

# Thinking of setting up a trust? Here are some facts you need to know

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Most people know about trusts, but few people know the details. And as everybody knows, the devil is in the details. As Capital Legacy is the country's leading provider of [wills](#) we get to set up and manage hundreds of trusts for our clients and have learnt a few things over the years we would like to share.



A trust can be defined as a “legal entity created by a party (the founder) through which a second party (the trustee) holds the right to manage the trust’s assets or property for the benefit of a third party (the beneficiary)”.

There are two types of trusts in South Africa, namely testamentary trusts and living (intervivos) trusts. A testamentary trust is set up in terms of the Will of a testator and only comes into effect after the death of the testator. An intervivos trust or living trust is set up during the lifetime of the trustor and is a contract between the founder and the trustees(s). Intervivos is a Latin phrase which means “**while alive**” or “**between the living**”.

A trust needs a bit of research to determine if one wants to venture into it. One should also determine which kind of trust is best suited to one’s needs.

## Reasons why you may need a trust:

You may need a trust if the following factors are applicable to you:

- You have minor children, and you want to leave your assets to them.
- Your assets (including life policies) exceed R3.5 million.
- Your assets consist of capital appreciating items.
- You want to control how/which assets are passed onto your heirs.



*Kenrick Newport, national manager, succession planning at Capital*

- You need asset protection planning.

From this list we can see that the contents/reasons for creating a trust may vary, and this erases the idea of trusts being reserved for an elite group of people. Any individual who deems it necessary, can create a trust.

The two types of trusts, namely testamentary trusts and living trusts, have different subcategories. The subcategories are not mutually exclusive of each other.

## **Discretionary and non-discretionary trusts**

### **1. a) Intervivos discretionary trust**

This type of trust is set up during the lifetime of the founder and in it the party gives the trustees absolute power over trust assets and income for the benefit of the beneficiaries. This type of trust should interest you if your priorities are asset protection and estate planning. Living trusts are created by the drafting of trust deeds and registering the trusts with the Master of the High Court. The trust comes into effect as soon as it is registered.

### **1. b) Intervivos non-discretionary trust**

This is another sub-category of an intervivos trust and is beneficial for estate planning. In this type of trust, the trustees do not have absolute discretion. This is a trust which is created during the lifetime of the founder.

## **2) Testamentary trust**

This kind of trust can be discretionary or non-discretionary. It is a trust which becomes valid when the testator passes. The trust is usually set up to care for family members who are too young to receive bequests directly. Alternatively, it can also be where the trust is only available to these minors at a certain age, according to the wishes of the founder.

## **Special trust**

Any trust (intervivos or testamentary) where the beneficiary(ies) is/are not of the age to receive a bequest or is a disabled person, it is called a 'Special' trust and is taxed as if it were a natural person. It can be discretionary or non-discretionary depending on the wishes of the founder/creator of the trust.

## **Why trusts may not always be a good idea**

The factors mentioned underneath should be looked at before deciding on setting up a trust or not:

### **General costs:**

When a person passes away, the court reviews his/her assets to ensure that the debt on the estate is up to date. Once the process has been completed, the court also ensures that any outstanding debt is paid off. This entire process can be very expensive. General costs include attorney fees, executor fees, appraisal fees and bond fees.

### **Tax:**

The income of a trust is currently being taxed at the highest rate applicable to individuals, being 45% percent. Capital gains are taxed at the highest effective rate applicable to any taxpayer, being 36%. Rebates can only be claimed by natural persons from a tax perspective and therefore, trusts cannot claim rebates.

### **Administration:**

It is of the utmost importance that the records of the trusts are kept up to date. These documents need to be detailed and updated like clockwork.

This includes:

- keeping all records from inception of the trust to at least five years after the trust has been deregistered,
- maintaining a separate bank account for all trust cashflows,
- passing trustee resolutions on every transaction,
- maintaining an asset register,
- providing financial statements, income tax returns and bi-annual provisional tax returns.

This can become very complicated and time-consuming, especially when the individual creating the trust, owns and controls multiple properties and assets.

### **Creditors:**

Debt collection by creditors is not an uniform process. Once a creditor locates the assets of the deceased, he/she/it is well within his/her/their rights to file a lawsuit to collect claims. There are also no time constraints to this process, which means claims may be filed before or after major debts are settled, and this could be to the detriment of the party(ies) in charge of dealing with the deceased's estate.

### **Relinquishment of control:**

SARS may deem income back to the donor of the asset if there is not an adequate relinquishment of control over the asset.

A court may investigate the trust if there is not an adequate separation of control between the trustees and the trust assets.

### **Claiming money back from a trust:**

In the case where a trust releases funds at a certain age, it is often the responsibility of a guardian to look after the beneficiary financially. Once the trust commences, the guardian may claim his/her/its money back from the trust. However, this process often presents a bump in the road - namely, that these claims are only valid before the trust has been dissolved. The trust may need to pay out several parties and as a result, will not have enough money to pay the guardian.

### **How do you ensure that you are making the right decision?**

Every person's needs and requirements are unique and setting up trust structures may benefit some people but not others. In some cases, the use of a trust can be detrimental to your desired estate plan outcome, incurring unnecessary expenses and other complexities. For this reason, it makes sense to engage with a professional who understands not only the implications of these structures whilst you are alive, but also when you wish to leave an inheritance to your spouse and children when you pass away one day. Capital Legacy deals with hundreds of estates every year and is well positioned to advise on best practice and pitfalls when considering using the various trust structures.

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