# To trust or not to trust

By Alex Simeonides, issued by Capital Legacy

7 Jul 2021

It is a global misconception that trusts are only for the rich, and the benefits of a trust are only enjoyed by 'trust fund babies'. This misconception is perpetuated by misinformation and often ignorance. Testamentary trusts are trusts you create through your will and when set up correctly they provide financial provision, safeguarding of assets and certainty for beneficiaries until the beneficiaries are able to manage their inheritances effectively on their own. This means they enable 'financial guardianship' for your beneficiaries, much like a guardian who will care for your children. At Capital Legacy, we have packaged such trusts into purpose-driven trusts that can meet the unique needs of beneficiaries.

**What is a testamentary trust?**

A testamentary trust is simply a trust that is established according to a deceased individual's wish in their valid last will and testament. In other words, it is planned for in your will but only comes into effect when you pass away. There are certain tax exemptions which may be applied to the trust depending on its specific purpose. This helps ensure that the inheritance, which is left to minor children or beneficiaries who are unable to manage their own financial affairs, is managed well and to their benefit. In the case of minors and individuals who are unable to manage their own finances, if there is no trust in place, their inheritances are paid to the government Guardian's Fund, which, although altruistic in purpose, has been victim to fraud and maladministration.

LEGAL

Would you leave your children's inheritance in the hands of the government?

Alex Simeonides, Capital Legacy 25 Mar 2021

A testamentary trust is currently the only regulated alternative to the Guardian's Fund. However, it is very important to note that trustee fees could be exorbitant especially when considering the value of the capital being placed into trust, income accruing, and the number of years for which the trust needs to be active.

Before making any decisions, it's probably best that you, firstly, speak to a will-drafting specialist who can advise you on the various aspects you need to consider because your will becomes the trust deed for the testamentary trust, and it would have to be considered valid by the Master of the High Court when your estate is administered. It would be detrimental to your beneficiaries if your will is declared invalid and their inheritances are then paid into the government Guardian's Fund and your estate is administered according to the laws of intestate succession. Secondly, you need to consult with a professional financial advisor to ensure that the purpose of the testamentary trust is financially planned for. There is no sense in providing for a testamentary trust but then the trust runs out of financial resources before the end of the trust term, and it cannot fulfil its intended purpose. This is unfortunately a situation we, as a fiduciary business, have had to navigate all too often. At Capital Legacy, we ensure we clearly understand what our clients' wishes are for their loved ones and propose trust solutions that have a very clear purpose, to fulfil their wishes. These purpose-driven trusts meet the unique needs of beneficiaries through methods that work and that are easy to set up.

**Three purpose-driven trusts that we frequently use:**

1. **Legacy Childrens Trust™**
   When you provide for a children's trust through your will, it will be created for minor children (who are under the age of 18 years) at the time of your death and will run until they turn 18 years old or reach the age specified in your will. Minor children cannot inherit directly, and so creating a testamentary trust ensures their inheritance is not left in the hands of guardians or the Guardian's Fund, and that any property that they may inherit can be leased or sold. A children's trust is classified as a type B testamentary trust – which enjoys certain tax benefits by Sars.

2. **Legacy Widows Trust™**
   A Widow's Trust is established to protect your spouse or partner's inheritance ensuring that the estate left to them is not squandered or mismanaged by others, and that your spouse or partner is provided for until they pass away. Additionally, this structure ensures that your children or other beneficiaries also benefit from your estate when your spouse or partner passes away one day – creating a generational legacy. The purpose behind this trust is often overlooked because of the assumed tax implications, but this specific trust does not attract estate duty or capital gains tax which, as an estate planning tool, can help save millions in life insurance and taxes.

3. **Legacy Providers Trust™**
   A Provider's Trust is established to ensure the ongoing financial support of an individual who needs financial help if they are unable to provide for themselves or manage their own finances. Parents of children with special needs such as cerebral palsy or autism often use this structure in their wills to ensure their children are looked after, even in their older age. A Provider's Trust will only be classified as a type A testamentary trust, which has very favourable tax benefits, if the beneficiary has been diagnosed with a mental disorder as provided for in the Mental Health Care Act 17 of 2002, or a serious physical disability which precludes them from earning an income or managing their own affairs.

**Tax benefits and implications of trusts**

When a testamentary trust is classified as a type A or type B, certain tax benefits are applicable – which naturally benefit the beneficiaries of the trust. It is important to remember that a trust is not a tax avoidance tool; tax still applies but it may be more favourable within a testamentary trust structure, set up through your will.

**The role of the executor and trustees with regards to a trust**

It is important to recognise that even though a testamentary trust is set up in accordance with the provisions made in a last will and testament, that the executor of the deceased estate plays a role in the trust itself. The executor is responsible for ensuring that the wishes of a deceased individual are carried out as far as reasonably possible, but they are not necessarily the ones who will administer the trust, unless you have provided for this through your will.

In South Africa, the Trust Property Control Act No 57 of 1988, in conjunction with the trust deed, governs the actions and decisions taken by trustees. So, the provisions that you make in your Will should include how the trust should be set up, when it should be ended, and what the duties of the trustees are and their limitations. In our wills, we, by default, make provision for a testamentary trust within the will in case one of the beneficiaries or their descendants are under the age of 18 years, however, we also make provision for the executor and trustees to use their discretion on whether setting up a testamentary trust is financially viable at the time. It is important that the trustees who are appointed to the trust you create remain objective and ensure that each decision they make is in the best interest of the beneficiary. It's for this reason that we often encourage our clients to appoint both a personal trustee as well as a professional one who remains independent.

**Running costs of a testamentary trust**

When establishing a trust, there are certain services the trustees may charge for, such as:

- Initial setup costs of the trust
- Annual trustee fees for management of capital
- Fees in the form of a percentage of income received by the trust

In addition to these fees, the trust needs to have annual financial statements which incur accounting costs, and the income tax rules are applied to the income received by the trust.

Sometimes these fees seem prohibitive, and people end up avoiding a trust structure even though it may be the best solution for their needs – especially when minor children are involved. Capital Legacy's Legacy Protection Plan™ is a unique solution that covers the costs of setting up and running a trust, as well as other legal costs related to executing an estate, such as executor and conveyancing fees.

Combining sound fiduciary advice with sound financial advice means you can provide your beneficiaries, especially the young and vulnerable ones, with certainty when you are no longer around. A trust can be an efficient vehicle for the every-day man and shouldn't be misconstrued as something only used by the rich and famous.

To find out more about wills and trusts, visit [www.capitallegacy.co.za](www.capitallegacy.co.za)

## ABOUT THE AUTHOR

Alex Simeonides is the CEO of Capital Legacy

- **Don't leave chaos in your wake** 16 Apr 2024
- **What happens to your home when you pass away?** 20 Mar 2024
- **Mandela estate mayhem** 6 Feb 2024
- **Legacy in motion: Carl Coetzee appointed as a managing director within the Capital Legacy group** 26 Jan 2024
- **Inheritance oddities: A world tour of weird rules and customs** 21 Nov 2023