

Family Trusts: An effective Vehicle to Manage your Estate

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Whilst many desire to acquire as much wealth as they can while they live, only a few think of what will happen to the fruits of their labour and toil when they die. The wise will plan for today and life after! When one dies, he ceases to have control of the affairs but there are legal mechanisms which one can use to have their voice heard even when they are no more and family trusts are among the best mechanisms as shall be demonstrated below.

What is a trust?

A trust is a fiduciary arrangement that allows a third party in the name of trustee to hold assets on behalf of a beneficiary or beneficiaries. A trust has three parties and these include the grantor (a person donating or giving), trustee (a person holding the property on behalf of beneficiaries) and the beneficiary (a person who is set to benefit from the set up). What is key to note is that once the grantor donates and trustee accepts the donated asset on behalf of the beneficiary, the grantor ceases to have control over the donated asset. The asset becomes wholly divorced from the grantor's estate and becomes the Trust's property which will be used for intents and purposes for which the trust was formed.

Types of trusts

There are two broader types of trusts and these are revocable and irrevocable trusts.

(a) Revocable Trusts

These are also referred to as revocable living trusts. These allow one to maintain control of his/her assets during his/her lifetime. A revocable trust can be dissolved in one's lifetime hence the name revocable. This type of trust offers flexibility in that if one thinks of changing the terms due to influencing factors e.g. divorce or acquiring new assets can do without impediments.

It is critical to note that if one creates this trust with *mala fide* (bad) intention like escaping payment of debts or denying one of their matrimonial share in the event of divorce, the trust will be disregarded for being an alter ego of the grantor.

Suffice to mention is the fact that once the grantor dies the revocable trust ceases to be viewed as such. It then qualifies to be an irrevocable trust as is to be discussed below.

(b) An irrevocable Trust

This type of a trust cannot be changed or modified in any way thus, the name irrevocable trust. Once one transfers real estate or other transferrable assets that he or she owns he/she cannot undo that action as long as the objectives of the trust are still relevant and the terms of the winding up close are still binding.

One of the main benefits of creating such a trust is that it can be used as a safeguard. "An irrevocable trust would typically be used to create a safe haven for the placement of assets," Joseph says.¹ This is made possible by the fact that personal debts or obligations cannot be claimed or satisfied from the trust's property.

The family trust that will be under discussion also falls within this category.

Family Trusts

A family trust by definition is an estate planning tool. It provides a method of managing the assets of belonging to an individual or couple while they live, as well as to specify how the assets are to be distributed when they pass away. Many people find that a trust is a superior alternative to simply leaving a will, as the trust is not subject to probate, as is a will, and it is kept private, rather than becoming a matter of public record.

What can be put in a family trust?

- (a) Houses
- (b) Farms
- (c) Businesses
- (d) Vehicles
- (e) Life policies
- (f) Shares from and in a company etc.

The main reason it is beneficial to open a family trust is that it less costly in terms of costs. As a result of the limited tax benefits associated with transferring assets to a trust, the focus has shifted to transferring assets that will outgrow any tax cost, as well as personal assets, such as investment paintings and antique furniture, as well as assets with sentimental value.

The reasons a family trust is by far an effective tool for estate planning are as follows,

- (a) Surviving spouse avoids paying estate taxes when the first spouse dies as is done when one is transferring property from one's name into his or hers.
- (b) Erodes incidents of family bickering
- (c) Clearly communicates how beneficiaries will benefit and clearly deal with uncertainty and conflict that can arise in circumstances where there is no clear plan.
- (d) A family can actually invest or run a family business through the trust and the manner in which the proceeds will be shared will be clearly and unequivocally provided for.
- (e) Allows the family to choose as trustees people with expertise to run the affairs of a trust professionally
- (f) A family gives their family trust a life span and clearly provides on how affairs will be run till the last day of the existence of a trust.
- (g) Assures safety of one's assets from being followed after by creditors in the event of either spouse falling heavily in debts.
- (h) It takes away possession from an individual so incidents where property is sold in times of crisis or to the detriment of another are eliminated.
- (i) In the event of the death there is no situation where the surviving spouse inherits the matrimonial home in his/her personal capacity. In Zimbabwe, when a spouse dies, the law specifically provides that the surviving spouse inherits the matrimonial home. It is critical to

note that the matrimonial home is inherited in one's personal capacity and what this means is that one can deal with the house in a manner that she/he deems fit. This can happen to the detriment of the children who might end up homeless in the event of the unfortunate happening. Section 3A of the Act specifically provides that a surviving spouse of every person who, on or after the date of commencement of the Administration of Estates Amendment Act, 1997, dies wholly or partly intestate shall be entitled to receive from the free residue of the estate

(a) the house or other domestic premises in which the spouses or the surviving spouse, as the case may be, lived immediately before the person's death;³

The advantages of creating a family trust are multitudinous and it suffices to dwell on how a family trust is created in Zimbabwe.

Creation of a family trust in Zimbabwe

Any form of a trust is created and registered by a registered Notary Public in Zimbabwe. The trust is only valid if it bears the notarial stamp or notarial seal of duly registered Notary Public and the same deed shall be registered with the Deeds Registry in Harare or Bulawayo. The Deeds office remains with the copies of the Deed and the grantor is given one with the Registry's stamp as proof of registration. The cost at Deeds Registry is USD50. 00

There is no other route to registering a family other than the one mentioned above. Notary Publics enjoy monopoly on this aspect and why the system is like that will be a story for another day.

Advantages of family trusts over wills

Before delving into the advantages of a family trust it is critical that a will is defined. A will can be defined as a written document which leaves the estate of the person who signed the will to named persons or entities (beneficiaries, legatees, devisees) including portions or percentages of the estate, specific gifts, creation of trusts for management and future distribution of all or a portion of the estate (a testamentary trust)definition.⁴

A will is a simple and less expensive way of one to pronounce how he or she would want his or her estate dissolved but the family trust has far great advantages as demonstrated below;

(a) First, a trust enables one's heirs to avoid the Master of High Court's process as in Zimbabwe, whereas wills are required to go through probate. Probate is the legal process through which a court transfers ownership of one's assets to the people designated in one's will. For example, the probate court would supervise the sale of one's home and the distribution of the proceeds in accordance with the will's named beneficiaries. There can be significant costs and delays associated with the process. In Zimbabwe one is required to pay 4% of the total value of the estate to the Master of High Court. The beneficiary will then have to incur further costs in transferring immovables that were registered in the deceased's name. In case of widows of no means, they end up selling the houses to enable them pay the Masters fees.

This can be avoided. When one creates a family trust and donate an immovable and not have money for the transfer or conveyancing can have his or her lawyers put a caveat on the property in the deeds office and later have the property transferred into the trust when it's convenient. There are no inconveniences of selling the immovable to meet some state's tax demands.

(b) Unlike the terms of a will, the terms of a trust are private. Probate proceedings and documents are public records, meaning that anyone can read the terms of one's will or the circumstances of its administration. But because a trust is a contract, the distribution and terms of one's estate are private and the details are not accessible to the public, including the nature and amount of your property or the identity of your beneficiaries.⁵

(c) A will can be contested in court and be declared invalid for failure to comply with the laws of the land and in that instance, one risks having his or her estate being dealt with in a manner that he or she never intended whereas a family trust is safe from such contestations.

In conclusion, a family trust is a legal vehicle that shelters one's assets from unlikely and unfortunate events which can find one languishing in debts and having creditors coming after his/her estate. A family trust secures the future of one's children and grandchildren if it is properly run and it remains one of best ways to plan for now and life after.