vested rights – the protection is only afforded to those assets in which the insolvent has no vested rights (a bewind trust provides no protection in these circumstances).

Capital gains tax and trusts

With the introduction of capital gains tax, the effectiveness of the use of inter vivos ordinary trusts in estate planning has been slightly negated.

Capital gains tax is payable by any trust in South Africa on any gains made as a result of a disposal of assets after 1 October 2001.

Estate duties

- If properly planned, managed and controlled, a trust can act as a significant shelter against future estate duties.
- The founder may transfer assets with growth potential into a trust, preferably a discretionary trust, with his children and grandchildren as beneficiaries.
- Assets can also be bequeathed to an inter-vivos or testamentary trust.
- The growth in the assets from the date of transfer to date of his death accrues to the trust, and at most, only the value of the asset at the date of the transfer (usually in the form of a loan account) is retained in his estate.
- The loan account is usually gradually reduced during the founder's lifetime by loan repayments, further reducing estate duty liability.
- Any growth in the asset(s) will take place in the trust and not in the founder's hands. The increase in value will not be included in the founder's estate and the value of his estate (and therefore estate duty) is reduced accordingly.

These benefits are only applicable to a discretionary inter vivos trust and not vested or bewind trusts.

In addition, the provisions of **Section 3(3)(*d*) of the Estate Duty Act** and **Section 7C of the Income Tax Act** should be borne in mind by the estate planner.

Methods of transferring assets into a trust

Assets can be transferred into a trust by sale (via a loan granted to the trust), a donation or on death in terms of a Last Will and Testament.

By donation: The founder will pay donations tax on the value of the assets donated to the trust. The first R100,000 per annum per natural person is exempt from donations tax.

By Last Will and Testament: Assets could in terms of a Last Will and Testament be bequeathed to a trust to assist with the estate duty saving of the heirs.

By sale: Assets can be sold to the trust at fair market value against a loan account. The sale must be at fair market value, otherwise the founder will probably have to pay donations tax. Such a sale will also have capital gains tax consequences.In order to gradually reduce the loan account, the founder may then donate up to R100,000 each year to the trust without attracting any donations tax liability. The balance of the loan account will be included in his estate when he dies.

There must be loan agreement or a sale agreement in these circumstances. Without an agreement, SARS could regard the transaction as a donation.

The loan agreement does not necessarily have to include an interest rate provision, but must include a repayment date. However, since the introduction of Section 7C to the Income Tax Act, to the extent that interest is not charged on the loan at SARS's official interest rate, it will be treated as a donation, as is described in more detail below.

IMMOVABLE PROPERTY AND TRUSTS

Checklist when buying or selling a property using a trust

- Review the trust deed, particularly the clauses pertaining to the powers and authority of the trustees to act. They must have the requisite capacity to contract on behalf of the trust regarding the acquisition or disposal of property, or power to obtain a mortgage bond or pass a mortgage bond over any immovable property held in trust by them.
- The trustees must be duly authorised to act in terms of the most recent Letters of Authority issued by the Master of the High Court, or Master's Certificate, if the trustees have changed.
- Obtain all signing trustees' identity documents, and other FICA documentation.
- The board of trustees must be properly constituted. The minimum number of trustees required by the trust deed must be appointed.

- Provided the trustees are authorised by the trust deed to delegate their authority to act, they must then issue the necessary authority for one trustee to act on their behalf, failing which, all trustees are required to sign the necessary documentation. A prior resolution of trustees is required authorising the purchase or sale of any immovable property in the name of the trust. If this is not effected, all of the trustees will be required to sign the Deed of Sale.
- An asset register must be kept of each property acquired in a trust.

Advantages of buying or selling immovable property using a trust

Advantages

- The trust is treated as an entity separate from the individuals.
- Assets don't form part of the insolvent estate in the event of sequestration.
- Strict controls – trustees are accountable to Master of the High Court.
- Special trusts formed for mentally ill or seriously disabled, will be allowed CGT exemption if primary residence (and meets other requirements to qualify).
- Special trusts – taxed at individual rates.
- Trust deed can be set up so as to determine the manner in which trustees administer the fixed property and the trustees are dutybound to obey these wishes.

Disadvantages

- The trust cannot be sold as an entity on its own.
- The beneficiaries normally have discretionary rights which are not assets that can be sold, such as shares.
- Trustees cannot act until Letters of Authority have been issued.
- The addition or substitution of a beneficiary in a discretionary trust may trigger transfer duty if the trust holds residential property as per Section 1 of the Transfer Duty Act (no.40 of 1949).

Transferring property into a trust should be considered in light of ongoing and proposed legislative amendments. Each situation should be considered on its own merits (with the aid of specialists in the field).

Tax Rates for Trusts

Tax rates applicable to trusts are as follows:

Type of Trust	Income Tax Rates	Capital Gains Tax Inclusion Rate
Normal or "Ordinary" Trust	45%	80%
Special Trust	Same as those applicable to natural persons, except that the rebates and interest exemptions do not apply. The tax rates for natural persons for the 2024 year of assessment is between 18% to 45%.	40%

For taxation purposes a trust is considered to be a separate "person".

A trust will be considered to be resident for tax purposes if it is incorporated, established, formed or has its place of effective management in South Africa.

Depending on the circumstances, trust income can be taxed in the hands of the donor, beneficiary or the trust.

A grey area exists where a trust distributes a capital gain to a non-resident beneficiary. Trustees should therefore seek advice before making capital distributions to non-resident beneficiaries, as in terms of the SARS interpretation the capital gain would most likely be taxed in the hands of the trust.

Income Tax

Trustees may create tax efficiencies based on the timing and amounts of distributions made to beneficiaries.

Where income received by the trust is paid out to the beneficiaries within the same tax year, it is treated, for tax purposes, as if it had never been received by the trust, but rather directly by the beneficiaries. It is therefore advisable for distributions to be made to the beneficiaries in the same year as income is received.

The trust acts as a conduit through which income flows. Income flowing through a trust to beneficiaries retains its identity. Therefore, interest received by the trust is also treated as interest received by the beneficiary and is thus taxed in the beneficiary's hands.

A taxable capital gain on the disposal of an asset by a trust could also be distributed by the trust and taxed in the hands of the beneficiary. However, unlike normal income, a taxable capital gain cannot flow through multiple trusts.

Where income is taxed in the hands of the trust, any subsequent distribution thereof will not again attract tax in the hands of the beneficiary.

Anti-avoidance provisions

Anti-avoidance provisions exist to combat the use of trusts for income splitting and tax avoidance schemes. These provisions will normally be applicable where income accrues to a person other than the donor as a result of a donation, settlement or other disposition made (i.e.interest free loans). These provisions may apply where income accrues to the following persons:

The donor's spouse, a minor child of the donor, the trust to whom the donation, settlement or other disposition has been made, and non-residents.

The result of the anti-avoidance provisions are that the income that accrues to the person's mentioned above are deemed to be the income of the donor.

Interest-free and low-interest loans to a trust

With effect 1 March 2017, and the introduction of Section 7C of the Income Tax Act, loans made to a trust by

- a natural person, or
- at the instance of that person, a company in relation to which that person is a connected person, and where that person or company is a connected person in relation to the trust

an amount, calculated as the difference between the amount of interest incurred by the trust (if any, otherwise nil) and the interest that would have been incurred by that trust had the official rate of interest been charged on the loan, will be a continuing, annual donation for purposes of donations tax, made by the lender on the last day of the year of assessment of the trust

The following will be specifically excluded from the preceding donation provisions:

- special trusts that are created solely for the benefit of disabled persons.
- trusts that fall under public benefit organisations.
- vesting trusts (in respect of which the vesting rights and contributions of the beneficiaries are clearly established).
- loans used by the trusts to fund the acquisition of a primary residence.
- loans that constitute affected transactions and are subject to transfer pricing provisions.
- loans provided to the trust in terms of a sharia-compliant financing arrangement, or
- loans that are subject to dividends tax.
- loans to a qualifying employee share purchase trust.

The lender may utilise the annual donations tax exemption of R100 000 (or remaining portion if applicable) against this deemed donation.

No deduction, loss, allowance or capital loss may be claimed in respect of the reduction, waiver or other disposal of such a loan, advance or credit by the lender and will thus have no tax benefit for the lender.

Loans by a natural person or a company to a company is also subject to donation tax on the same basis if 20% or more of the shares of the company is held directly or indirectly by a trust (or beneficiary of trust or spouse of beneficiary). Preference shares issued by a company are also regarded as loans for this donation tax calculation.

Other anti-avoidance provisions for trusts

Various anti-avoidance provisions exist to combat the use of trusts for income splitting and tax avoidance schemes, including the deemed donation tax to be levied on interest-free or low interest loans to trusts.

Income splitting occurs where the marginal rate of tax is reduced to an amount less than if the income had been taxed from one source.

Section 103(2) of the Income Tax Act includes trusts – and prevents the utilisation of any loss in a trust, solely for the purposes of avoiding tax.

The Section 7 deeming provisions of the Income Tax Act work mainly on the basis whereby any income earned by the trust as a result of a donation, settlement, or other disposition made by a person ("the donor") which is not distributed, is deemed to be the income of that donor and taxed in their hands. If income is distributed to beneficiaries who are minor children of the donor, the income is also taxed in the hands of the donor. Similar provisions exist in respect of capital gains made by or accrued to a trust.

Withholding Tax on Acquisition of Property from Non-Resident by a Trust

The purchaser (trust) must withhold CGT on the purchase price where immovable property are purchased from a non-resident except where the amount payable by the purchaser is less than R2 million. The amount withheld is an advance tax in respect of the sellers' liability for CGT. This withholding tax is not a final tax and is merely a prepayment of the expected CGT.

The following withholding tax rates are applicable and are based on the proceeds on disposal:

NON-RESIDENT SELLER	2022	2023	2024
Trust	15%	15%	15%

SPECIAL TRUSTS

A trust in South Africa can also be used for another specific purpose, and be categorised as a "Special Trust".

For tax purposes the following types of special trusts are recognised:

Special Trust Type A – a trust created solely for the benefit of a person(s) with a "disability", as defined in section 6B(1) of the Income Tax Act (no.58 of 1962)*, where the disability makes it impossible for the person(s) from earning enough money for their care or from managing their own financial affairs: Provided that –

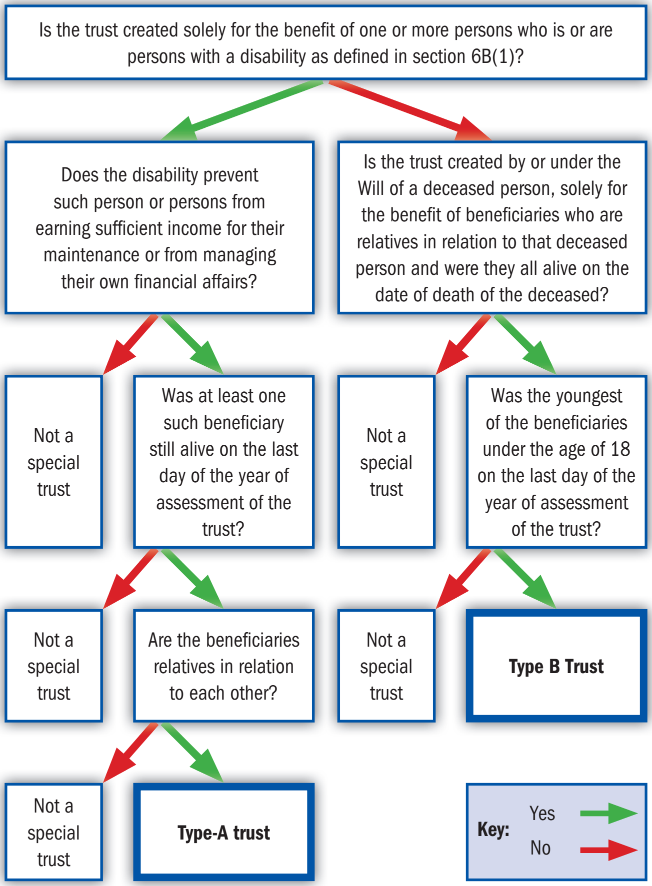
- Such trust shall be deemed not to be a special trust in respect of years of assessment ending on or after the date on which all such persons are deceased; and
- Where such trust is created for the benefit of more than one person, all persons for whose benefit the trust is created must be relatives in relation to each other.

Special Trust Type A trusts can be testamentary or inter vivos trusts and are some-times created as a result of a court order in favour of a specified natural person. **In order to be classified as a Special Trust Type A, approval must be obtained from SARS.**

*Disability
A "disability", as defined in section 6B(1) of the Income Tax Act means – a moderate to severe limitation of a person's ability to function or perform daily activities as a result of a physical, sensory, communication, intellectual or mental impairment. The disability must be diagnosed by a duly registered medical practitioner, and that disability must have lasted or has a prognosis of lasting more than one year.

Special Trust Type B – this is a testamentary trust created by a testator by or in terms of his Last Will and Testament, which is created solely for the benefit of a person(s) who is a relative of that testator, and such person(s) are alive on the date of death of that deceased testator (including those conceived but not yet born), and the youngest of the beneficiaries is younger than 18 years on the last day of the year of assessment. A trust will cease to be a Type-B trust as from the beginning of a year of assessment in which the youngest of its beneficiaries turns 18 years old.

IDENTIFYING TYPES OF SPECIAL TRUST



TAX TREATMENT OF SPECIAL TRUSTS

Unlike conventional or "ordinary" trusts which are taxed at a flat rate of tax (45% for the 2024 year of assessment), both Type A and Type B special trusts are taxed on the same sliding scale applicable to natural persons, except that the rebates medical tax credits and interest exemptions do not apply.

For Capital Gains Tax purposes, both the Type-A trust and Type-B trusts are treated as an individual, with a capital gains tax inclusion rate of 40% (2024 year of assessment). The distinction between a Type-A trust and a Type-B trust is important however, in that a Type-A trust qualifies for certain further relief from Capital Gains Tax (CGT) while a Type-B trust does not qualify for such relief. Type A trusts will be allowed the CGT exemption for primary residence (where a primary residence is disposed of, the capital gains relating thereto of up to R2 million is exempt from CGT), should all other requirements also be met in order to qualify. The Type-A trust also qualifies for the CGT annual exclusion (R40 000 for the 2024 year of assessment). The property legally and beneficially owned by a Type-A trust will be a "primary residence" of that trust, provided the beneficiary or a spouse of the beneficiary uses the property mainly (more than 50%) for domestic (that is, residential) purposes.

On disposal of personal-use assets by Special Trusts, capital gains or losses thereon may be disregarded for Special Trusts Type A, but not for Special Trusts Type B. In addition, a Special Trust Type A may disregard capital gains or losses on compensation for personal injury, illness, or defamation of the beneficiary of that trust, but this is not the case for a Special Trust Type B.

Only a Type-A Special Trust is excluded from the application of section 7C – and not a Type B Special Trust.

Summary of tax on special trusts

	Natural person	Special trust Type A	Special trust Type B
For Income Tax:			
Taxed at individual rates: sliding scale 18% to 45%	✔	✔	✔
Interest exemption	✔	✘	✘
Local dividend exemption	✔	✔	✔
Foreign dividend exemption	✔	✔	✔
S 10A exemption (Purchased annuities)	✔	✘	✘
Medical tax credits	✔	✘	✘
Normal age rated tax rebates	✔	✘	✘
For Capital Gains Tax:			
Inclusion rate of 40%	✔	✔	✔
Annual R 40 000 exclusion	✔	✔	✘
R 2 million primary residence exclusion	✔	✔	✘
Personal use asset exclusion	✔	✔	✘
Compensation for injury, illness and defamation exclusions	✔	✔	✘

SARS REPORTING REQUIREMENTS FOR TRUSTEES: 1 SEPTEMBER 2023

- SARS has increased the reporting requirements for trustees of resident trusts.
- As from the 1 September 2023, trustees, as representative taxpayers for a trust, are required to submit an IT3(t) form to SARS electronically – relating to the trust for which he or she acts as trustee.
- The IT3(t) will be due on the 30th September of each year in which the trust's tax year ends.
- The trustees will be required to supply information about all distributions made from the trust to beneficiaries or other persons (in respect of any amount vested in a beneficiary including income (net of expenditure), capital gains and capital amounts distributed by 30 September during the preceding tax year of assessment, which ended at the end of February of the same year.
- In addition to the information about distributions, demographic information about the trust and beneficiaries will also be required to be submitted.
- **Summary of Information required to be provided in the IT3(t):**
    - Demographic information of the reporting trust
    - Demographic information of the trustees and beneficiaries, which includes:
        - (a) Identity number/Passport number
        - (b) Address and contact details
    - Details relating to all financial flows including loans, donations and distributions, including:
        - (a) Taxable amounts distributed to/vested in persons/beneficiaries
        - (b) Details of all non-taxable income distributed
        - (c) All trust financial flows

A complete list of information required in the IT3(t) can be found in a document published by SARS entitled Business Requirement Specification (BRS) document on IT3 data submissions.

EXAMPLES OF IMPORTANT CASE LAW

Case	Court Decision	Relevance
IK v MK 2020	The trustee was using trust(s) as his alter-ego and the trust instruments were drafted in such a way as to benefit the husband (in this case) and to give him control over the trusts' assets. He could decide how, when and if, his wife would benefit from the trust(s). The judge ordered that the "veil" protecting the trust(s) be pierced to determine the accrual of the husband's estate in the divorce proceedings.	A spouse who anticipates an imminent divorce, cannot use trust(s) to conceal asset(s) that the founder(s) and trustee(s) are not willing to disclose to interested parties. One cannot mingle personal assets with trust assets.
Jordaan vs Jordaan 2001	Trust was the founder's alter ego (founder treated trust assets as his own), assets were subject to division.	Separation of ownership (or control) from enjoyment is fundamental in creating a valid trust.
Doyle v Board of Executors 1999	Beneficiaries are entitled to have access to the books of account of the trust.	Trustees must keep accurate records and act in good faith.
Potgieter v Potgieter NO 2012	Beneficiary had not agreed to amendment of trust deed so agreement was invalid.	Once a beneficiary has accepted his rights, any change to the trust deed must be agreed by the beneficiary.

Case	Court Decision	Relevance
Simplex (Pty) Ltd v van der Merwe and Others 1996	Trustees had acted before being authorised to do so by the Master and agreements were null and void.	Trustees have no authority to act until Letters of Authority had been issued by the Master.
Steyn and Others NNO v Blockpave (Pty) Ltd 2011	Transactions are not valid if all the trustees have not agreed to them.	All trustees must act together when making decisions affecting the trust.
Rees v Harris case of 2012	The creditor attempted to attach the trust's assets (which was connected to the trustee), the Court held that in appropriate circumstances, the veneer of a trust can be pierced in the same way as the corporate veil of a company.	Separation of ownership from control of assets. Where if it can be demonstrated that a trustee has actual control over trust assets, and acquired and owns such assets purely for his/her sole benefit, then the trust form would be disregarded and treated as an "alter ego" trust, and the assets would be considered as belonging to the trustee, and not the trust.
Land and Agricultural Bank of South Africa v Parker 2005	Contracts were void because they were not signed by the stipulated number of trustees.	A sub-minimum of trustees cannot bind a trust.

MASTER OF THE HIGH COURT OFFICES IN SOUTH AFRICA

Section 3 of the Trust Property Control Act deals with the jurisdiction of the Master's office in South Africa, in regard to a testamentary trust, and provides that jurisdiction shall lie with the Master in whose office the testamentary writing or a copy thereof is registered and accepted, and in any other case, with the Master in whose area of appointment in terms of the Administration of Estates Act (no. 66 of 1965), the greater or greatest portion of the trust property is situated – provided that a Master who has exercised jurisdiction shall continue to have jurisdiction notwithstanding any change in the situation of the greater or greatest portion of the trust property.

An inter-vivos trust must be registered with the Master in whose area of jurisdiction the greatest portion of the trust assets are situated. If more than one Master has jurisdiction over the trust assets, the Master in whose office the trust was first registered will continue to have jurisdiction.

A Master of the High Court is appointed for every provincial division of the High Court of South Africa. Masters' Offices are situated in Bloemfontein, Cape Town, Grahamstown, Kimberley, Mmabatho/Mafikeng, Nelspruit, Pietermaritzburg, Pretoria (Tshwane), Umtata, Bisho, Thohoyandou, Johannesburg, Polokwane, Durban, and Gqeberha (Port Elizabeth).

NOTES

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Disclaimer

We recommend that professional advice be sought before making any decisions based on this guide's contents or when dealing with any matters relating thereto. The guide should not be treated as a substitute for advice. Professional advice must therefore be sought in relation to any aspect referred to in this guide. All references to the masculine gender shall include the feminine (and vice versa). While every care has been taken in the compilation of this guide, no responsibility of any nature whatsoever shall be accepted for any inaccuracies, errors or omissions.

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