REGISTRATION OF FAMILY TRUSTS IN KENYA

Family Business **Newsletter** **14th March 2022**

Introduction

On **23rd December 2021**, the Trustees (Perpetual Succession) (Amendment) Act (TPSA) came into force, introducing a new regime of registration of family trusts.

Previously, family trusts could only be registered indirectly by incorporating companies limited by guarantee. This made the forming of family companies unpopular leaving probate as the main tool for estate planning. Probate proceedings require the institution of succession causes in court. They are of a public nature thus lead to the private affairs of the deceased being a matter of public record. They are also lengthy, costly and adversarial leading to a lot of disagreements within families.

What is a Family Trust?

The Act defines a Family Trust as *"a trust, whether living or testamentary, partly charitable or non-charitable registered by any person (s) jointly or individually for planning or managing their personal estate."*
Family Trusts are created for purpose of planning/managing one's personal estate for beneficiaries to ensure preservation of wealth for generations. The TPSA provides that family trusts are strictly not for trading purposes. They can only engage in business activities by incorporating companies separate from the Trust.

Categories of Family Trusts

Registered family trusts can be categorized into two: testamentary and living trusts.

a) Testamentary Trusts

A Testamentary Trust is created in accordance with the instructions in a person's Will. It outlines how assets will be given to certain named beneficiaries upon a person's death. It is governed by the Law of Succession Act and becomes effective upon the Settlor's death, upon the conclusion of probate proceedings.

The benefit of Testamentary Trusts is that they consolidate one's estate, and preserve the wealth for generations. The disadvantage is that one still has to go through probate proceedings to kick-start their operation.

b) Living Trusts

Living trusts are a new creature of the *Trustees (Perpetual Succession) (Amendment) Act*. They are formed for the and become operational during the lifetime of the Settlor. Living Trusts beneficiaries need not be directly related to the Settlor. They can be either revocable or irrevocable.

i. Revocable Living Trusts

A Living Trust is revocable if it contains an express revocation clause in the Trust Deed, exercisable by the Settlor in his lifetime. The Settlor has absolute control over the administration of the Living Trust. This type of Trust does not offer protection in insolvency and creditor proceedings as the Settlor maintains significant control over the affairs of the Trust. It can therefore be presumed that the Settlor may use the Trust property to settle personal debts.

ii. Irrevocable Living Trusts

An irrevocable Living Trust does not contain a revocation clause. Once formed, the settlor cannot make changes to the terms of the Trust. Property transferred by the Settlor is deemed to be solely owned by the Trust and does not formed part of the Settlor's personal property. This provides **creditor protection** in the event of the settlor's bankruptcy or proceedings by the creditors.

Benefits of Family Trusts

1. Family Trusts as a tool for tax planning

Following the enactment of the **Finance Act, 2021**, several amendments were made to the Income Tax Act and the Stamp Duty Act with respect to registered family trusts. These amendments provide for tax exemptions for some transactions affecting family trusts. These include;

a. Exemptions under the Income Tax Act

i. Income Tax Exemptions

- Certain income derived by the beneficiaries from registered family trusts are exempted from tax. This include amounts paid out of the trust, on behalf of beneficiaries exclusively for education, medical treatment and early adulthood housing purposes. This applies to all Income of less than 10M per year.
- The Act also provides for exemption on the income of a family trust.

ii. Capital Gains Tax Exemptions

- Property which is sold for *purposes* of transferring proceeds into a registered family trust are exempted from capital gains tax (CGT).
- Individuals who transfer their property into registered family trusts are exempted from CGT payment for those transactions.

b. Exemptions under the Stamp Duty Act

With the introduction of **S.52(2)(b)**, conveyancing transactions of registered Family Trusts are now exempt from paying stamp duty during the transfer of land, investment shares etc.

2. Family Trusts as a tool for Estate Management

a. Creation and preservation of sustainable generation wealth

Family Trusts protect family assets throughout multiple successive generations since the property is held by a trust.

b. Elimination of the need for probate proceedings

The operation of living trusts is not subject probate proceedings. Eliminating the need for court proceedings safeguards the privacy of the settlor and their beneficiaries and saves on legal costs.

c. Safeguard the Deceased's living & testamentary power

There are several court instances where a deceased's testamentary power was called to question, and a will was invalidated. The operation of living trusts ensure that the deceased's wishes on their property are adhered to.

d. Asset protection against creditor and bankruptcy proceedings

This is especially in relation to irrevocable living trusts. In the event of bankruptcy proceedings, the Trust property cannot be sold or transferred for purposes of settling debts of the Settlor or the beneficiaries. This is a crucial estate planner and should be explored by individuals whose assets may be at risk because of insolvency.

Conclusion

The benefits of registering family trusts under this new regime of the TPSA cannot be overstated. Family trusts are a helpful tool for managing one's estate and ensuring preservation of wealth through successive generations. Further, the tax breaks offered to these entities are evidence of the government's effort to support estate planning by encouraging the formation of family trusts. Family trusts are a revolutionary development that if set up right, will ultimately deal with most family property challenges.

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Our Services

At **Muma & Kanjama Advocates,** we understand that incorporating Trusts may challenging for the ordinary *mwananchi*. We encourage you to get in touch with us for your Trust and overall family business legal needs.

We have a robust **Family & Estate Planning Services** that offer; -

- Registration of Trusts
- Estate and Succession Planning
- Probate and Administration
- Child Custody & Maintenance; and
- Family dispute resolution, among others.

We also offer various **Trust Administration Services** including; -

- Development of governance policies & procedure manuals
- Filing of returns & application of Tax exemptions
- Attendance of Board Meetings
- Other transactions with respect to administration of the Trust

Contact us today at: info@mumakanjama.com
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