

Testamentary trusts are created at the winding up of a deceased estate following a specific stipulation in a person's will that a trust must be set up. Such a stipulation in the will serves the same purpose as a trust deed.

The terms of a testamentary trust are typically not as detailed as with an inter-vivos trust - a trust set up during your lifetime.

In the instance of a testamentary trust, the formalities relating to the making of a valid will must be complied with. The will at least have to contain the following: evidence that it was the testator's/testatrix's intention to create a trust, clearly identified property to be moved into the trust and who the beneficiaries are.

Sometimes a full trust deed is attached to a will, instead of incorporating the usually shorter provisions of a testamentary trust in the body of the will. This serves to provide additional comfort and assurance that the testator's/testatrix's wishes will be honoured.

If, for any reason, the will is invalid, the trust will not come into effect. The Master of the High Court has the power to declare this type of trust invalid, unlike an inter-vivos trust, where the Master of the High Court has no such power.

The legal principles applicable to testamentary trusts are found in the law of testation and succession.

The South African law of succession prescribes the rules which determine the transfer of a person's estate after his/her death. As a result of the freedom of testation in South Africa, it is very difficult to contest the terms and conditions of a testamentary trust.

Freedom of testation means that a person is perfectly entitled to bequeath assets to whoever he/she pleases. Even an unpopular bequest is valid provided the person making it is of sound mind.

Freedom of testation is, however, limited by public policy, and a court will remove clauses which offend the Constitution, such as discrimination based on race or religion.

So be mindful of setting up a testamentary trust that discriminates.

It is important to note that a testator/testatrix cannot delegate his/her testamentary powers in a testamentary trust by giving the trustees wide powers. Only a testator/testatrix can instruct how his/her assets should be dealt with post death.

The law does not allow a testator/testatrix to delegate his/her testamentary powers beyond certain limited exceptions, including achieving that through setting up a testamentary trust.

Any clause in the will that offends this legal principle will be regarded as invalid.

During the settlement period of the deceased estate, the appointed trustees apply for Letters of Authority at the office of the Master of the High Court where the estate is registered.

The testator/testatrix serves as the founder of the trust and appoints the trustees in his/her will. The role of a trustee usually ends after a predetermined period, or at a determined date, such as when a minor turns 18, or upon the death of an income beneficiary.

The child's guardian does not necessarily have to be a trustee.

In fact, it is often a good check and balance to have a separate, independent person, who is financially astute, as a trustee.

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