



THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA

ESTATE PLANNING
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Have you been asked to act as a trustee on a trust?
Are you planning to appoint a trustee?

This overview from FISA provides brief guidance on the responsibilities of a trustee and points out that it is not a role to be taken on lightly.

The Trust Property Control Act No. 57 of 1988 ("the Act") defines a trust as an arrangement through which ownership of a person's assets is entrusted to the trustees or beneficiaries, with the trustees being tasked to administer these assets according to the trust instrument for the benefit of the beneficiaries. (The trust instrument is the trust deed or the will in terms of which the trust is created).

Based on this definition, it is clear that the administration and governance of a trust is completely in the hands of the trustees, which means that the position of trustee comes with a substantial amount of responsibility. The Act requires a trustee to act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. This is called a fiduciary relationship. The standard of care required of a trustee is similar to that of a director of a company. The fiduciary relationship requires the trustee to act honestly and in good faith in relation to the trust, the beneficiaries and the other trustees, and to exercise the powers that he or she may have to manage the trust in the interest of the beneficiaries and for their benefit.

The three main principles of trustee duties can be summarised as follows:

- The trustees must carry out the trust deed as far as it is lawful and effective under the laws of the place where the administration is to take place.

- The trustees must act "with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another".
- The trustees must exercise independent discretion in all matters except questions of law.

Trustees can be sued by the beneficiaries if they do not fulfil their fiduciary duties or are negligent in any way. It is therefore essential for trustees to know and understand their duties. These duties are mainly imposed by the trust instrument, but there are also specific duties imposed by the common law and statute (specifically the Act). Here are some of the most important duties of a trustee:

- Know, understand and observe the trust instrument – it is the founding document which gives the trustees their powers
- Take control of the trust assets
- Always act jointly and in good faith – contractual powers must be exercised by all trustees acting together
- Make the trust assets more productive – the trustees have a duty to obtain a reasonable return on the trust capital
- Keep trust assets separate – trust assets must never be blended with a trustee's personal assets
- Always be impartial – trustees must, as far as possible, avoid conflict between their private interests and their duty as trustee. They must also, as far as possible, treat beneficiaries impartially
- Preserve the trust assets – this may in some instances extend to selling trust assets and re-investing the proceeds
- Keep accurate minutes of meetings, proper resolutions and comprehensive records of all transactions
- Provide the beneficiaries with details of the administration of the trust and its assets
- Open and maintain a bank account



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- Register the trust assets (where applicable) and keep the assets identifiable as trust assets
- Keep safe custody and control of documents of the trust
- Prepare and submit income tax returns
- Account to the Master of the High Court if called upon to do so
- Have in-depth knowledge of all relevant laws that govern and/or impact trustees, including but not limited to the:
 - Trust Property Control Act 57 of 1988
 - Immovable Property Act 94 of 1965
 - Income Tax Act 58 of 1962
 - Estate Duty Act 45 of 1955
- Have a working knowledge of the law of contract, property and marriage
- Be familiar with prudent investment vehicles
- Have knowledge of Foreign Exchange Control Regulations
- Have knowledge of the Financial Sector Conduct Authority (previously the Financial Services Board) and its reporting requirements

It should be evident from the above that the role of trustee is not an appointment to be taken lightly. It is important when appointing a trustee to ensure that the person understands the legal requirements applicable to trustees and has the necessary experience. It is therefore wise to appoint a person who is a member of a professional body that sets high ethical standards for its members.