OTTO KRAUSE INCORPORATED

REGISTRATION OF A TRUST: CLIENT INFORMATION QUESTIONNAIRE

Information required for the drafting of a trust deed and for the registration of the trust with the Master of the High Court

Client name	
File / matter reference	
Attorney dealing	
Date completed and returned	

HOW TO COMPLETE THIS QUESTIONNAIRE

This questionnaire may be completed on your computer. Click into any shaded block and type your answer. The block will expand as you type. It is not necessary to print the document or to complete it by hand. When you have finished, save the document and e-mail it back to this office.

Where you are unsure of an answer, simply leave the block blank. Several of these questions concern matters upon which you may want our advice before deciding, and that is exactly as it should be. We shall go through the questionnaire once we receive it and contact you about anything outstanding.

You are welcome to contact our offices directly at any stage should you experience any difficulty with any of the questions.

It is not necessary to attach any supporting documentation at this stage. A list of the documents we shall eventually require appears at the end of this questionnaire.

Everything you disclose in this questionnaire is protected by legal professional privilege and will be treated in strict confidence.

BEFORE YOU BEGIN

A trust is one of the most useful instruments in our law, and one of the most frequently misunderstood. It is used to protect assets, to provide for children and for family members who cannot manage property themselves, to hold a family home or a farm across generations, to carry on a business, to secure an obligation and to plan an estate. It is not, however, a device for placing assets beyond the reach of creditors who already have a claim, nor is it a way of avoiding tax, and a trust which is treated by its founder as though it were simply his own property is likely to be disregarded by a court when it matters most.

A trust also has real costs and real formalities. Trustees must act jointly, they must keep the trust property separate from their own, they must account, and they may not act at all until the Master has authorised them in writing. If you are not going to observe those requirements, a trust is probably not the right structure for you and we shall say so.

This questionnaire gathers what we need in order to draft the trust deed and to attend to the registration. Where a question concerns something you have not yet decided, leave it blank. Deciding these matters is part of what we are here to help you with.

WHAT A TRUST IS

In its simplest terms, a trust is an arrangement under which one person hands property over to another to hold and administer, not for that other person's own benefit, but for the benefit of somebody else or for the achievement of a stated object. Three roles are therefore involved, and they should be kept separate in your mind.

The founder is the person who creates the trust and places the first property in it. The trustees are the persons who hold and administer the trust property. They have the control, but they do not have the enjoyment: the property is not theirs, it does not form part of their personal estates, and it is not available to their personal creditors. The beneficiaries are the persons for whose benefit the trust exists. They have the enjoyment, but they do not have the control.

That separation between control and enjoyment is the essence of a trust and the source of its usefulness. It is also why the Trust Property Control Act obliges trustees to keep trust property separate from their own, to act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another, and to account to the Master. A trust is not a legal person in our law. It acts through its trustees, who must ordinarily act jointly and who require written authority from the Master before they may do anything at all.

Our law recognises two ways in which the property may be held. In the ordinary trust, ownership of the property passes to the trustees, who hold it for the beneficiaries. In what is called a bewind trust, ownership vests in the beneficiaries themselves, but control of the property is placed in the hands of the trustees. The choice between them has consequences for tax, for insolvency and for the rights of the beneficiaries, and we shall advise you on it.

INTER VIVOS AND MORTIS CAUSA TRUSTS

Trusts are also divided according to when and how they come into existence, and this is the distinction you will most often hear spoken of.

An inter vivos trust — the phrase means "between the living", and it is often called a living trust — is created by a person during his or her lifetime. The trust instrument is a written trust deed, which in our law takes the form of a contract concluded between the founder and the trustees for the benefit of third parties, being the beneficiaries. It comes into existence when the deed is signed and the founder makes the initial donation, and it is registered with the Master of the High Court in whose area the greater part of the trust property is situated. The founder can watch it operate, can usually be a trustee, and can see whether the arrangement works. It continues after the founder's death unless the deed provides otherwise. This is the trust most commonly used for holding a family home, an investment portfolio, a farm or a business interest, and for estate planning, because assets properly held in the trust do not form part of the founder's estate on death.

A mortis causa trust — the phrase means "on account of death", and it is usually called a testamentary trust or a will trust — is created by a person's will and comes into existence only upon that person's death. The trust instrument is the will itself. It is most often used to provide for minor children, or for a beneficiary who cannot be trusted with capital or who is unable to manage it, so that the inheritance is administered for that person rather than paid over outright. Where a minor inherits and no such trust exists, the money is ordinarily paid into the Guardian's Fund administered by the Master, from which it can be released only in limited circumstances. That is the single most common reason for creating a testamentary trust.

The practical differences follow from the timing. An inter vivos trust can be created and funded today, and can hold assets during your lifetime; a testamentary trust can hold nothing until you die. An inter vivos trust deed is a contract, and can generally be amended only with the agreement of the parties to it and, once beneficiaries have accepted benefits, with their agreement too; a will can be revoked or altered by the testator at any time until death. An inter vivos trust involves cost and administration from the outset; a testamentary trust costs nothing until it is needed.

The two are not alternatives, and many clients have both. Which is appropriate depends upon what you are trying to achieve, and it is a matter upon which we shall advise you once we have your instructions.

WHAT THE MASTER REQUIRES

An inter vivos trust is registered with the Master of the High Court. The trustees may not act, contract, open a bank account or deal with the trust property until the Master has issued Letters of Authority. The documents ordinarily lodged are the following.

Document	What it is
The trust deed	The trust instrument itself, signed by the founder and by each trustee, together with the original and the required copies.
Application for registration	The Master's prescribed application form, completed on behalf of the trust.
Acceptance of trusteeship	A written acceptance by each trustee of the office, together with a certified copy of that trustee's identity document and particulars of his or her address.
Bond of security	Trustees may be required to furnish security to the Master for the proper performance of their duties, unless the deed exempts them or the Master dispenses with it.
Beneficial ownership information	The Trust Property Control Act now obliges trustees to establish and record the beneficial owners of the trust and to lodge that register with the Master, and to keep it up to date.
Letters of Authority	Issued by the Master once the registration is accepted. This is the document which authorises the trustees to act, and every bank and every conveyancer will call for it.

You do not need to obtain or complete any of these forms yourself. Once you have returned this questionnaire we shall prepare the trust deed, complete the Master's forms, arrange the signatures and the certified copies, and attend to the lodgement and registration. We shall report to you when the Letters of Authority are issued.

THE PRINCIPAL STEPS

Consultation and instructions. We establish what you are trying to achieve and advise you whether a trust is the appropriate instrument and, if so, of which kind.

Choosing the structure. Inter vivos or testamentary, ownership trust or bewind, discretionary or vested. Each of these choices has consequences for control, for tax and for the protection the trust affords.

Founder, trustees and beneficiaries. The persons who will fill each role are identified. The Master ordinarily requires that at least one trustee be independent of the family where all the other trustees are also beneficiaries.

Drafting the trust deed. We prepare the deed, setting out the objects of the trust, the powers of the trustees, how decisions are to be taken, how and to whom distributions may be made, and how the trust may be amended or brought to an end.

Signature and acceptance. The founder and the trustees sign the deed, the founder makes the initial donation, and each trustee signs a written acceptance of the office.

Lodgement with the Master. The deed and the supporting documents are lodged with the Master of the High Court having jurisdiction, together with the prescribed fee.

Letters of Authority. The Master registers the trust, allocates a trust number and issues Letters of Authority. Until this happens the trustees have no power to act.

Bank account and tax registration. A bank account is opened in the name of the trust and the trust is registered with the South African Revenue Service. Trust property must be kept separate from the personal property of the trustees.

The registers. The register of beneficial ownership is prepared and lodged, and the trustees' minute book and asset register are opened.

Ongoing administration. The trustees meet and minute their decisions, financial statements are prepared, returns are rendered and distributions are resolved upon and recorded. A trust which is not administered properly is a trust which may not be recognised when it is challenged.

PART A: YOUR PARTICULARS

Full names and surname	
Identity number (or passport number and nationality)	
Residential address	
Cellphone number	
E-mail address	
Income tax reference number	
Preferred language (English / Afrikaans / other)	
Are you giving these instructions as the intended founder, as a proposed trustee, or on behalf of somebody else?	

PART B: THE FOUNDER

The founder is the person who creates the trust and who makes the initial donation to it. The founder may be a natural person or an entity, and is often also a trustee.

Full name of the founder	
Identity or registration number	
Residential or registered address	
Marital status and, if married, the matrimonial property regime	
If married in community of property, has the spouse's consent to the donation been obtained?	
What amount or asset will the founder donate to establish the trust? (A nominal donation of R100 is customary where further assets are to follow)	
Is the founder also to be a trustee?	
Is the founder also to be a beneficiary? (This is possible but requires care, and affects the protection the trust offers)	

PART C: THE PURPOSE OF THE TRUST

In your own words, what do you want this trust to achieve?	

Is the trust intended to hold a family home, a farm, an investment portfolio, a business interest, or something else?	
Is it intended to provide for minor children, for a family member with a disability, or for future generations?	
Is it intended for estate planning, for asset protection, for business purposes or for a charitable object?	
Is it a special trust for a person with a disability, or for the minor children of a deceased parent? (Trusts of that kind are taxed differently)	
Do you intend to sell assets to the trust on loan account, or to donate them?	
Is any creditor presently pursuing you, or is any claim pending or threatened against you? (Please answer this frankly; a transfer made to defeat a creditor can be set aside)	

PART D: THE TRUST ITSELF

Proposed name of the trust — first choice	
Proposed name — second choice	
Is the trust to be an inter vivos trust created now, or a testamentary trust created in your will?	
Is ownership of the property to vest in the trustees, or in the beneficiaries subject to the trustees' control (a bewind trust)?	
Is the trust to be discretionary, so that the trustees decide who receives what and when, or are the beneficiaries to have vested rights?	
In which town or city will the trust be administered, and where will the greater part of its assets be situated? (This determines which Master has jurisdiction)	
What financial year end do you require for the trust?	
Is the trust to endure indefinitely, or to terminate on a stated date or event?	

PART E: THE TRUSTEES

Trustees must ordinarily act jointly. The Master generally requires an independent trustee where all the trustees are also beneficiaries, and we shall advise you if that applies to your trust.

Full names and surname	Identity number	Contact number	E-mail address

Name of trustee	Residential address	Occupation

How many trustees are there to be, and what is the minimum number required at any time?	
Is any trustee also a beneficiary? Which of them?	
Is an independent trustee to be appointed? Do you have somebody in mind, or should we recommend one?	
Is any trustee an unrehabilitated insolvent, or has any trustee been removed from an office of trust or convicted of an offence involving dishonesty?	
Are the trustees to be exempted from furnishing security to the Master?	
Who is to be the chairperson, and is the chairperson to have a casting vote?	
Are decisions to be taken unanimously or by majority? Are there decisions which must be unanimous?	
How are trustees to be appointed and removed, and who has that power?	
What is to happen if a trustee dies, resigns or becomes incapable of acting?	
Are the trustees to be remunerated?	

PART F: THE BENEFICIARIES

Beneficiaries may be named individually or described as a class — for example "the children and remoter descendants of the founder". A class has the advantage that persons not yet born are included.

Full names	Identity or date of birth	Relationship to the founder	Income, capital or both

Are the beneficiaries to be named individually, or described as a class? Describe the class	
Are unborn or future children and descendants to be included?	
Are spouses of beneficiaries to be included or excluded?	
Are any charitable or public benefit organisations to be beneficiaries?	
Is any beneficiary a minor, or a person unable to manage his or her own affairs? Give particulars	
At what age, if any, should capital be paid over to a beneficiary?	
Should a beneficiary's interest be protected against that beneficiary's creditors, or against a spouse in the event of divorce?	
Is any beneficiary to be excluded in any circumstances — for example on marrying in community of property, or on insolvency?	
Who is to benefit if all the named beneficiaries have died?	

PART G: THE TRUST PROPERTY

Description of asset	Estimated value (R)	Presently owned by	To be donated or sold to the trust

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What property is to be transferred to the trust immediately, and what is to follow later?	
Is any immovable property to be transferred? Give the full property description and state whether a bond is registered over it	
If assets are to be sold to the trust rather than donated, how is the purchase price to be dealt with — by way of a loan account, and is interest to be charged? (Interest-free loans to a trust attract a deemed donation for tax purposes)	
Are any shares, member's interests or business interests to be held by the trust? Is any consent required from a co-shareholder?	
Is a policy of life insurance to be ceded to or taken out by the trust?	
Will the trust borrow money or give security?	

PART H: POWERS AND ADMINISTRATION

Mark the powers which the trustees are to have:

Power	Mark with an X
To acquire, hold, let and sell immovable property	
To borrow money and to mortgage or pledge trust assets	
To give surety or security for the obligations of another	
To carry on any business or trade	
To hold shares, members' interests and other investments	
To lend money, with or without interest and with or without security	
To employ and remunerate professional advisers	
To make distributions of income and of capital in their discretion	
To create further trusts for the benefit of beneficiaries	
To vary the beneficiaries' interests within the class	

Power	Mark with an X
To insure the trust assets	
To delegate administrative functions	

Are there any powers which the trustees should expressly not have?	
How often should the trustees meet, and what is to constitute a quorum?	
Is the founder to retain any power — to appoint or remove trustees, to veto a decision, or to amend the deed? (Powers of that kind must be approached with caution, as they can undermine the trust)	

PART I: DISTRIBUTIONS

Are the trustees to have an unfettered discretion as to who receives income and capital, and when?	
Is any beneficiary to receive a fixed or minimum amount?	
Is income to be distributed annually or accumulated in the trust?	
Are distributions to be made in cash, or may assets be distributed in specie?	
Are there any guidelines you wish the trustees to follow — for example that education be paid for before anything else?	
Do you wish to leave a letter of wishes for the trustees, recording your intentions without binding them?	

PART J: AMENDMENT, TERMINATION AND SUCCESSION

Who is to have the power to amend the trust deed, and with whose consent?	
In what circumstances should the trust terminate?	

To whom should the trust property be distributed on termination?	
What is to happen on the death of the founder?	
Have you made a will, and does it deal with this trust?	
Do you require your will to be prepared or revised at the same time? (We ordinarily recommend that the two be considered together)	

PART K: TAX, ACCOUNTING AND COMPLIANCE

Who will attend to the accounting records and the annual financial statements of the trust?	
Do you have an accountant or auditor? Give the name and contact details	
With which bank is the trust account to be opened?	
Do you understand that a trust is taxed at a flat rate which is higher than that applicable to individuals, unless income is distributed to beneficiaries in the same year and taxed in their hands? (The rate presently applicable is [[current trust rate]])	
Are any donations to be made to the trust which may attract donations tax?	
Do you require an estate duty and capital gains tax analysis of the proposed structure?	
Who are the natural persons who ultimately own or control the trust, for purposes of the beneficial ownership register?	

PART L: OTHER DOCUMENTS REQUIRED

Document	Mark with an X
Trust deed and registration of an inter vivos trust	
Testamentary trust incorporated in a will	
Will or revision of an existing will	
Loan agreement between the founder and the trust	
Deed of donation	

Document	Mark with an X
Sale and transfer of immovable property to the trust	
Cession of a policy to the trust	
Trustees’ resolutions and minute book	
Beneficial ownership register	
Letter of wishes to the trustees	
Amendment of an existing trust deed	

PART M: ANY OTHER INFORMATION

Please set out anything else you consider relevant, including any concern you have about a particular family member, beneficiary or trustee.

PART N: DECLARATION BY THE CLIENT

I, the undersigned, confirm that the information furnished in this questionnaire is true and correct to the best of my knowledge and belief, and I instruct Otto Krause Incorporated to act upon it in the preparation of the trust deed and in attending to the registration of the trust. I confirm that no transfer contemplated in this questionnaire is made with the intention of defeating the claim of any creditor. I undertake to inform my attorneys forthwith should any of the information change or should I become aware that any of it is incorrect or incomplete.

Full names	
Signature (you may type your name here and sign the printed copy at our offices, or attach a scanned signature)	
Place	
Date	

ANNEXURE: DOCUMENTS TO BE FORWARDED IN DUE COURSE

Document	Available? (Yes / No / Will obtain)
Certified copy of the identity document of the founder	
Certified copies of the identity documents of all trustees	
Certified copies of the identity documents or birth certificates of the beneficiaries	

Document	Available? (Yes / No / Will obtain)
Proof of the residential address of each trustee	
Income tax reference numbers of the founder and the trustees	
Antenuptial contract of the founder, if married out of community of property	
Title deeds of any immovable property to be transferred	
Valuations of any assets to be transferred	
Financial statements of any business interest to be held	
Any existing trust deed, where an existing trust is to be amended	
Any existing will	
Bank details for the trust account, once opened	