



RESEARCH BRIEF: TO LICENCE OR NOT TO LICENCE ESTATE PLANNING TRUSTEES

Research and Market Development Department

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1.0 Background and History of Trusts

Trusts have been part of succession for years in jurisdictions such as the United States and England. The history of trusts in the United States can be traced back to the nineteenth century where American courts established the right of the settlor of a trust to fix terms and conditions for the distribution of trust income to beneficiaries.¹ In England, the law of trusts was first developed in the 12th century from the time of the crusades under the jurisdiction of the King of England. In modern trust law, individuals in England can create both *inter-vivos* trusts during their lifetime as well as testamentary trusts that determine how property is invested, owned, and distributed following their death.²

Ugandans have embraced trusts as a tool for estate planning by creation of family trusts. This is in a bid to develop strategies to transfer, protect and control the distribution of their wealth, either in death or while alive. The recurring question is who regulates the trustees of a trust primarily set up for estate planning purposes and how can clients be protected from trustees in the event of mismanagement of the Trust?

This brief makes an effort to appreciate legal recognition for trustees of trusts in reference to estate planning in Uganda and provide a basis on which to guide on whether to licence them or not under the capital markets regulatory framework.

2.0 Definition of a Trust

A trust is an arrangement created by a settlor (or grantor) who transfers assets to a trustee. The trust is a relationship in which the trustee holds and manages assets for the benefit of the beneficiaries. As a result, the beneficiaries are considered to be the beneficial, not legal, owners of the trust assets. The terms of the trust relationship and the principles used by the

¹ Adam J. Hirsch 2007, American History of Inheritance Law Page 3

² <https://www.sbshlaw.com/a-history-of-trusts/>

trustee to manage the assets and distributions to the beneficiaries are outlined in the trust document or otherwise referred to as the “Trust deed”.³

Trusts can be categorized in many ways, but two dimensions are particularly important in understanding their character. Trusts can take either of the following dimensions; revocable, irrevocable, fixed or discretionary trust arrangements. In a revocable trust arrangement, the settlor (who originally transfers assets to fund the trust) retains the right to rescind the trust relationship and regain title to the trust assets while in the irrevocable trust arrangement, the settlor has no ability to revoke the trust relationship. In a fixed trust arrangement, distributions to beneficiaries occur at certain times or in certain amounts while in the discretionary trust arrangement, the settlor can make his/ her wishes known to the trustee through language in the trust document and/or through a non-binding letter of wishes.⁴

In Uganda, different types of trusts have been established over time, from simple charitable trusts/foundations (focused on management of properties owned by religious based organizations), to family trusts, unit trusts and private trusts. Because trustees play a central role in the management and running of trusts, there is need to ensure that they act in utmost good faith while preventing any possibility of derivation, directly or indirectly, any profit from trusteeship.

In Uganda, trustees play a role in a number of arrangements such as retirement plans, unit trusts, charities and estate planning.

3.0 Legal Framework for Trusts and Estate Planning Trustees in Uganda

There are two pathways that can lead to the creation of trusts and recognition of estate planning trustees. The first pathway is through the Trustees Act. The Trustees Act (Chapter 164) (1954) section 2 (1) applies to all trusts, executorships and administrator ships

³ CFA Institute Level 3 Alternative Investment, Portfolio Management and Private Wealth Management Pg314

⁴ CFA Institute Level 3 Alternative Investment, Portfolio Management and Private Wealth Management Pg314

constituted either before or after the commencement of the Act. The Trustees Act explicitly provides guidance for the general powers of trustees, providing procedure for the appointment and discharge of trustees and the powers of the court to authorize remuneration, appoint new trustees and handling contentions on investments. The provisions of the Act apply to estate planning trustees.⁵

The Trustees Act further guides on the formation of a “Trust Deed”, giving it the legal power as an enforceable document that informs the operations and objects that are intended to be achieved by a trust. Upon creation of trust deeds, trusts deeds are officially registered as guided by the Registration of Documents Act (1922), legalizing the enforceability of the trust deed, thereby providing for registration the selected trustees. Should any issues arise regarding the mismanagement of the trust, these are resolved and managed under the common law and legal precedencies that have been made by the courts of law. The scope of the aforementioned legal regime is applicable to estate planning trustees.

The second pathway for the recognition of trusts and estate planning trustees is under the Trustees Incorporation Act. Section 1 of the Trustees Incorporation Act, 1939 provides for the appointment of trustees by any body or association of persons established for any religious, educational, literary, scientific, social or charitable purpose, and such trustees or trustee may apply, in the manner mentioned, to the Minister of Lands, Housing and Urban Development for a certificate of registration of the trustees or trustee of such body or association of persons as a corporate body.⁶ Upon meeting the particular requirements as guided by section (1) (2) of the Act, the trustees become a body corporate by name, having a perpetual succession, a common seal, powers to sue and to be sued. Important to note is that these are registered under the Ministry of Lands Housing and Urban Development especially when the trust is related to the registration of title to land, stocks, funds or securities.

⁵ Trustees Act (Uganda) 1954

⁶ The Trustees Incorporation Act, 1939

Imperative to note is that non-bank financial sector regulators in Uganda have made an effort to define and regulate trustees to the extent that applies to their respective jurisdictions. The trustees of retirement benefits schemes are currently licensed under the Licensing of Trustees Regulations (2012) that clearly state the restrictions and requirements for one to be provided a license. The Regulations explicitly state the need for prescribed fees to be accompanied and gives the Uganda Retirement Benefits Authority power to grant and revoke a license.⁷ Under the Collective Investment Act (2003), section 10 gives the Capital Markets Authority power to grant or refuse an application, made to the Authority, to be a trustee of unit trusts.⁸ The trustees highlighted in this specific Act speak to trustees of Collective Investment Schemes.

3.0 Conclusion

By nature of their role, the role of estate planning trustees in ensuring prudent management of trusts cannot be underplayed. The creation of private trusts, estate and will planning is a growing trend for wealthy families and individuals that desire to extend their control of the management of assets even in the event of death. Uganda has the required binding regulations to guide the establishment of trusts under Trustees Act (Chapter 164) (1954), to guide the power of trustees and provide mechanisms in the event of mismanagement by trustees. These provisions are applicable to the estate planning trustees.

With continuous reliance on common law, the Trustees Act (1954), Registration of Documents Act (1922) and the Trustees Incorporation Act, there exists no valid reason to justify the primary licensing of trustees for estate planning, family and private trusts under

⁷ The Uganda Retirement Benefits Regulatory Authority (Licensing of Trustees) Regulations, 2012

⁸ The Collective Investment Schemes Act, 2003

the capital markets regulatory framework. The capital markets regulatory framework should be restricted to licensing of trustees managing securities. In conclusion:

- a. Estate planning trustees should continue being recognized within the existing legal framework. However, Uganda Registration Services Bureau can be engaged to explore the possibility of creating a roll or register of trustees in order to build public confidence in estate planning trustees;
- b. CMA should only licence and monitor the conduct of trustees for trusts involved in the securities business, which is the key competence of CMA as a regulator.