TRUSTS

In South Africa, there are basically three types of Trusts. These are:

- Inter vivos Trusts or living Trusts,
- testamentary Trusts and
- bewind Trusts.

Testamentary Trusts are created at the winding up of a deceased estate following a specific stipulation in the deceased person's will that a Trust must be set up.
Testamentary Trusts are usually created to hold assets on behalf of minor children, since minor children cannot in terms of South African law inherit anything (in the absence of a Trust, assets from the deceased estate left to minor children are sold, and the money is paid to them when they reach adulthood).

Bewind Trusts are created as trading vehicles providing Trustees with limited liability and certain tax advantages.

An Inter-Vivos Trust is established by someone during their lifetime to manage certain assets or investments and support beneficiaries, such as family members. These can be vested or discretionary trusts.

In vested Trusts, the benefits of the beneficiaries are set out in the Trust deed.

In discretionary Trusts the Trustees have full discretion at all times about how much each beneficiary is to benefit.

TRUST TERMINOLOGY UNPACKED

Inter vivos: A Trust created during the settlor's lifetime is known as an "inter vivos" Trust.

Testamentary: If a Trust is created as a consequence of the settlor's death, for example under the will or a beneficiary designation of the settlor, it is called a "testamentary Trust".

Discretionary: In a "discretionary" Trust, the Trustee is given discretion to make certain decisions, usually regarding the amount and timing of distributions and sometimes, which beneficiary.

Non-discretionary: In a non-discretionary Trust, the distribution scheme is spelled out in the Trust document and the Trustee has no discretion regarding distributions.

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Family Trust: When the beneficiaries of a Trust are all family members, the Trust is referred to as a “family Trust”. Not all Trusts that are used in estate planning are family Trusts. For example, a Trust may be for philanthropic goals and have a charitable organization as the beneficiary

Founder (also known as the "settler" or "donor") is the individual who forms the Trust.

Trustees are akin to the managers of a company who manage the assets of the Trust for the purpose and the objectives as set out in the Trust Deed for the benefit of the beneficiaries.

Beneficiaries are the individuals and/or organisations and institutions who qualify to benefit from the Trust either by receiving income and/or capital from the Trust. Beneficiaries may have **vested rights**, which give them entitlement to something, or **discretionary** rights, which entail that they are potential beneficiaries but are only entitled to receive a benefit once the Trustees have made a decision to benefit them.

PARTIES TO A TRUST

Trustees

The Trustees are the custodians of the assets in the Trust, but do not necessarily have an interest in the assets. In order to promote the independence of the Trust, it is advisable to appoint at least one independent Trustee

Beneficiaries

The beneficiaries are the individuals / entities entitled to benefit from the Trust assets or income

Donor / Founder

Person setting up the Trust

WHAT IS AN INTER-VIVOS TRUST?

An Inter-Vivos Trust is established by someone during their lifetime to manage certain assets or investments and support beneficiaries, such as family members.

An Inter Vivos Trust is a core and most effective form of estate planning.

At the outset, an Inter Vivos Trust must be distinguished from a Testamentary Trust.

The former is created during the lifetime of a person by agreement between that person (referred to as the Founder) and another person(s) who is referred to as the Trustee(s).

By creating an Inter Vivos Trust an individual essentially creates another legal entity in which certain assets can be housed, which then will be administered and dealt with in terms of the Trust Deed created by the Founder.

These Trusts are governed by a Trust deed, rather than a Will.

These Trusts allow assets to be managed on behalf of beneficiaries and, in some cases, generations of a family, without having to passthrough the estate of family members that have passed away.

An Inter Vivos Trust is often referred to as a Family Trust, and is an entity which is formed during the life of a person.

Typically, a Settlor or Donor will enter into a contract with Trustees, the terms of which will be contained in a Deed of Trust, in terms of which the Settlor will donate to or settle upon the Trust, a sum of money in order to establish the Trust, and appoint Trustees to administer the Trust fund, for the benefit of beneficiaries which will be described in the Trust Deed.

The objects of the Trust are usually to provide an income for the beneficiaries, to provide funds for the housing, care, maintenance, education, general welfare, recuperation, health, entertainment or pleasure or advancement of life of the interests of any beneficiary, and to transfer the assets to the capital beneficiaries upon termination of the Trust.

Inter Vivos Trusts can be created with the Vesting of assets or benefits in beneficiaries stipulated in the Trust Deed whereby the assets vest in the named beneficiaries, but the assets and benefits flowing from them, are required to be administered by the Trustees until the happening of a certain event.

More common forms of Inter Vivos Trusts are Discretionary Trusts in which the Trustees are authorised to use their discretion in determining how the benefits flowing from the Trust are to be distributed amongst beneficiaries. In these types of Trusts, the vesting of benefits or assets in beneficiaries is delayed until the exercise of such discretion by the Trustees.

TESTAMENTARY TRUSTS

Testamentary Trusts are commonly known as a Will Trusts.

These types of Trust are created in terms of the Will of a deceased person.

Will Trusts cannot be registered with the Master of the High Court during the lifetime of the Testator (the person making the will), as they do not come into existence until the death of the Testator.

Set up and administration charges pertaining to the Will Trust are therefore postponed until the death of the Testator, when the Will Trust comes into existence.

Will Trusts are usually incorporated in Estate Planning where a Testator wishes to protect certain assets in his or her Estate for the benefit of certain beneficiaries, or to limit beneficiaries' personal administration and management of certain assets, or as a protection against the beneficiaries themselves.
The terms of a Will Trust are typically not contained in such detail as they are in an Inter Vivos Trust where the Trust Deed may run into 25 pages or more. A practice is sometimes adopted to attach a full Trust Deed to a Will, rather than to incorporate the usually shorter provisions pertaining to Will Trusts in the body of the Will.

In the past, terms and conditions pertaining to Will Trusts, were often very poorly described in Wills, and it is now practise to include wide terms, conditions, and powers of Trustees in Will Trusts, which makes them more effective and practical.

WHAT ARE THE POTENTIAL ADVANTAGES OF ESTABLISHING AN INTER VIVOS TRUST?

Flexibility: A discretionary Trust is extremely flexible, and can be administered so as to take into account changes over time in family, financial and legislative circumstances. This means the Trustees can manage the Trust's assets in the best interest of the beneficiaries at any particular time by taking into account all relevant factors at that time. This flexibility caters for such uncertainties as divorce, insolvency, increase in family size or fortunes, and of course changes to tax legislation – which occurs on an annual basis.

Tax planning: If created and operated with care and with appropriate advice from tax experts a Trust can administered so as to mitigate taxes such as estate duty, income tax, capital gains tax, donations tax and transfer duty (depending on the relationship between the settlor and the beneficiaries) for both the settlor and the beneficiaries. Also, the assets owned by the Trust will not be subject to estate duty, capital gains and executor's fees on the death of the settlor.

Estate / succession planning: Trusts provide for the creation of flexible succession arrangements. Also, the assets owned by the Trust will not be subject to cumbersome and often lengthy legal procedures after your death, as is the case with the administration of assets in your personal estate. Trust assets are accessible at all times, whilst assets in your personal estate are frozen during the estate administration process.

Continuity : A Trust survives the life of an individual: and can provide a certain degree of continuity and control to ensure that the wider affairs of a deceased continue after death without interruption and hardship to the family.

Family asset management: A Trust can provide a centralised asset management structure and controlled distributions for beneficiaries who are not in a position to manage assets themselves. This may be due to minority, disability or prodigality. A Trust can provide for joint ownership of indivisible assets like holiday homes and farms. Should the estate owner subsequently be mentally incapacitated through sickness or injury, a Trust prevents the need for the appointment of a curator bonis to manage the founder's affairs.

A Trust can be employed for the benefit of an individual if he or she is physically or mentally disabled as a result of medical events or for reasons of age.

Asset protection: A Trust, which is set up and administered properly, can assist a family to protect assets from potential creditors, although care must be taken to ensure that transfers of property are not made in such a way as to prejudice creditors. The manner in which assets are transferred is also important and relevant to the extent of the protection. For example, if you transfer an asset on loan account, the amount of the loan account will remain an asset in your estate until the Trust repays you.

That means that the amount of the loan account will not be protected from creditors, only the increase in the value of the asset during the period of the Trust's ownership if it. However, over a period of time, as the value of the Trust's assets increase and the value of your loan account decreases, so will the benefit of asset protection be established. Remember also, that the ownership of the asset by the Trust also means that it will not fall into your beneficiaries' personal estates on your death, i.e. the asset will be protected from creditors of your beneficiaries.

A Trust can protect an individual's assets from creditors, which may be crucial where the individual is involved in business ventures which may expose him financially in the event of a bad turn.

Assets held in a Trust may be protected from claims arising from matrimonial/relationship disputes.

As a Trust can continue to exist for more than one generation, it is an exceptional tool to preserve the assets for the benefit of the donor's family or other causes.

It is a flexible last advantage mechanism if a family has to cater for minors, a prodigal, a person with mental or physical impediments or inexperience.

Professional asset and investment management :By choosing your Trustees wisely, you can ensure professional asset and investment management and that your assets are taken care of when you are not around or able to look after them yourself.

Tax savings : For some a Trust can provide tax savings because of the different ways income and capital gains can be distributed.

A Trust is created and the growth of the assets then fall into the Trust - as opposed to the donor's individual's estate - thereby escaping estate duty payable on the death on such growth.

THE DISADVANTAGES OF AN INTER VIVOS TRUST

It is important to realise that there are some down sides to the use of an Inter Vivos Trust, such as:

Ownership : The donor must be prepared to divest himself of ownership and control of those assets transferred to the Trust and such assets thereafter belong to the Trust. The use of these assets are then determined by the Trust Deed.

The settlor will lose control of the underlying assets. To set up a valid Trust, a settlor must intend to and actually transfer legal (although not beneficial) ownership of the Trust assets to the Trustees. This means that the Trustees then must administer and control the Trust assets.

On a macro level, the security the settlor then has regarding the management of the assets, is that the Trustees are legally bound to comply with the terms of the Trust deed and with their fiduciary duties.

Very broadly this means that the Trustees may only distribute assets to the beneficiaries as defined in the Trust deed and in the manner prescribed in the Trust deed. They are also obliged at all times to act in the best interests of the beneficiaries.

Administration : A certain amount of administrative responsibility is created and extra requirements must be adhered to when operating a Trust.

Administrative requirements include:

- Compilation and retention of records (first entry to financial statements) from inception of the Trust to at least 5 years after the Trust has been deregistered
- Trustees minutes and resolutions about all transactions to be drafted and retained
- Maintain a separate bank account for all Trust cash flows
- Maintain asset register

Costs : There may be certain costs involved to obtain the assistance and services of professionals in the administration, where necessary.

Establishing a Trust generates additional administrative costs and complexity in one's affairs. It can be difficult to find dedicated and knowledgeable independent Trustees. And if the Trust is not set up and administered properly, you run the risk of the Trust being regarded as a sham (or as not having been established in the first place), in which case the benefits of asset protection may be lost.

A Trust is deemed to be a separate legal entity. As such, the following are required annually:

- Annual financial statements
- Annual income tax return
- Bi-annual provisional tax returns

Tax : There may be certain income tax disadvantages, such as higher transfer duty and income tax rates and the lack of rebates and exemptions, but generally these are insignificant in relation to the potential of estate duty saving.Higher tax rates apply to income and gains retained by the Trust. Capital gains tax is payable in the Trust at an effective rate of 20%, and there are no abatements. Income retained in a Trust is taxed at 40%. However, the accurate application of the anti-avoidance provisions and income splitting can facilitate overall tax savings rather than additional tax. Looking at the various taxes and costs incurred in setting up the Trust and transferring the assets to it. One needs to assess whether these costs are outweighed by the long term benefits.

Piercing the trust veil : The Trust may not be used as a counter-ego for the donor and the courts are increasingly challenging such arrangements.SARS may deem income back to the donor of the asset if there is not adequate relinquishment of control over the asset. A court may look through the Trust if there is not adequate separation of control between the Trustees and the Trust assets

From the above it becomes evident that a Trust is not suited for every individual.

CAN YOU SET UP A LIFE-INTEREST BENEFIT THROUGH AN INTER-VIVOS TRUST?

A life-interest benefit allows a person to benefit from an asset for the rest of their life, but without ultimately inheriting it. For example, a Trust may allow a beneficiary to live in a property, earn the return on invested funds, or receive rental income from the property for the rest of their life.

In some cases you may wish to create a Trust to manage funds for the remainder of your own lifetime,to relieve you of the burden of investment and management of those funds.

TRUSTEES

The Trustee is the guardian of the Trust assets, and has a duty to manage these in the best interests of the beneficiaries as outlined in the Trust deed.

A person who is a major can potentially be a Trustee of a Trust. It is usual for the Trust Deed to set out instances in which a Trustee may not be appointed as a Trustee, or in which a Trustee is obliged to resign, for example, if a Trustee becomes insolvent or dies.

In terms of the Act, there is no prescribed minimum number of Trustees, and the number of Trustees required is dealt with in the Trust Deed or Will.

WHO CAN BE TRUSTEE?

You can appoint a family member or a friend, who is over 18 years of age and an South African resident to act as Trustee. You can also appoint a professional Trustee Company, or a corporation that specialises in legal, accounting or financial planning. You may also wish to name yourself as Trustee or co-Trustee.

In Inter Vivos Trusts it is very usual for a husband and wife to be appointed as Trustees in such a Trust. Since the land mark case of Land and Agricultural Bank of South Africa vs. Parker and others, 2005 (2) SA77(SCA) it is now necessary for an Independent Outsider/Professional Trustee to be appointed together with the spouses as Trustees.

A practical number of Trustees on a board of Trustees is 3. Where more than 3 Trustees are appointed, this can create administrative difficulties in the signature of documents and attending to the various duties of Trusteeship. This number also ensures that there is also uneven number of Trustees so that a majority decision can be achieved in a voting situation.

DUTIES OF TRUSTEES

Trustees could find themselves personally liable for losses suffered by the Trust if it can proven that they did not act with care, diligence and skill according to Section 9 of the Trust Property Control Act.

It is important to note that "skill" is more than just acting in good faith. Trustees may be proven negligent not only if they invested in risky investments, but also if they invested capital too conservatively causing the capital not to grow sufficiently. Trustees also need to be aware that they can still be held liable if only one Trustee has signing power on behalf of the Trust and he/she makes a poor decision that finds all the Trustees liable for his negligence.

LOSS OF CONTROL

The founder of the Trust needs to aware that the assets in the Trust do not belong to him/her anymore. The assets belong to the Trust. Should a loss of control not occur, the Trust may be seen as an alter ego of the founder which could result in the assets being included in creditors' claims as well as having estate duty consequences.

WHAT ASSETS CAN BE PART OF THE TRUST?

There are many types of assets that can be held in Trust. These may include:

Investments
Land or property
Cash
Other valuable assets; such as paintings, furniture, or jewellery.

The money and investments held in Trust are also called Trust capital. This capital may produce income, such as interest or dividends on shares. Assets may also grow in value resulting in capital gains for the Trust. This capital gain is however taxed.

WHO OWNS THE ASSETS IN THE TRUST?

Once the assets have been transferred into Trust, you no longer own them. The Trustee becomes the legal owner of the assets and manages these for the benefit of the beneficiaries. However you may wish to be the initial Trustee to ensure the Trust is established and operated according to your wishes.

BENEFICIARIES

The beneficiaries are usually defined as income beneficiaries and capital beneficiaries.

Income beneficiaries are usually those persons who may from time to time (or in terms of the Trust Deed) be selected by the Trustees in their discretion from the list of beneficiaries contained in the Trust Deed to whom benefits in the form of income generated by the Trust or use of assets is awarded. It is usual for this class of beneficiaries in Discretionary Trusts to be widely defined to enable the Trustees to exercise their discretion as to the distribution of the income benefits from the Trust.

Capital beneficiaries are usually persons who, from time to time, are selected from the Trustees in their discretion to be benefit from the distribution of the capital assets of the Trust. This class of beneficiaries is often described very widely as well.

Contingent beneficiaries are sometimes identified in the Trust Deed to ensure that the Trustee do not fail should none of the income or capital beneficiaries be able to ascertained.

WHEN CAN THE TRUST ASSETS BE DISTRIBUTED?

Inter-Vivos Trusts can hold and distribute funds at any time according to the terms specified in the Trust deed and the purposes the Trust was created for. This may mean distributing the income of the Trust amongst family members in a tax effective way for many years. It might also mean providing capital from the Trust at a time when it will most benefit the beneficiaries in the future, such as when purchasing a home.

Provisions pertaining to the distribution of income are usually very widely framed to enable the Trustees to award income benefits to the income beneficiaries as widely as possible.

Provisions pertaining to the award of capital amongst the capital beneficiaries are also provided for in the Trust Deed.

HOW LONG CAN THE TRUST OPERATE?

The Trust will end at a time, or upon an event, specified in the Trust deed. For example, this may be when the primary beneficiary dies or once all beneficiaries are over a certain age, or at the expiry of 80 years since the Trust was established. At this time the remaining Trust assets can be distributed to family members or charities according to the wishes of the person who established the Trust. These rules will be specified in the Trust deed when the Trust is established.

Typically, Trustees are given discretionary powers to extend the date of termination of the Trust, or to terminate the Trust prior to the happening of that event or the attainment of that date.

HOW A TRUST IS CREATED

1. The first step is to consult with a professional to ascertain whether a Trust is a suitable tool for you.

2. If so, an appropriate Trust Deed will be drawn up for your consideration. The importance of this document cannot be overemphasised as it sets the foundation for the Trust.

3. Once the Trust Deed is finalised and signed by the parties and the further regulatory requirements of the Master are met, the Deed is registered with the Master of the High Court.

The Trust must not endeavour to enter into commercial or legal transactions before the so-called Letters of Authority are issued by the Master of the High Court, as the transactions will be invalid.

4. Initially the founder will either donate assets (although this is not the usual technique as this will undermine some of the other purposes of the Trust) but more commonly sell assets to the Trust while payment is deferred on loan account.

REGISTRATION OF TRUSTS

Trusts are registered through the office of the Master of the High Courts in the various provincial jurisdictions in South Africa.

There is no central registering authority for Trusts at this stage, although there is some talk that a central registry for Trusts is being planned in South Africa.

The formalities to register a Trust are contained in the Trust Property Control Act 57 of 1958 in terms of which the original Trust Deed, original Letters of Acceptance of Trust as Trustees by the Trustees to be appointed, a letter from an accounting officer agreeing to take appointment as accounting officer of the Trust and other supporting documents are submitted to the Master of the High Court.

Once the Master of the High Court is satisfied that the documents are in order, he will issue Letters of Authority appointing the Trustees named in the Trust Deed. It is important to note that until the Letters of Authority have been issued by the Master of the High Court, the potential Trustees do not have the capacity to act as Trustees.

Any change in the Trustees during the existence of the Trust need to be processed in a similar manner by the issue of new Letters of Authority by the Master of the High Court. If a Trustee dies or resigns, the Trust Deed usually makes provision for the assumption of a substitute Trustee to be appointed in the same manner. Most Trust Deeds make provision for a certain minimum number of Trustees to be appointed from time to time and this must be considered before deciding whether to appoint an additional Trustee.

TRUST ADMINISTRATION FORMALITIES

The Trust Deed will stipulate in great detail how the Trust is to be administered and what formalities must be followed.

These formalities will include issues such as:

- How many Trustees need to agree to certain issues, what number of Trustees will comprise a quorum, how meetings of Trustees are to be carried out, whether there is a casting vote, and whether there is a reservation of power in favour of one of the Trustees.

- It is imperative that all decisions of the Trustees are minuted or recorded in Minutes or Resolutions. Traditionally, this aspect has often been overlooked in the administration of Trusts. With the modern administration of Trusts, substantial focus is placed on the trail of documentation evidencing decisions made or action taken by the Trustees from time to time.

CONTRACTS WITH TRUSTS

People are often nervous about entering into contracts with Trusts, such as the purchasing of property from a Trust or the sale of property to a Trust.

In dealing with a contract involving a Trust, it is advisable to ensure that the contracting party has had sight of a minute or resolution authorising the Trustees to act or sign. This is particularly so in the case of the purchase or sale of immovable property. In terms of the Alienation of Land Act, 1981, any deed of sale of immovable property has to be in writing and the parties thereto or their agents have to be legally authorised to act at the time of signing the contract.

It is possible for a Trust to purchase property prior to its registration, but very strict formalities need to be complied with in this instance. Usually, a person representing the Trust to be registered, will sign such a contract in his or her capacity as a representative for a nominee. Careful attention will be needed to taken pertaining to the terms of the nominee appointment, as the sale agreement will usually include clauses pertaining to how and when the person needs to nominate the nominee.

The nominee will usually be the Trust which is about to be registered. People often feel that they are unable to purchase on behalf of a Trust to be formed due to the danger of the possibility of double taxation fortransfer duty purposes if such a person purchases the property and then transfers it on to a Trust. The nominee provision described above generally ensures that a double transfer duty position is avoided.

A deed of sale entered into by one Trustee purporting to act on behalf of other Trustees where that Trustee is not authorised to do so by his or her co-Trustees, may be void *ab initio* as it will not comply with Section 2 of the Alienation of Land Act, and cannot be ratified thereafter (C Thorpe NO v Trittenwein (2006) SCA 30).

It is therefore important, when dealing with a Trust, to request sight of a copy of the Trust Deed, the Letters of Authority issued by the Master of the High Court, a suitable resolution pertaining to the transaction, and copies of their Identity Documents of the Trustees.

SHOULD IMMOVABLE PROPERTY BE REGISTERED IN THE NAME OF A TRUST?

There are certain disadvantages to immovable property being registered acquired in the name of a Trust:

- The possibility of higher Capital Gains Tax being payable on the disposal of the immovable property due to the loss of the primary residence exclusion for capital gains purposes, if the property is to be one's primary residence;

- Income tax on income retained in a Trust is payable at the rate of a flat 40%. If, however, distributions are made to beneficiaries and income is not retained in the Trust, there can be anattribution of the income tax to the beneficiaries at such beneficiaries' tax rate;

There can be significant benefits of transferring immovable property into a Trust where the immovable property is not a primary residence. The Trust is a useful vehicle in which to house investment properties. The reason for this is that the growth in the value of the properties can be contained in the Trust and not in the planner's personal Estate for Estate Duty purposes.

CAN A TRUST OWN SHARES IN A COMPANY OR MEMBERS INTEREST IN A CLOSE CORPORATION?

This is possible, and can often be an advantage as the tax rate and the inclusion rate for capital gains tax purposes which applies to companies and close corporations is lower than that applicable to Trusts. It has only been possible since 2005 for an Inter Vivos Trust to own Members Interest in a Close Corporation, although it has been possible for Will Trusts to own Members Interest in Close Corporations prior to this. Please note that, since the implimentation of the new Companies Act, no new Close Corporations are able to be registered.

OFFSHORE TRUSTS

The concept of Trusts goes back to the days of the Crusades, and English Law has accordingly incorporated provisions pertaining to Trusts for many years. The concept of utilising Trusts in offshore jurisdictions, where there are tax exempt or restricted tax benefits, has been a very popular method of estate and business planning over the years.

It is often very useful for a South African resident to have an Offshore Trust in which offshore assets are held, but the biggest drawback in this regard, is the substantial cost involved in the registration and administration of Offshore Trusts. Generally, administration costs pertaining to Offshore Trusts are substantially higher than those of local Trusts and this has often been an impediment to utilising Offshore Trusts in Estate planning and investment structures relating to offshore assets.

ESTATE-PEGGING OPPORTUNITIES

The use of Trusts has considerable advantages with regard to the pegging of one's Estate. A typical example would be whereby a planner wishes to invest a certain sum of money, say R1 million, and intends for the investment to be of fairly aggressive nature, anticipating substantial growth over a period of time. If such investments were placed in the planner's own name, the planner's Estate would be enhanced by the growth of the investment over time.

If, however, the planner were to loan the proceeds to be invested, i.e. R1 million, to a Trust and the investments were placed in the Trust's name, the growth on such investments would happen in the hands of the Trust and the amount owing back to the planner, which would be an asset in his Estate, would merely be the inception amount of the loan, particularly if the loan was not interest bearing.
It is accordingly common for persons embarking upon the purchase of shares in a private company, investment property or other investments to structure the acquisition or investment through Trusts.

As the law currently stands, it is possible for no-interest or low-interest loans to be made to Trusts by South African residents, but such no-interest or low-interest loans cannot be made to an offshore Trust without the Section 31 of the Income Tax Act transfer pricing provisions being invoked, whereby the Commissioner of taxes may deem an interest rate to be applicable to such loans.

IS IT NECESSARY FOR FINANCIAL STATEMENTS TO BE PREPARED FOR TRUSTS?

One needs to have reference to the Terms and Conditions of the Trust as contained in the Trust Deed or Will to ascertain whether there is an obligation to provide Annual Financial Statements for a Trust.

It is advisable that a Trust:

- Has in place up to date and valid Annual Financial Statements for the Trust which are prepared on a formal basis;
- Holds an Annual General Meeting of Trustees where the Trustees can to peruse and approve the financial statements;
- Appoints a reputable accounting officer or accountant to prepare compile Financial Statements for the Trust;
- The Trust is registered for income tax purposes, and VAT in certain circumstances.

Many Trustees have failed to ensure that Annual Financial Statements or at least a simple balance sheet and income and expenditure statement are prepared, and experience has shown that this has created substantial difficulty many years down the line, particularly when taxes need to be assessed and where Trusts need to be terminated and the assets distributed to beneficiaries.
Presentation on Trust,

TAX CONSIDERATIONS

In terms of South African tax law, living Trusts are considered tax payers.

Two types of tax apply to living Trusts, namely:

- income tax – payable at a flat rate of 40% (individuals pay according to income scales), and
- capital gains tax (CGT) – Capital gains tax for an *Inter vivos* Trust is 66,60% whereas the inclusion rate for individuals is 33,30%.
- estate duty – Trusts do not pay estate duty (tax payable by a deceased estate).

Trusts may be required to pay back outstanding loans to a deceased estate, in which the loan amounts are taxable with deceased estate.

The Trust's income can be taxed in the hands of either the Trust or the beneficiaries (a valuable tax planning tool).

HOW TO REGISTER FOR THE FOLLOWING TAXES

Income Tax - To register for Income Tax, complete an IT77TR – (Application for Registration as a Trust and Change in Particulars Trust). Once a trust is registered for Income Tax, the trustee will be required to annually send an Income Tax Return for the Trust.

Complete an IT77TR – (Application for Registration as a Trust and Change in Particulars Trust).

Provisional Tax - The trust must apply for registration within 21 business days of becoming liable for Provisional Tax.

Payroll Taxes –Employees' Tax [Pay-As-You-Earn (PAYE)] -The trust must apply for registration as an employer within 21 business days of becoming an employer.

Skills Development Levy (SDL) – Payable at 1% of the total amount paid in salaries to employees (including overtime payments, leave pay, bonuses, commissions and lump sum payments).

Unemployment Insurance Fund (UIF) – Payable at 1% of remuneration paid or payable during the month.

Value-Added Tax (VAT) – The trust must register if an enterprise has taxable supplies, goods or services subject to VAT – of more than R1 million are made in any 12 month consecutive period. A trust making taxable supplies of less than R1 million may register voluntarily.

A trust may also be liable for the following taxes:

Donations Tax –Donations tax is tax payable at a flat rate of on the value of property disposed of by a donation (sections 54 to 64 of the Income Tax Act, 1962).

Donations tax is levied at a flat rate of 20% on the value of the property donated

A donation includes property disposed of for an inadequate consideration (section 58).

Exemptions- Section 56(1) contains a list of exempt donations which include amongst others donations between spouses and donations to approved public benefit organisations.

Annual exemptions-A donation will be exempt if the total value of donations for a year of assessment does not exceed: Casual gifts by companies and trusts: R10 000. Donations by individuals: R100 000

Donations tax applies to any individual, company or trust that is a resident as defined in section 1 of the Income Tax Act, 1962.

Non-residents are not liable for donations tax.

The person making the donation (donor) is liable for the tax but if the donor fails to pay the tax within the set period the donor and donee are jointly and severally liable for the tax (section 59).

After making a donation you should fill in form IT144 (Declaration by donor / donee) and send it to SARS with your payment.

Donations tax must be paid by the end of the month following the month during which the donation takes effect or such longer period as SARS may allow (section 60(1)). Payment must be accompanied by form IT144 (section 60(4)).

A donation takes effect when all legal formalities for a valid donation have been complied with (section 55(3)).

Donations tax can only be paid by a bank cheque at a SARS branch office.

Transfer Duty – Payable at a sliding scale on the value of property transferred.
hese are the Transfer Duty rates applied to properties acquired **on or after 23 February 2011**, and apply to all persons (including Companies, Close Corporations and Trusts):

VALUE OF PROPERTY (Rand)	RATE
R0 – > R600 000	0%
R600 000 – > R1 000 000	3% on the value above R600 000, but not exceeding R1 000 000
R1 000 000 – > R1 500 000	R12 000 plus 5% on the value above R1 000 000, but not exceeding R1 500 000
R1 500 000 and above	R37 000 plus 8% on the value above R1 500 000

Securities Transfer Tax (STT) – Levied on the transfer of a security at 0,25% of the taxable amount of the security.

HOW DOES A TRUST ACQUIRE ASSETS

Assets can be transferred into the living Trust by:

- selling it to the Trust (through a loan granted to the Trust) or
- donating cash or other assets to it (any person can donate R100 000 per year tax free; 20%

donations tax applies to further donations within the year).

WHEN A TRUST IS TERMINATED

The Trust Deed may provide for the termination of the Trust at either a definite future date or event, such as the death of the founder, or alternatively, at a time and on a date determined by the Trustees in their sole discretion.

The latter provision allows for greater flexibility and may serve to protect the interests of the beneficiaries from unknown future circumstances that could adversely affect the continuation or termination of the Trust.

Prior to distribution of the Trust Fund, the Trustees must discharge all claims owing by the Trust in respect of any liabilities, including amounts owing to the South African Revenue Service and capital gains tax, where applicable.

Upon the termination of the Trust, the Trustees must prepare a final statement of administration and distribute the accumulated income, capital and other benefits accruing to the appropriate beneficiaries. The balance of income, which has accrued, is added to the capital for distribution, so that the balance of the Trust Fund may devolve upon the capital beneficiaries.

Although there are no statutory formalities, it is advisable to deregister the Trust as a taxpayer and go on record with the relevant Master that the Trust has been terminated.

It is important to note that following the termination of a Trust, the Trustees are required to retain the books of account and financial records for a period of five years.