

ESTATE PLANNING

It is not debatable that you are going to die sooner or later. Right now, you are obviously working hard with certain beneficiaries in mind but are you sure the beneficiaries you have in mind are the ones who will enjoy the benefits of your sweat? It is high time you start thinking about how you want to plan your estate.

Death legally activates the need to distribute one's property amongst the living. Within 14 days after a person dies, his or her estate should be registered with the master of the High court for purposes of estate administration. Failure to register the estate within the 14-day period is a criminal offence. The Master appoints an individual to administer the estate through a document titled "letters of administration." That appointed individual is called an executor and he/she administers the estate under the supervision of the Master of the High Court. If one dies without legally communicating how his or her property is to be distributed (intestate death), the Zimbabwean probate laws provide for the method through which the property is shared. In the case of intestate death, the deceased's close family members are called for a meeting (edict meeting) where they agree on who should be appointed executor (the executor dative). If the deceased left a will, (testate death), the Master issues the letters of administration to the executor who is appointed in terms of the will (executor testamentary).

It is advisable for one to plan his or her estate to avoid a chaotic death which leaves the family divided due to disagreements on the manner in which his/her property should be shared. There are various ways of estate planning. One should choose what best suits him. These are some of the estate planning options;

- i. **Acquiring property in children's/ selected beneficiaries' names or making donations and transferring title to them** -: *This means that one distributes*

property to his children or any beneficiary of choice during his lifetime in the manner he would have wanted to bequeath it in a will. In most cases, the parent or benefactor maintains full control and enjoyment of the property although it is not registered in his/her name. He may even remain in possession of the title deed until his or her death only for the title holder to enjoy exclusive use and possession of the property after the death of the parent or benefactor. The parent/benefactor can as well opt to register the property in the child's or beneficiary's name with a condition for him retaining the right of use and enjoyment of the property until he dies (Usufruct).

- ii. **Writing a will** – : This is a legal document through which one communicates how his property should be shared among his preferred beneficiaries. The will writer also appoints his or her preferred executor (executor testamentary) who will administer the estate as directed in the will. This will ensure that when you die, your wishes will be communicated through a document whose terms will be executed in terms of the probate laws of the land

- iii. **Establishing a Family Trust** -: This is whereby one makes an arrangement for a fund which is kept in Trust under the management of his appointed Trustees for the benefit of his appointed beneficiaries. The Trustees are guided by the terms and conditions set out in a Deed of Trust which is executed before a notary public. In terms of the arrangement, the founder donates and relinquishes his ownership and title of the assets or funds in favor of the family Trust. The arrangement takes effect during the lifetime of the founder and when the founder dies, there is no need to register the estate with the master if he had transferred all his property to the Family Trust.

This presentation will exclusively focus on one estate planning option being Family Trust Arrangement.

FAMILY TRUST REGISTRATION

WHAT IS A FAMILY TRUST

- It is a fiduciary arrangement whereby a **founder** donates assets or funds to be held in trust by some appointed individuals (**Trustees**) on behalf of and for the benefit of certain individuals of the founder's choice (**beneficiaries**). A family Trust is regulated by a document called a Deed of Trust which directs the Trustees on how

the assets or funds donated to or acquired by the family Trust are to be managed and how and when they are to pass to the beneficiaries.

- A family trust arrangement provides a lifetime and after-death property management which excludes the estate from the probate laws of the land upon the demise of the founder. Court intervention or supervision by the Master of the High Court is not a requirement even after the founder's death.
- It is perfectly permissible for one to found more than one family trust arrangements for example, there can be a deed of trust for the benefit of each individual child born to the founder whereby that child will be the only beneficiary of the trust fund.
- A founder is not precluded from being one of the trustees and/or one of the beneficiaries of the Trust
- A Trustee can also be a beneficiary and vice versa
- It is perfectly permissible for one to register a family trust before he or she acquires any property of value. A small amount of money can be donated for the establishment of the Trust.
- A Family Trust can have more than one founder

HOW DO I FORM A FAMILY TRUST?

- Appoint a Notary public of your choice for the process. A Notary Public is a legal Practitioner who is also registered as a notary public by the High Court of Zimbabwe.
- Every notary public in Zimbabwe is a registered lawyer but not every registered lawyer is a notary public. Therefore, it is important to find out if your preferred counsel is a holder of a notary public practicing certificate issued by the High Court of Zimbabwe.
- The Deed of Trust is prepared by and executed before a **Notary Public** who should then register it with the Registrar of Deeds whereupon it will then be allocated a unique registration number.
- The founder is encouraged to discuss with the notary public his or her preferred terms and conditions for the family trust which should be communicated to the trustees and beneficiaries through the deed of trust.

- The following information is also required by the Notary Public:
 - i. The name of the Trust
 - ii. The full names, date of birth, national identity number and address of the Founder
 - iii. The full names, date of birth, national identity number and address of each of the appointed Trustees
 - iv. The full names, date of birth, national identity number and address of every beneficiary
 - v. Copies of the title deeds/ proof of cession/ agreement of sale for the property to be donated by the founder

- Do not rush to sign the document without an understanding of the terms and conditions contained in it. Take time to go through and ensure that your wishes as the founder are fully captured in the Deed of Trust.

- Legally, once the Deed of Trust is notarized by the Notary Public, a family Trust is duly established. However, the Registrar of Deeds has recently made it a requirement that for a Family Trust to receive transfer of property title through the office of the Registrar of Deeds, The Family Trust should first be registered with his office and be allocated a registration number.

- Once a family trust is legally established, it can receive transfer of property title or rights and interests in a property

- A deed of trust may provide for the Trustees to accept donations from anyone other than the founder/s.

- After the donation of property to the Trust, the title or rights and interests in that property should then be transferred from the founder/s or donor/s to the Family Trust for the donation process to be complete.

- Once a deed of trust is registered, it is not necessary for the founder/s to acquire property and then donate it to the trust. Rather, it is more convenient and cost effective for the property to be acquired through the trust

- The duration of the Trust can be made perpetual benefiting one's descendants from one generation to the other

ADVANTAGES OF PLANNING THE ESTATE THROUGH A FAMILY TRUST ARRANGEMENT

- 1. Cost-effective and ensures privacy**
 - A family trust arrangement makes it possible for one to avoid the inconvenience of court-supervised distribution of one's estate post death. It is one of the best methods of handing over the family assets to future generations without going through probate processes or incurring costs.
 - Family trusts, unlike standard wills, are not publicly administered and the details of the family trust arrangement are kept confidential. Probate lists the deceased's debts and assets and avails information on how the estate will be distributed to members of the public.
 - The probate process can drag on and costs the beneficiaries considerable money in legal costs. However, a family trust allows the by-passing of the probate process, instead the assets are distributed as provided for in the trust deed.
- 2. Protects the property from creditors** - there is transfer of legal ownership of the property from the founder/donor to the Trust. **Bankruptcy or insolvency** and other business misfortunes can be overcome through protection of personal assets.
- 3. Keeps the property separate from matrimonial property**- The property placed under the trust is ultimately kept separate from matrimonial property.
- 4. Tax benefits** - Family trusts provide protection against various forms of wealth tax which may be introduced in the future such as death duties or inheritance tax. Most families use family trusts to minimize the inheritance taxes associated with the transfer of wealth from parents to children.
- 5. Generates income** - trustees can make investments in the name of the trust. For instance, a trust might use some of the property it holds as a lodge to create income that will go towards the upkeep of the property. The trust can provide the beneficiaries with income and /or capital to meet their legitimate cash requirements as they arise. This can protect the long-term value of family property.
- 6. Not easily contested or altered** - The powers of the grantor and trustee are normally considered irrefutable. Generally, a standard will is susceptible to

contestation due to the fact that it is public in nature. Since a family trust becomes operational during the founder's lifetime, the deed of trust cannot be contested when the founder dies.

DISADVANTAGES OF FAMILY TRUST ARRANGEMENTS

1. **Not easily revocable:** Once a donation into the trust is made, the founder or donor ceases to personally own the property and cannot have the property transferred back to him or her without the resolution by the Trustees.
2. **Costs** – There are, of course, costs involved in setting up a Trust and transfer of title from the founder to the Trust.

About The Writer

Advocate Tendai Rusinahama-Rabvukwa is the senior partner of Brentwood Chambers, Rusinahama-Rabvukwa Attorneys. She is an international speaker on the subject of Estate Planning and she is an expert in family and property law. Tendai says:- *“A man who leaves an inheritance for his offsprings is surely wise but wiser is he who ensures that the manner of distribution of the inheritance is clearly, properly and effectively communicated to avoid pandemonium post his death.”*



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