ANDREW & STEVE ADVOCATES

LEGAL ALERT

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# FAMILY TRUST & SUCCESSION PLANNING

## THE LAW

**Family trusts are legally recognized in Kenya as of 2021, following the signing of the Trustees (Perpetual Succession) (Amendment) Act ("the Amendment Act") into law on December 7th of the same year and can be registered/incorporated by any person(s), jointly or individually, for the purpose of personal estate planning or management.**

**The Amendment Act made significant amendments to the Trustee (Perpetual Succession) Act, which focused on the type of trusts recognized by law, their procedure for registration and their juristic personality. The Amendment Act specifically addresses family and non-charitable trusts, which are used to accumulate and preserve wealth for future generations.**

The American expression, "Shirtsleeves to shirtsleeves in three generations" essentially states the same belief as the Chinese saying that goes "Wealth does not last beyond three generations". The adage describes the inability of grandchildren to manage the wealth passed down to them from their grandparents and parents and underpins the creation of family trusts – structures designed to manage and safeguard assets for the purpose of ensuring wealth continuity and the seamless passage of wealth through generations.

A Trust is essentially a legal relationship that exists between a Settlor (creator of the trust), a Trustee (a protector of the trust) and a Beneficiary. These parties can either be individuals or legal entities.

Under a Trust arrangement, the Settlor transfers legal ownership of assets to the Trustee, to hold for the benefit of the Beneficiaries.

## PROCEDURE FOR REGISTERING A TRUST IN KENYA

1. **Preparation of a Trust Deed**

A trust deed is an instrument that contains the terms and conditions that govern the relationship between the settlor, trustees and beneficiaries in the management and control of the assets. It gives the trustee the power to carry out the wishes of the settlor. The trust deed should include the following information:

- The names of the grantor/settlor (the person creating the trust), trustee, and beneficiaries
- The assets and properties being placed in the trust.
- The powers and duties of the trustee.
- The terms and conditions for the distribution of assets or gains to beneficiaries.
- The provisions for amending or revoking the trust, if necessary.

The trust deed should be signed and executed by both the settlor(s) and the trustee(s). The execution by both parties provides clear evidence of the intentions of both parties and of the agreed obligations assumed by the trustee.

**2. Registration under the Registration of Documents Act (Cap 285, Laws of Kenya).**

Upon preparation and execution of a trust deed, the next step entails making an application for registration of the Trust Deed under Registration of Documents Act (Cap 285, Laws of Kenya) at the Lands Registry.
The process of registration under the Registration of Documents Act **takes 1-3 weeks** from the date of application for registration. Once registered under this Act, the trust does not have a legal personality of its own. In order for the Trust to have a legal personality of its own, it has to be incorporated pursuant to the Trustees (Perpetual Succession) Act (Cap 164).

The implication of an unincorporated trust is that the Trust can only own property, enter into contracts or do any other thing in the name of its trustees but not in its own name, that is in the name of the Trust. An unincorporated Trust does not have a separate legal existence of its own separate from its trustees. This poses a challenge when there are a change of trustees either by application of Law or under the provisions of the Trust deed, as changes are required to be individually noted on every ownership document.

**3. Registration under the Trustees (Perpetual Succession) Act (Cap 164, Laws of Kenya).**

Previously, the TPSA provided for incorporation of trustees and maintaining a register of trusts to be under the mandate of the Principal Registrar

appointed under the Registration of Documents Act, Cap 285. The Cabinet Secretary responsible for matters relating to land oversaw the making of regulations under the TPSA.
Pursuant to the recent amendments as of 24th April 2024, all the above tasks will now be carried out by the Registrar appointed under the Companies Act, 2015. The application forms and fees payable for incorporation of trustees have also been revised. It would appear that as the Registrar of Companies is responsible for incorporation of companies, the responsibility of incorporation of trustees as a corporate body under the TPSA has also now been included under his mandate.

An application for the incorporation of a registered trust shall be in writing and shall be accompanied by the following documents;

- Duly registered Trust Deed and Constitution;
- Petition (should be commissioned);
- Diagrammatic representation of the common seal;
- Abstract of minutes appointing the trustees;
- Organization's current financial status such as bank statements;
- Statement of donor funding/commitment;
- Curriculum vitae of trustees (for individual trustees);
- Brief summary of the Trust;
- Certified copies of Identity Card and KRA Pin (for individual trustees);
- Certified copies of Registration Certificate and KRA Pin (for corporate trustees); and
- Any other relevant document.

The Registrar shall, within **sixty (60) days of receipt of the application for incorporation of a registered trust**, approve or reject the application.
Upon incorporation, the trustees shall become a body corporate and shall have perpetual succession and a common seal, power to sue and be sued in their corporate name and may hold any movable or immovable property that may be vested in them by way of purchase, acquisition, donation, gift or other assurance.

### 4. Transferring Assets to the Trust

Once the trust is officially registered or incorporated, the settlor/founder can proceed with settling assets into the trust. This entails transferring ownership of assets from the founder to the trust. The assets settled into the trust may include the founder's own holdings as well as assets/ contributions from sources other than the founder, such as donations or settlements from the founder's debtors. This step simplifies the process of consolidating and preserving wealth, especially within larger families.

## TAX IMPLICATIONS ON TRUSTS

The law provides attractive tax incentives for registered family trusts including exemption from stamp duty and capital gains tax on the transfer of properties to the trust as well as income tax on the earnings of the trust. The income received by a beneficiary from the trust is also tax-exempt up to a maximum of Ksh.10 million per annum. Where trust funds are expended exclusively on a beneficiary's education, medical treatment or early adulthood housing, they are also tax-exempt.

However the Finance Bill 2024 proposes to repeal various exemptions applicable to trusts which were introduced by the Finance Act 2021, which include:

- tax exemption on the income of any registered trust scheme.
- tax exemption relating to the income or principal sum of a registered family trust; and
- tax exemption from Capital Gains Tax arising from transfer of immovable property to a family trust

These changes if passed are to be effective from 1st July 2024. A key reason as to why registered family trusts have become quite popular is due to the tax exemptions such as making the income of a registered family trust exempt from income tax. Accordingly, the removal of the exemption will be a significant setback in making registered family trusts as preferred option of estate and succession planning in Kenya. This may also lead to a return of the popularity of offshore family trusts.





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