

Trust deed – the “compass” of the trust



Presented by: Phia van
der Spuy

A trust is part of your estate plan



What is estate planning?

- ✧ The Wikipedia definition of estate planning – “**The process of disposing of your estate**”. This definition implies that you can arrange your financial affairs **while you are alive** for your own benefit, as well as for the benefit of those who you favour after your death (your legacy).
- ✧ Retirement planning ≠ Estate planning
- ✧ Will ≠ Estate planning
- ✧ Raubenheimer v Raubenheimer case of 2012 - *“It is a never-ending source of amazement that so many people rely on untrained advisors when preparing their wills, one of the most important documents they are ever likely to sign.”*

Where do I deal with my assets?



How does the law define a trust?

- ✧ **Trust Property Control Act:** 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**, which could be a trust deed or a will.
- ✧ **Income Tax Act (s1):** “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 **Deeds Registry Act, Transfer Duty Act, Value Added Tax Act** and the **Insolvency Act** afford a trust legal personality.
- ✧ The **Courts**, on the other hand, hold that a trust is, in essence, a **contract**.

A trust is a contract

- ✧ **Inter-vivos trust** - Law of Contracts; **Testamentary trust** - Law of Succession
- ✧ Principles that apply to the execution of a valid contract also apply to the execution of a valid trust deed:
 - ✧ **Consensus** between the contracting parties;
 - ✧ **Intention** to contract;
 - ✧ **Capacity** to contract;
 - ✧ Certain and definite **terms** – explicit;
 - ✧ The agreement must be **lawful**; and
 - ✧ Possible to perform the **contractual obligations**

A trust is a contract (cont.)

Normal terms that you would get in any contract:

- ✧ Parties
- ✧ Start date
- ✧ Duration
- ✧ What you can do (powers)
- ✧ What you cannot do
- ✧ Procedure for amendments
- ✧ Procedure for termination

Types of trusts

Trusts can be described in three ways, namely:

- ✧ the **way** in which they are formed (At death or during lifetime),
- ✧ the **rights** they give to beneficiaries of the trust (Discretionary or Vesting), or
- ✧ the **purpose** of the trust.

The **purpose** of trusts can be categorised as follows:

- ✧ Trading trusts
- ✧ Asset-protection trusts
- ✧ Charitable trusts
- ✧ Special trusts

Categories of trusts

ASSET PROTECTION TRUSTS

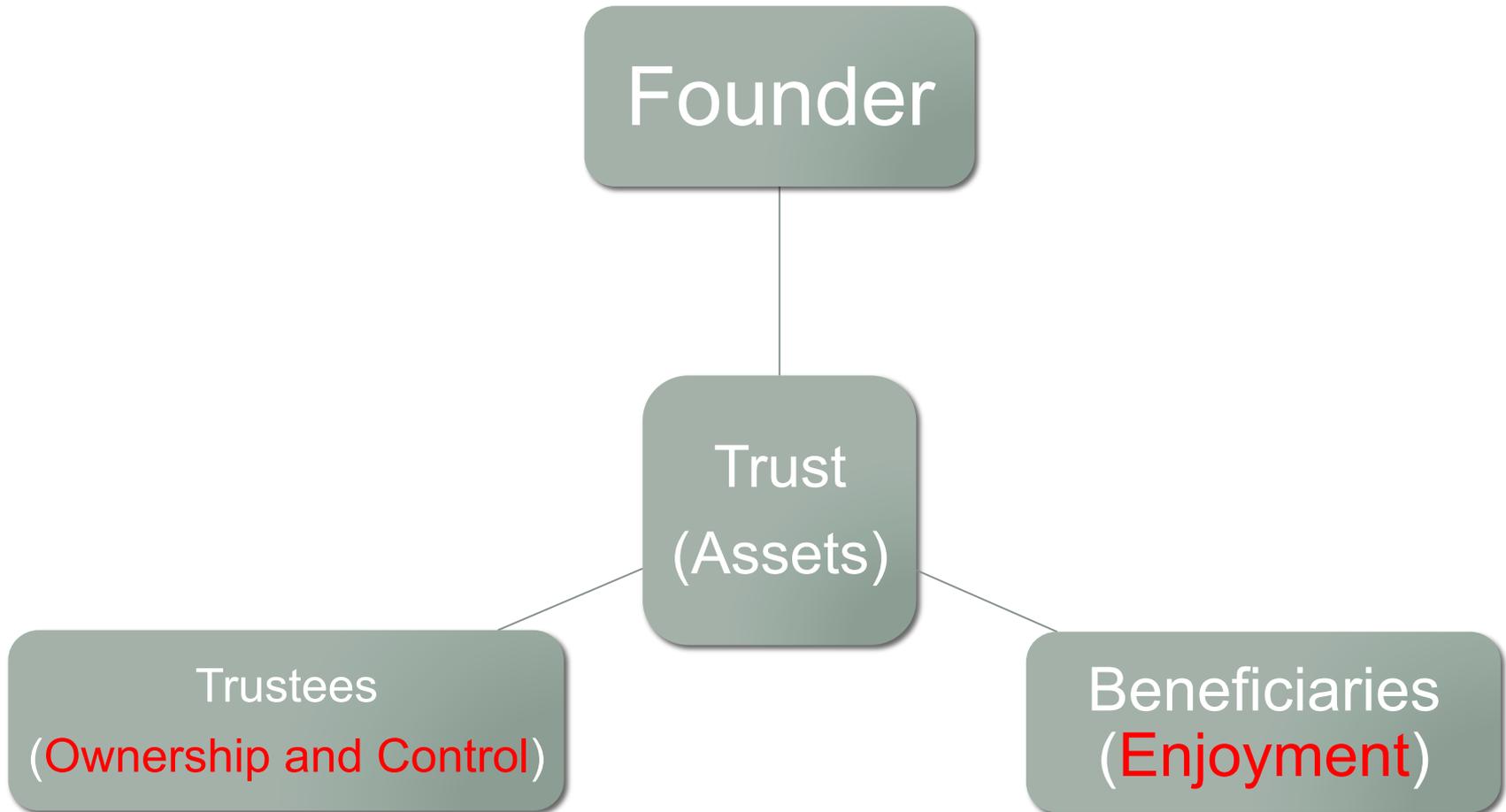
- ✧ Family (Private) Trusts
- ✧ Testamentary Trusts (mortis causa)
- ✧ Empowerment/Employee Trust
- ✧ Offshore Trusts

BUSINESS OR TRADING TRUST (*INTER VIVOS*)

CHARITABLE TRUSTS

- ✧ May qualify for exemption from Income Tax and Capital Gains Tax

Why is a trust unique?



Does the trust even exist?

- ✧ The founder must have a serious **intention** to create a trust and transfer control
- ✧ The trust must be set up **in writing** in the trust instrument
- ✧ **Trust property** must be clearly identified
- ✧ **Trust object** must be clearly stated and lawful
- ✧ There must be **binding obligation on the trustee(s)** to administer the trust property
- ✧ Trustees must be **authorised and have capacity**
- ✧ There must be at least **one beneficiary**
- ✧ Trust beneficiaries must be **clearly identified**

(Estate Richards v Nichol case of 1999)

Founder has to divest of assets... "mine is no longer mine"



Danger of the Estate Duty Act – abuse of roles

The Estate Duty Act (Section 3(3)(d)) is relevant where the trust instrument contains a provision that **empowers the deceased, immediately prior to his/her death, to:**

- ✧ **appropriate or dispose** of property; or
- ✧ **revoke or vary the provisions** of any donation, settlement, trust, or other disposition made by him/her

for his/her **own**, or his/her **estate's benefit**.

Objectives of trustees

Custodians of assets:

- ✧ To **protect** value
- ✧ To **grow** value
- ✧ To meet the **needs of beneficiaries**

CONFLICT!

Conflict of interest between **personal interest to maximise revenue** and duty as trustee to **preserve and grow capital** [Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W)].

Trustees need to understand and execute the trust deed

- ✧ Trustee must be well acquainted with the **manner** in which decisions must be taken on behalf of the trust
- ✧ The court held that trustees could be **removed** from office for not making a **thorough study of the trust deed** [*Tjimstra vs Blunt-McKenzie* 2002 (1) SA 459 (T)]

Trustees need to understand and execute the trust deed (cont.)

Important clauses:

- ✧ The **powers** given to trustees: Trustees may only act within the powers granted to them, for example, where the trust instrument does not grant trustees the power to acquire shares, they may not do so.
- ✧ The **process** to follow in the **appointment and removal of trustees**.
- ✧ The frequency of compulsory **meetings**.
- ✧ The **process** to follow in order for **meetings** to take place.
- ✧ The **number of trustees** required in order to reach agreement on certain issues.
- ✧ Requirements for **distributions**.
- ✧ The **signing of documents**.
- ✧ **Accounting and auditing**.
- ✧ **Beneficiaries' rights to reporting**.
- ✧ **Dispute resolution**.

Rights of beneficiaries

- ✧ **Vesting trust** – the income (both of a revenue and capital nature) or assets of the trust are vested in the beneficiaries. The beneficiaries have the vested rights to the income or assets of the trust.
- ✧ **Discretionary trust** – the trustee(s) usually have the discretion whether to, and how much of, the income, assets or net trust capital of the trust is distributed to the beneficiaries. In these circumstances the beneficiaries only have contingent rights to the income, assets or net trust capital of the trust.

Typical issues

- ❖ The trust deed (or a subsequent document) should stipulate trustees' acceptance of the initial donation made by the Founder. Accepting the office as trustee is not the same as accepting the donation. If the donation is not specifically accepted, the trust technically does not exist.
- ❖ Choose the correct Founder. A founder can never be replaced.
- ❖ Often parents act as trustees, but only appoint the children as beneficiaries. It will be impossible for the parents to ever benefit from the trust, even in crisis times, without tax consequences. There is nothing wrong to be trustees, as well as beneficiaries.
- ❖ The appointment of an independent trustee is now compulsory for new 'family business trusts'. Your cousin, brother-in-law, uncle, aunt, best friend, accountant and financial advisor will not qualify as independent trustee.
- ❖ As part of trustee disqualification clauses, terms such as "mentally disturbed, insane, unfit and unable to act as trustee" are used. This is far too vague and open to interpretation and abuse.

Typical issues

- ✧ The trust deed stipulates that the majority of trustees at a meeting forms a quorum. The courts ruled that a quorum is all the trustees of the trust. The requirement for only the majority of trustees leaves the trust open to abuse, which the courts try to prevent.
- ✧ Follow-up trustees are often inadequately dealt with in trust deeds. Trust deeds often state that the remaining trustees can appoint follow-up trustees. They also often state that if there are no trustees alive, a trustee can be appointed by any partner in the firm of auditors appointed to the trust. Both of these statements are unsatisfactory, as it is preferable for trustees, who are also beneficiaries, to appoint their follow-up trustees in their wills, in order to ensure their legacies get carried forward.
- ✧ Certain trust deeds make it compulsory for financial statements to be audited. Trusts do not have to be audited annually. It is restrictive and an unnecessary expense to have a trust audited annually. Trust deeds should rather state that the trustees have the option to have financial statements audited.

Typical issues

- ✧ It is a good idea to make provision in a trust deed that further trusts can be set up, especially when later generations decide to rather split the trust's assets between the beneficiaries, for them to manage it for their respective families. It is important to add wording to the effect of "with similar conditions and elements as the original deed", otherwise too wide powers are given to trustees, which invalidates the trust. Trustees can only have 'specific power of appointment', which means that they should only be allowed to do what the trust deed allows them to do, not whatever they want.
- ✧ Most trust deeds allow trustees to appoint alternates to act in their places. This is not allowed in our law. Can use proxies though.
- ✧ As a general rule for family trusts, children should not be made trustees whilst parents are alive and able to act as trustees. Children may overrule parents (if they are more in number), if they do not share the same sentiment. It may be a better idea to rather appoint them as follow-up trustees in your will. It may also be a good idea to appoint all children at once, to achieve equal representation, taking into account that trustees are the decision makers, and a child may be excluded after the parents both passed away. Take note that you can only be appointed as trustee when you reach the age of 18.

Typical issues

- ✧ For family trusts we do not recommend arbitration as the first remedy. As it is family, who have to live together the next day after a fight, we recommend mediation first, as often it is all about emotions, which need to be managed.
- ✧ Marital power no longer applicable since 1984.
- ✧ Beneficiaries need to be identified or identifiable.
- ✧ Giving the 'chairman' a second vote/casting vote is not valid, and the trust may be labeled an alter ego trust. It also has negative tax consequences, as all income and capital gains may be taxed in the hands of such person.
- ✧ Founder needs to sign amendment but founder is dead: This clause will become a huge problem if the founder passes away and the trustees want to amend the trust deed as they will have to launch a court application to change the trust deed. The clause needs to make it clear that while the founder is alive their signature is required. After death needs to be catered for.

Have you read and understand what the trust deed requires?

Trust Deed Parameters



STEP 5: POWERS OF TRUSTEES

Trustees may:

- Banking facilities
- Accept further funds
- Manage assets
- Let or hire property

Text to be included in the Trust Deed

to open and operate any banking account or facility for this Trust, apply for any credit or debit cards and to draw and/or bills of exchange, and attend to any of the latter by electronic, telephonic or internet means as approved by

to accept and acquire for the purpose of this Trust any gifts, bequests, grants, donations or inheritances (including from any Person or estate, or payments from any Person that may be given, bequeathed or paid to them as an ad

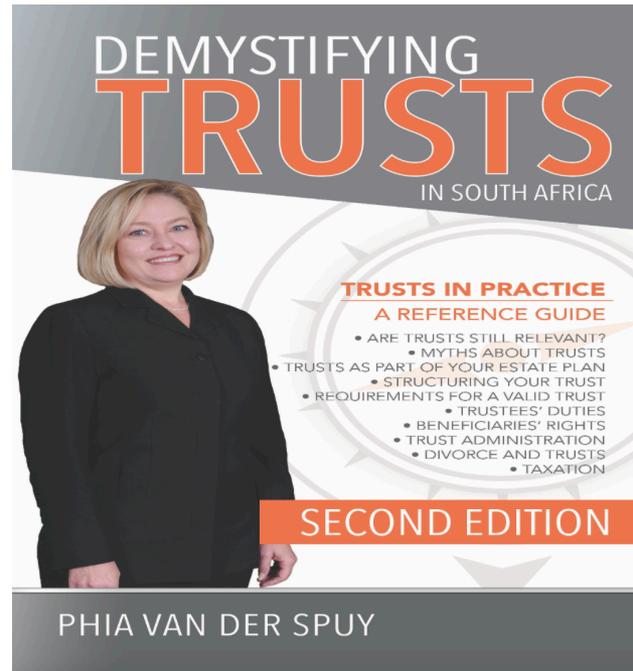
to acquire, dispose of, invest in, exchange, and/or barter movable or immovable, whether corporeal or incorporeal necessary for the purposes of effecting and registering, if needs be, the transfer according to the law of any such clause or otherwise, they shall be entitled to cause such sale to be effected by public auction or by private treaty and absolute and unfettered discretion may deem fit;

to demolish, improve, alter, repair and maintain any movable and immovable Trust Property, to develop immovable Income, profit, capital gains and/or Trust Capital, or any portion thereof, for the preservation, maintenance and up

to let or hire any movable or immovable, whether corporeal or incorporeal, assets, to collect rent, cancel leases, and any powers of lease they shall be entitled to cause any property to be let at such rental, for such period and on such discretion may deem fit;

Thank you!

phia@trusteeze.co.za



Call us for a demo of our digital trust administration and accounting platform