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Recent Changes to Trustee Perpetual Succession

Introduction

On December 07, 2021, Trustee (Perpetual Succession) Act (the Act) was amended to streamline the registration of trusts and shift the administration duties from the Cabinet Secretary to the Principal Registrar of Documents. It makes a new provision for irrevocability of trusts, definition on the various types of trusts, adding property to trusts, validity of trusts, beneficiaries of a trust and their class, and the introduction of enforcers.

These new changes are discussed below.

Incorporation of Trustees

A trust is a legal relationship created by the settlor to place his/her property under the control of a trustee who then has an equitable obligation to hold that property for the benefit of a beneficiary.

The existence of a trust is not determined by the life of a settlor, therefore a beneficiary can continue to enjoy the benefits of the trust property even when the settlor dies. This is what is known as perpetual succession. The Act mainly deals with the application procedure for a certificate of incorporation by the Principal Registrar of Documents. Before the amendment, changes to the certificate were issued by the Cabinet Secretary of Lands. This was a much needed and welcome change.

Under the new amendment, any form of trust can apply to the Principal Registrar for a certificate of incorporation. This revises the previous position where, before an application for incorporation was made, trustees were required to be appointed or associated with either a religious, educational, literary, scientific, social, athletic or charitable body, or were trustees of a pension or provident fund.

In addition, the Principal Registrar is required within a fixed period to deal with the application for incorporation, unlike previously where applications took an inordinate period. This change brings predictability to the registration process.

Irrevocability of Trusts

All trusts are now deemed to be irrevocable upon the death of the settlor unless the trust deed contains an express power

of revocation or the settlor exercises an express power of revocation during his/her lifetime.

When a trust is irrevocable, it cannot be amended or modified except by consent of all beneficiaries or by a court order.

Types of Trusts

The Act has made provision to the following trusts:

a) Charitable Trust

This is a discretionary trust formed solely for the purpose of poverty reliefs, education advancement, religion or human rights and fundamental freedoms, environmental protection, or for any other purpose beneficial to the general public.

They must be capable of being pursued in Kenya and empower the trustee to defer distribution of the trust's assets to any charity or other beneficiary of the trust during its term.

b) Non-Charitable Purpose Trusts

It is created for a specific purpose whether partly charitable or not, and its terms provide for the disposal of surplus assets upon its termination.

c) Family Trust

This is a non-trading entity formed for the purpose of managing one's estate. It is an effective and convenient tool in succession planning as it avoids probate and estate administration processes which from experience is costly and time consuming. It is also used for preserving generational wealth.

Adding Property to a Trust

The Act has allowed trustees to add assets as part of the trust property from any person, unless the trust provides otherwise. This provision gives leeway to the settlor to instruct his/her debtor(s) to pay debts directly to the trust without necessarily receiving them first.

The Act has further provided that where the settlor has declared a trust for a property to which he/she does not possess, the trust will not be properly constituted until he/she becomes the beneficial or legal owner. This provision

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targets future assets that the settlor may soon acquire or before ownership is transferred to him/her.

Validity of a Trust

A trust is considered valid and enforceable as per its terms, except in the following situations:

- a) It is created for an illegal purpose in Kenya;
- b) It has no identifiable or ascertainable beneficiary;
- c) It was formed by duress, fraud, misrepresentation or in breach of a fiduciary duty;
- d) Its terms are vague to make performance impossible; or
- e) The settlor lacked capacity to create the trust.

Additionally, where a trust is created without any assets, this will not invalidate it in circumstances where the settlor becomes bankrupt, or that his/her property is liquidated, or is sued by his/her creditors. This will safeguard the interests of the beneficiaries from any claims that the settlor may be involved in once the trust is formed.

The principle of severability, which is often used in interpreting contracts, will now be applied in trusts. This principle will allow courts to ignore or separate certain parts of the trust that would make it invalid and declare the remainder operative. This principle will also extend to the holding of any property under the trust, if affected by the invalidity.

Beneficiaries of a Trust

The Act has provided a criterion that a trust must meet in identifying a beneficiary. This may be in reference to a class of beneficiaries or the beneficiaries are directly related to the settlor or not, or are living or yet to be born.

The terms of the trust may include a criterion for the addition and exclusion of a beneficiary in a class. In cases of a family trust, unborn children can be included in the trust.

In instances where the trust is created in favour of a particular class, a person may join as a member before its closure.

The Act also allows for the imposition of an obligation or condition on a beneficiary to the trust. For example, in a family trust, there may be a pre-condition restricting children from benefiting from the trust until they attain the age of eighteen (18) years.

Class of Beneficiaries

Presently, if there is no member in a class, the accumulated income will be reserved until he/she exists.

Such accumulations must however not exceed one of the accumulation periods provided under the Perpetuities and Accumulations Act.

It is noteworthy that these periods have been criticised for being complex and causing uncertainty when electing the appropriate accumulation period where the trust does not stipulate for one. This issue has been taken up for debate in Parliament through the Perpetuities and Accumulations (Amendment) Bill, 2021 (the "Bill"), which we will provide an update once it is enforced.

Enforcer

The Act has introduced a new independent person in the trust structure called an enforcer.

The appointment of an enforcer is optional and the Act places no restriction on who can be appointed. This can be the settlor or any person, body or an association duly appointed or replaced by the settlor or the beneficiaries in the absence of the settlor.

The Act has indicated that an enforcer will play an oversight role on the administration of the trust. Other roles outlined, include:

- a) Enforcing the trust;
- b) Inquiring into the status of implementation of the trust;
- c) Requiring the trustee to take remedial action, where there is breach of trust;
- d) Reporting to the settlor or the beneficiaries, any financial or other breaches by the trustees; and
- e) Taking legal action on behalf of or against the trustees, whether criminal or civil.

An enforcer will be entitled to access any documents, accounts or information when discharging his/her functions.

The roles of an enforcer and the trustee are distinguishable, and the Act requires that both functions are not performed by the same person.

The Act also restricts an enforcer from entering into dealings with the trustee regarding trust property and making profits from the trust, save for reasonable fees and any incurred expenses that may be reimbursed from the trust. The role of the enforcer is a double edge sword and could in cases of

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smaller trusts mean higher administration costs eating into the trust assets.

Conclusion

Trusts are one of the most preferable tools for wealth management and administration of estates. This changes are much welcome change to the Trust law regime in the country which was still running under an Act that was passed in 1948 and last amended in 1987. The Bill is pending in Parliament and is key to aligning the changes made under the Act. We will keep track of the bill and appraise you once it is passed. We expect there will be an increase in the use of trusts in wealth management.

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