

Trust trusts to carry out the wishes of your will

Testamentary trust often the best option to ensure fairness

By ANGELIQUE ARDÉ

● You may think of trusts as the preserve of the wealthy, but that's not entirely the case. A trust is a very useful vehicle that can be established to provide for the needs of minor children, children with special needs, or dependants who may not be good at handling money, including a surviving spouse.

You can set up either a testamentary or an inter vivos trust, depending on your needs. A testamentary trust may be both necessary and a cost-effective way to meet the needs of many families.

A testamentary trust is one that is set up on your death through your will. An inter vivos trust is created by way of a contract, not a will, and operates while you are alive.

While you may not need an inter vivos trust, if you don't make provision for a testamentary trust, any money you leave to minor beneficiaries will go to the Guardian's Fund, which falls under the administration of the master of the high court. Making claims from this fund for the everyday needs of beneficiaries can be an administrative nightmare, and the money in the fund is generally conservatively invested.

A testamentary trust can also be useful for blended or "reconstituted" families, which are families where one or both parents have children from previous marriages, says Advocate Sankie Morata, the chief operations officer of Sanlam Personal Finance: Fiduciary Services.

A Money reader, who is twice divorced and married to his third wife, says he has been advised to set up a trust. "I'm turning 68 and nearing retirement. I have two children of my own and two stepchildren. None of them are dependants. When I die, I want to make provision for my wife, but I want to make sure that my assets go to my children," says the reader, who asks not to be named.

The reader has a house worth several million rands, and retirement savings.

The agents advising him have not specified what type of trust he needs, nor the costs associated with setting up or managing a trust.

Morata says the reader could consider bequeathing his property to a testamentary trust, subject to his wife having a usufruct on the property. This gives her the right to live in the house until she dies. At her death, full ownership of the property goes to the trust and, ultimately, his children when the trust dissolves and the property is distributed. "She enjoys use of the property, even the income if she were to rent it out, but she doesn't have full ownership."



Setting up a trust is not only for the wealthy. Experts say a testamentary trust, which comes into effect upon your death, makes sense for many. Picture: 123rf.com

If he were to leave the property to his wife, she might not leave it to his children on her death. The trust ensures that the assets are used as you intended and managed by the trustees to ensure their best use for your heirs.

Costs

Angelique Visser, the vice-chairwoman of the Fiduciary Institute of Southern Africa and a director at Baraza Wealth, says the cost of setting up a testamentary trust will depend on the fiduciary practitioner used.

Many fiduciary practitioners do not charge a fee to register the trust with the master of the high court but do charge an ongoing trustee fee to administer the trust. Some practitioners also charge up to 1.5% of the value of the trust assets as an acceptance fee over and above the annual trustee fee, which could be up to 2% a year.

"Trustee fees are not regulated, and it is therefore highly recommended that you determine what your appointed trustee will charge when a testamentary trust is set up



You need to negotiate fees with the trust company and include these in your will

Sankie Morata

Chief operations officer of Sanlam Personal Finance: Fiduciary Services

in your will.

"It is also a good idea to set the fees out in your will, lest they become quite costly," Visser says.

Morata says fees charged by trust companies vary between about R850 and 1.5% of the assets, plus a percentage of the income, which is normally 6%. You need to negotiate

these fees and include this in your will. He says fees must be reasonable and there must be a balance between cost and value.

Morata says that fees are determined by the nature of the assets in the trust.

Where the trust company is also a trustee, it may charge a trustee fee, an ongoing cost to the trust, Morata says.

Costs are an important consideration, especially when they are based on assets in the trust. "Some people only become wealthy at death, when their life policy pays out," Morata says.

"When you create an inter vivos trust, you transfer your assets into the trust and in doing so incur costs such as capital gains tax and transfer duty if property is among your assets, which means you need cash at the time of setting up the trust.

"If you don't have the cash it becomes more practical to do it at death, when there's enough liquidity in your estate to cover these costs," Morata says.

To put your assets into an inter vivos trust you need to donate your assets, incurring do-

nations tax, or sell your assets to the trust.

To avoid donations tax, most people choose to sell their assets to the trust, but typically the trust doesn't pay you for these assets. Instead, you open a loan account and the trust owes you the money and must pay interest on the outstanding balance.

Each year you can donate R100 000 tax-free to the trust and in this way reduce the loan. However, if you are at an advanced age, you could die before the loan is repaid, leaving you with an asset in your estate that could attract estate duty.

As soon as you register an inter vivos trust, there will be compliance requirements to be met, for example, to register the trust as a taxpayer with SARS and lodge annual tax returns, Visser says.

"If you want to keep costs low, a testamentary trust may be less expensive as it will only be set up after your death and compliance requirements will have to be met thereafter, but then you may miss out on estate-planning opportunities during your lifetime."

Take care when appointing your trustees

● The appointment of trustees is not something to be taken lightly. Often, people choose close friends to be the trustees of their testamentary trust. This is problematic, because circumstances change, and friends emigrate and die unexpectedly. If you aren't on top of your affairs, you might not have amended your will to reflect your wishes.

Angelique Visser, the vice-chairwoman of the Fiduciary Institute of Southern Africa and a director at Baraza Wealth, says it's crucial that you review your will annually, when you review your financial plan. Check that you are still happy with your choice of guardian and trustees.

Visser advocates including at least one professional trustee. "You need someone who knows what the legal requirements are. It will also be very important to ensure that one selects a trustee who has the necessary experience, professional indemnity and is a member of a professional body that sets high ethical standards as this person will be responsible for managing the trust assets for the benefit of one's loved ones."

She is also in favour of a family member as a co-trustee. "But understand you are placing a burden of responsibility on that person. You can't expect such a person to know trust law, even if they are a professional person in their own right. Professionals are busy and don't always have the time to manage a trust. And when something goes wrong — when a creditor or beneficiary sues the trust — all the trustees are exposed."

Advocate Sankie Morata, the chief operations officer of Sanlam Personal Finance: Fiduciary Services, says all trustees are jointly and severally liable for their actions, but not all will expect to be paid. "For example, if I was a trustee in my brother's estate in my personal capacity, I wouldn't charge because it means my brother's children would inherit less."

The duties of a trustee are wide but can be summarised as follows, says Visser. A trustee must:

- Know and understand the trust deed;
- Act in the best interests of the beneficiaries;
- Act impartially and independently;
- Act with due care and utmost diligence;
- Manage the risks to the assets in the trust;
- Administer, dispose of, invest and maintain trust assets;
- Keep a proper record of transactions, resolutions and minutes of trustee meetings;
- Prepare and submit income-tax returns;
- Avoid conflicts of interest;
- Exercise discretion — this is part of controlling the assets and having the discretion to take action;
- Maintain a bank account;
- Be accountable; and
- Stay up to date with legislative changes.