

## **FAILURE TO TRUST: WHY TRUSTS FAIL**

The concept of Trusts has developed over the years and as Kenyans become more affluent and investment savvy, Trusts are becoming a popular vehicle for estate planning. In recent years, we have seen Trusts come under scrutiny with media reports of families going to court to settle disputes arising from Trusts. Such negative publicity has eroded public confidence in the use of Trusts. While most people are familiar with the concept of Wills as a tool of estate planning, there are still those who are not well acquainted with Trusts as an instrument of estate planning. Wills are not to be regarded as the sole tool of estate planning and often times Trusts are used alongside Wills. It is possible for one to have a “Pour-over” Will, which is a Will that directs the executors of the estate to send any property not included in your Will to your Trust.

### ***What is a Trust?***

A Trust is a fiduciary arrangement whereby a person (settlor/donor) transfers their assets (trust property) to chosen persons (trustees) or a company (corporate trustee) to manage the trust property for the benefit of individuals known as beneficiaries. Upon the transfer of assets by the settlor, the settlor ceases to be the owner of the assets and the trustees become the legal owners of the trust property while the beneficiaries become the beneficial owners.

### ***Why a Trust?***

A Trust is an effective estate planning tool for the following reasons:

- ✓ It protects, preserves and builds your wealth for future generations.
- ✓ Where the trust property is transferred to the trustees during the settlor’s lifetime:
  - the trust property does not form part of matrimonial property and will not



be the subject of matrimonial proceedings in the event of divorce.

- when the settlor dies, the trust property will not form part of the settlor's estate - it will not undergo the lengthy probate process. Probate can take upwards of 12 months where there is a Will and much longer in instances where a Will is contested or where there is no Will.
- ✓ It is quick to set up. All that is required to establish a trust is a trust deed.
- ✓ It protects assets from creditors or dependents of a deceased Estate because the trust property does not form part of the deceased's Estate.

### So why do Trusts fail?

Just with everything else, trusts are not ironclad.

- ✓ Lack of transparency. Whether you opt for a Will or a Trust or both, transparency is key in estate planning. The settlor should disclose to both the trustees and the beneficiaries the purpose and vision of the Trust. This will help avoid future conflict.
- ✓ Choice of trustee. Most trustees tend to be family members or friends. Professionals can also act as trustees but at a fee. Trustees are held to a very high standard

and therefore must be trustworthy and competent. Trustees should exercise reasonable caution and remain impartial when carrying out their duties, so one must select their trustees wisely - preferably trustees who have or can gain the confidence of the beneficiaries. In the event of breach of trustee duties, the trustee can be removed by the other trustees or a suit may be instituted against the said trustee by the beneficiaries. A well drafted Trust Deed should contain trustee removal and appointment provisions.

- ✓ Broken family. Where a family is already fractioned, the likelihood of a trust failing increases irrespective of how well the trust document is prepared (there is nothing stopping disgruntled beneficiaries from challenging the trust or interrogating the decisions of trustees). It is advisable to have dispute resolution provisions within the Trust Deed.
- ✓ A poorly drafted Trust Deed which does not properly set out the intentions of the settlor, may lead a Trust to fail.
- ✓ As your circumstances change, your estate plans need to change alongside them.
- ✓ Anyone can move to court to challenge a Trust Deed provided they have *loci standi*.

In the event of a dispute or disagreement, one can seek legal redress from the courts. Recent decisions have shown that the courts place a lot of value on the sanctity of Trusts and will endeavor as much as possible to uphold the wishes of the settlor as contained in the trust document.

Whereas there are instances of Trusts failing, there are far more cases of Trusts working and achieving the desired effects of the settlor. Depending on the circumstances of your case, you may want to put your *trust* in a Trust.

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