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## **THE TRUSTEES (PERPETUAL SUCCESSION) (AMENDMENT) ACT 2021**

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*Disclaimer: This Article does not form part of a Legal Opinion and is purely informative.*

### **INTRODUCTION**

On December 7<sup>th</sup> 2021, President Uhuru Kenyatta assented to the Trustees (Perpetual Succession) (Amendment) Act 2021 which seeks to amend the provisions of the Trustees (Perpetual Succession) Act of 1955. The Amendment Act seeks to promote and enable the accumulation of generational wealth. Provision for and the definitions of various types of trusts are also included such as charitable trusts and non-charitable purpose trusts.

The Amendment Act further proposes to amend the provisions of the 1955 Act on incorporation of trustees to recognize that trusts are to be registered with the Principal Registrar of Documents as opposed to the Cabinet Secretary.

Furthermore, the amendments include provision for the creation of trusts with specific purpose notwithstanding the absence of a named beneficiary as well as the provision for irrevocable trusts where express power is not provided. All these issues are discussed in detail below.



## Irrevocable trusts

Where the 1955 Act was silent on the issue of irrevocable trusts, Section 4 of the Amendment Act 2021 amends the Principal Act by inserting a new Section 3A (1) which provides that trusts are deemed irrevocable where there is no express power of revocation. The trust is also deemed irrevocable if the express power of revocation is not exercised by the settlor in their lifetime (Section 3A (2)).

## Charitable trusts

Charitable trusts under the new section 3B (1) are defined as trusts formed exclusively for relief of poverty, the advancement of education, religion or human rights and fundamental freedoms, or environmental protection or any other beneficial public purpose.

For trusts to be deemed charitable they must meet certain requirements under the new amendments including that, the charitable objects are pursuable in Kenya or elsewhere; they are beneficial to the general public or a section of the public; the trust is discretionary; and that the trustee has powers to defer asset distribution of the trust to any charity or other beneficiary of the trust for a period not exceeding the duration of the trust (Section 3B (2)).

## Non-Charitable Trusts

The amendment also addresses non-charitable trusts which are defined as trusts “created for a specific purpose notwithstanding the absence of any beneficiary” (Section 3C (1)).

Non-Charitable trusts become valid “if the purpose, whether partly charitable or not, for which the trust is created is specific, capable of fulfilment and is not illegal; and the terms of the trust provide for the disposition of surplus assets of the trust upon its termination.” (Section 3C (2)).

## Family Trusts

A family trust may be living or testamentary, charitable or non-charitable, registered or incorporated by a person or persons, either jointly or as an individual in order to plan or manage their personal estate (Section 3D (1)).

A family trust must be made in contemplation of intended beneficiaries, whether they are directly related to the settlor or not, or whether they are alive or not; for the preservation or creation of generational wealth; and it must be a non-trading entity (Section 3D (2)). Nevertheless, a family trust remains valid notwithstanding the fact that the settlor or joint settlors are also beneficiaries (Section 3D (3)).



## Adding property to a trust

Under the new amendments, subject to the terms of the trust, the trustee is not precluded from adding additional property to the trust property (Section 3E (1)). However, if a settlor declares a trust in regards to property he/she doesn't own at the time of the declaration, no rights or duties arise under the trust document at the time of constitution of the trust and the trust is thus deemed to exist only when the settlor is beneficially or legally entitled to the said property (Section 3E (2)).

Trustees do not acquire a better title to trust property than the settlor or transferor had prior to the transfer of the disposition (Section 3E (3)).

## Validity of a trust

Trusts remain valid and enforceable subject to the terms of the trust itself (Section 3F (1)). The circumstances for invalidity are laid out in the amendments to include trusts created for illegal purposes; trusts with no identifiable or ascertainable beneficiaries; trusts established by duress, fraud, misrepresentation or breach of a fiduciary duty; uncertain terms that render performance impossible; or the settlor lacks legal capacity to create the trust (Section 3F (2)).

Trusts are however not void if the settlor becomes bankrupt; their property liquidated; or where proceedings or a suit has been instituted against the settlor by creditors (Section 3F (3)). A court may declare a trust void if it's proven that there is evidence of fraud including to evade the settlor's creditors (Section 3F (4)).

Subject to the fact that terms are so uncertain so as to render performance impossible, where some of the purposes of the trust are invalid while others are not, where they cannot be separated, the trust remains invalid (Section 3F (5)(a)). Where they can be separated the court may make a declaration of validity with regard to purpose which is lawful (Section 3F (5)(b)).

If a trust is partially invalid, the court may make a declaration as to what property is subject to the trust and which is not (Section 3F (6)).

Notably, the amendment provides that the invalidity of a trust due to an unidentifiable or unascertainable beneficiary are not applicable to non-charitable purpose trusts (Section 3F (7)).

## Beneficiaries of a trust

Beneficiaries of trust must be identifiable or ascertainable in regards to a class or relationship with another person whether alive or dead (Section 3G (1)). Subject to this, the terms may provide for the addition or exclusion of a person in a class eligible to be a beneficiary (Section 3G (2)). Additionally, the trust terms may impose obligations or conditions upon a beneficiary (Section 3G (3)).





## Class of beneficiaries

The new amendments further provide that where a trust is in favour of a class, such class is closed when it's no longer possible for persons to become members and where the interests relate to income and no member of the class exists, the income is accumulated and retained until such member comes into being (Section 3H (1)).

## Disclaimer of beneficial interest

Subject to trust terms, the amendments provide that a beneficiary is entitled to disclaim an interest or a part of if they have not received any trust benefits (Section 3I (1)). The written disclaimer must be addressed to the trustees (Section 3I (2)).

## Enforcers

Pursuant to the amendments under the Trustees (Perpetual Succession) (Amendment) Act 2021, an enforcer may be appointed in line with the trust terms (Section 3J (1)). An enforcer's functions include enforcement of the trust; inquiries into status of implementation; requiring trustees to take remedial action in case of breach; reporting to settlors or beneficiaries of financial or other breaches; and pursuit of criminal or civil action against trustees (Section 3J (2)). Enforcers may also act in lieu of trustees during hearings and determination of suits relating to the enforcer's functions (Section 3J (3)). Individuals are precluded from performing dual functions as both enforcer and trustee (Section 3J (4)).

The amendment provides that enforcers must have access to documents, accounts or information required for their functions (Section 3J (5)). Additionally, enforcers may request trust accounts; the trust instrument; and other documents used by trustees (Section 3J (6)).

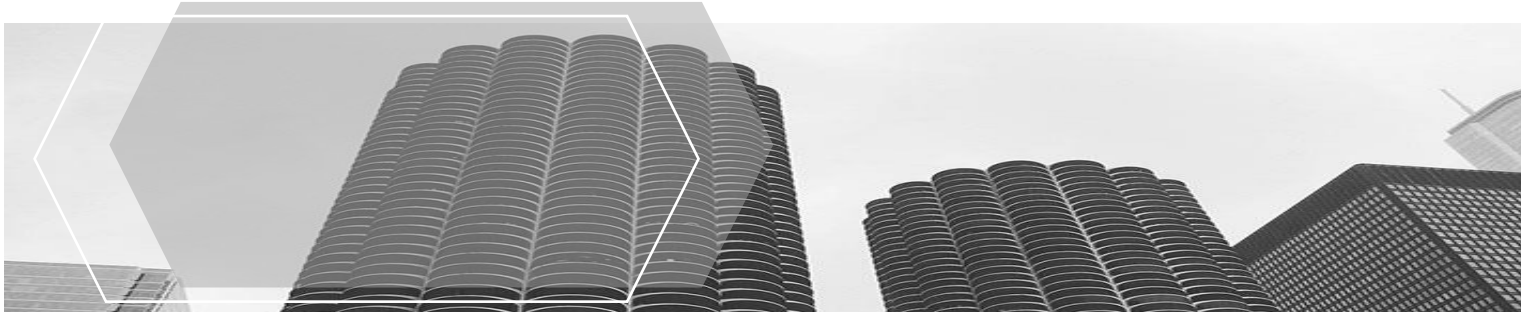
Enforcers are precluded from deriving profits either directly or indirectly by reason of appointment provided that reasonable fees and expenses may be paid out of the trust and entering into dealings with a trustee regarding the trust property. Enforcers may provide written resignations to the trustees (Section 3J (7)) and the trustees is required to notify the Principal Registrar in writing of the change in enforcers within 30 days of the notice of resignation (Section 3J (8)).

## CONCLUSION

Generally, the amendments have sought to address some of the existing gaps in the Trustees (Perpetual Succession) Act of 1955 by creating a framework that enables the accumulation of generational wealth and additionally making provision for a number of different trusts.

The Act is available at:

[http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2021/TheTrustee\\_PerpetualSuccession\\_Amendment\\_Act\\_No.13of2021.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2021/TheTrustee_PerpetualSuccession_Amendment_Act_No.13of2021.pdf)



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