

What to consider when buying property in a trust

When purchasing property as a long-term investment that you plan to will to heirs on your passing, consider establishing a trust that could allow you greater control over what happens to the property after you're gone.



Image: Supplied

“Most of the time, people buy property as their primary residence with a view to upgrading – or downsizing - at a future date when finances and circumstances allow, however, if your property investment plans stretch beyond that, then you should look at ways of safeguarding your intentions,” says Grahame Diedericks, manager principal for Lew Geffen Sotheby’s International Realty in Midrand.

“A trust is a popular option as it helps you hold the property for your benefit and the benefit of whomever you decide should own it after you and, although legally, that means the trust, rather than you, owns the home, you can be the trustee of the property and still have significant control over it.

“In a nutshell, a trust is a legal entity which is created by a founder to protect and benefit, both financially and legally, the assets which are placed therein. However, it’s not as simple as it sounds and it’s important that you weigh up the pros and cons before deciding whether it’s the best option for you.”

Pros:

- The trust owns the assets and, practically, this means that once the founder passes away, the assets in the trust will not form part of the deceased’s estate and will not be liable for estate duty.
- If there is no reason to transfer the property to any of the deceased’s heirs, it will save on transfer duty.
- The rate a trust pays on Capital Gains Tax is lower than the rate of estate duty.
- The assets are protected from creditors and, should the founder become insolvent, any assets in the trust cannot be attached, provided a certain period of time has passed.

Cons:

- Trustees are appointed to manage the entity and its assets so the founder is no longer technically in control of the assets.
- Trusts pay higher tax than individuals pay and any income received by a trust is now taxed at 45% per annum, with no rebates applicable.
- Trusts are not exempt from transfer duty when purchasing immovable property and they are liable to donation tax in the case where assets are donated.
- Despite a property being one's primary residence, the R2m capital gains tax exception does not find application.

Eduan Milner of Eduan Milner Attorneys, Notaries and Conveyancers, says that whilst trusts are an excellent way to protect assets, it's important to consider all the options and whether a trust is the correct entity for the purpose that you require.

"Compare it to a company or closed corporation and seek financial advice beforehand from an auditor or accountant regarding the initial set up costs and ongoing annual fees involved in all three options.

"Also bear in mind that every trust must submit a yearly tax return which necessitates that all accounting records must be kept up to date – and that that a trust involves more work and takes much more responsibility to administer than most lay persons foresee!"

Miner says that once you've decided that a trust is the way to go, the next step is to establish a living – or *inter vivos* – trust which is a trust created during a person's lifetime, and it allows the trustee to manage the assets for the benefit of a beneficiary, such as a child.

"It's essential that the professional you approach to set up your trust has experience with establishing and registering trusts and all the legalities involved and, very importantly, get an estimation of the costs beforehand."



Removing an unwilling trustee

28 Jun 2016



Basic requirements of setting up a trust

"Firstly, the trust requires a founder, who is the creator of the trust," says Milner, "and then a trust deed needs to be drafted setting out all the legal aspects, the most important being to define the purpose for which it's being created, to clearly identify the beneficiaries and to set out the functions and powers of the trustees.

"Thirdly, trustees need to be identified who are willing to act as trustees and, finally, an accountant needs to be appointed who will attend to the financial record keeping of the trust."

Set-up costs

“These will vary, depending on the purpose and the complexity of the trust but the most expensive aspect is taking instructions from the founder regarding the trust deed and thereafter drafting the document.

“There are other documents to draft for the various trustees to sign and there are also a few attendances at the Master’s office, but by far the greatest time will be spent in preparing the trust deed itself.

“Another consideration will be the person whom you appoint to attend to this work. If you make use of an attorney, you will find that their hourly rates can differ, usually ranging between R1,600 and R2,600 per hour.

“But, as a rule of thumb, I usually advise clients that registering a straight forward, simple trust – for example one that will just acquire just one property and perhaps rent it out - will definitely exceed R10,000 in set-up costs.”

Appointing trustees

Milner says that the selection of trustees will be determined by the type of trust being established. For example, if it is a family trust that merely owns property for the use of the beneficiaries themselves, you do not require a person with expert knowledge in a specific field.

However, if the trust has business dealings of a more complicated nature, it would be advisable to select at least one trustee that can assist in that type of field, or that has a general legal or accounting background.

“It goes without saying that any trustee you select should be somebody that is trustworthy, dependable, prudent and careful and, although the Trust Property Control Act does not prescribe when a trustee may not be appointed, it stands to reason that it should not be someone who has been declared insolvent or has a criminal record.”

Diedericks cautions that when looking to sell a property in a trust, trustees should be even more careful in their selection of property professionals as an agent without experience or a thorough understanding of property transactions involving trusts could easily miss a number of potentially costly pitfalls.

“For instance, quite often, especially with family trusts where there has been very little activity within the trust for many years, the trustees may be inexperienced in such transactions or one or more may have passed away or resigned and this can cause major problems and delays if not sorted out before the time.

“A recorded resolution is always required before a trust can buy or sell property and if a listed trustee has not been replaced before the transaction begins, it could be an issue as every trust agreement will have a minimum number of trustees required to acquire or divest of assets.

“To avoid any delays, it’s critical that the trust deed is thoroughly before commencing with the transaction and if you have the right professionals on side, there is every chance of a successful transaction,” Diedericks concludes.