A trust is set up when one transfers the ownership of their property, or ‘puts it in a trust’, which becomes an instrument with a separate legal personality. The transferred property is administered and managed for the benefit of specified beneficiaries such as children, in accordance with the Trust Property Control Act no 57 of 1988 — the law that governs trusts in South Africa.

The act states that trustees should be appointed, whose primary responsibility is to administer and manage the trust’s assets, for the benefit of the beneficiaries, which in this case would be the founder’s children.

The trust comes to life after it is registered with the Master of the High Court, which must subsequently issue a letter of authority to the appointed trustees, giving them powers to begin acting on behalf of the beneficiaries.

In instances where a minor inherits money without a trust in place, it will be held by the Guardian’s Fund, which is administered by the Master and invested with the Public Investment Corporation (PIC),until the child turns 18.

“The child must then know that they must approach the Guardian’s Fund to claim what is due to them”.

A trust averts the government claims process that tends to be lengthy and stymied by red tape, by allowing parents to elect and put in charge trustees who will hold money on behalf of the minor until they reach a certain age, for example.

“The role of trustees is not to take care of the minors, but to make financial decisions in terms of the trust deed

There are many reasons for setting up a trust for minors. These range from a grandparent who does not want the money to fall into the hands of the parents, but rather be spent on the grandchildren; or a divorced parent who does not wish the other parent to lay claim on money meant for the children; to parents who want to ring-fence assets for their children and protect the assets from creditors.

Benefits Of Setting up a Trust

- The dominant theme and benefit of setting up a trust seems to be that of protection.
- Trust assets are protected from the creditors of the parents.
- Trust assets can continue growing without being subject to the vicissitudes of life that affect income earners

Remember that a trust has a separate legal identity. This means that in the event of a liquidation, sequestration (personal or business) or even a divorce, the assets which the said parent transferred ownership of to the trust, cannot be touched. Creditors cannot come after the trust assets as they do not form part of the personal estate.

However, all is not sweet. By virtue of being a separate legal person, the trust, like other natural and juristic persons – is liable for taxes.

Another benefit is the ease with which funds for the maintenance and wellbeing of the children are made readily available to the minors when needed, as compared to the bureaucratic process of going through the Master of the High Court in the case of the Guardian's Fund.

"The Guardian's Fund does allow for withdrawals to be made for the benefit of minors for maintenance, for example: school fees, clothes, medical expenses, accommodation expenses and other needs if so motivated by the child's guardian. The Master may pay from interest, as well as up to R250 000 from the invested capital in this regard," says Thomson.

Nevertheless, by setting up a trust, invested capital and interest can be used for the benefit of the maintenance of the minor, she says. "Trustees are also able to make investment decisions about the funds held in trust that benefit the minor."

Taxes and mistakes

Transferring assets into the trust does involve tax implications, as the trust either receives the assets as a donation (donations tax) or purchases the assets (for example, transfer duty and fees in the case of immovable property).

She says that for many decades, trusts were the perfect tax-saving vehicles. "However, during the past decade or so, the government has increased the tax rate for trusts to the point where trusts are taxed at the same rate as individuals."

One of the common mistakes trustees make is forgetting that tax returns might have to be filed.

July marks trusts' filing season in SA, the month in which Sars urges representative taxpayers of trusts (trustees) to complete and file income tax return for trusts (ITR12T) forms. The Income Tax Act regards trusts as a legal person, and as such, is liable for paying taxes on income generated within a financial year.

Another common mistake she mentions is that founders of trusts often do not realise that a trust must be managed. "Resolutions have to be passed, authorising the trustees to do certain acts. For example, if a trust purchases immovable property, the trustees first have to pass a resolution, authorising the purchase of the property. If this is not done, the deed of sale could be invalid, and the trust can be sued for damages."

Appointing trustees

Neilson advises clients to never have only one trustee, for the sake of accountability. Nor does she advise them to have two trustees, to avoid a deadlock should they disagree in decision-making – she advises to have three trustees.

"One trustee should be financially astute; another trustee should focus on the best interests of the children and the third trustee should be morally and ethically beyond reproach. This third trustee can be the moral compass."

Thomson says trustees must be trustworthy. They must be individuals who have the best interests of the child in mind and will be able to make good decisions for the benefit of the child as far as the use of funds for the child is concerned.

The trustees "should also have sound financial knowledge, or be confident to use the services of a financial adviser to guide them to make the appropriate decisions to benefit the child by making sound financial investment decisions," she says.