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The role of the Founder in a Trust

The Role of a Founder in a Trust

A Trust is seen as a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose ¹.

A more readable description of a Trust can be described as a legal relationship which has been created by a person (known as the founder, donor, or settlor) through placing assets under the control of another person (known as the trustee) during the founder's lifetime (an inter vivos trust) or on the founder's death (will trust, testamentary trust or trust mortis causa) for the benefit of third persons (the beneficiaries). Therefore a trust is either a contract (Crookes v Watson case of 1956) that is brought about by a person (the founder) when he/she is alive or it is a testamentary disposition that is brought about on the death of a person. A trust can also be created in terms of a court order (court order trust), such as a divorce order.

Remember that, for a trust to be valid, it should be the founder's intention to have a trust in place, and the founder should transfer legal (although not beneficial) ownership of the trust assets to the trustees. The key element of the trust arrangement is the transfer of ownership and control of the trust assets from the founder to one or more trustees who hold the trust assets, not in their personal capacities, but for the benefit of the trust beneficiaries.

Even though a trust is not a legal 'person', a trust has an existence, separate and apart from the founder, the trustees and the beneficiaries. It should therefore achieve a separation between ownership/control and enjoyment, otherwise a trust does not come into existence.

It is important to note that, without being appointed as trustee of the trust, the founder cannot assume powers, act in any other capacity, seek the enforcement of the provisions of the trust deed, or litigate on behalf of the trust he/she/it formed, merely because he/she/it was the founder of the trust. Once a trust has been formed, the founder has no further jurisdiction over it and his/her/its mandate expires, unless specific powers have been specifically reserved for the founder in the trust deed (NAFCOC Northern Cape v Modise case of 2013). In the absence of specific provisions in the trust deed of an inter vivos trust, the role of the founder of the trust is limited to being able to amend the trust deed, subject to the terms of the trust deed and the common law. A trust deed, being a contract, can be amended at any time by the parties thereto - the founder/s and the trustee/s and the beneficiaries, when they have accepted their benefits.

Although the Court found in the NAFCOC Northern Cape v Modise case of 2013 that the founder had no right generally to enforce the terms of the trust deed and therefore could not bring an application to Court on behalf of the trust, the conclusion reached in the judgement could be challenged as a trust is a contract between the founder and the trustees. The trustees and beneficiaries obtain their powers and rights and assume their obligations in terms of the trust deed and the law. So if the trustees, as contracting parties, breach any terms of the trust deed (the contract), the founder (as contracting party) would have the right to enforce the terms of the trust deed, and could therefore turn to the Court to have the terms enforced, if they were being breached by the trustees.

If you are the founder of a trust and you want to remain involved in the management of the trust to ensure that the objective of the trust is achieved, then rather also act as trustee of the trust.²

~ *Written by Phia van der Spuy* ~

¹

Cameron, D. W. (n.d.). *Honoured South African Law of Trusts - Fifth Edition*. Juta.

² Article "The role of the founder of a trust" - dated 6 December 2029, by Phia van der Spuy of Trusteeze