

Is your trust deed valid?

By [Professor Willie van der Westhuizen](#)

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The alarming answer is most probably not, because legal audits have shown that more than ninety percent (90%) of trust deeds (and/or amendments to trust deeds) in South Africa may not stand the test of validity if tested in a court of law.



The fact that a trust deed has been filed at the office of the Master of the High Court is no guarantee for its validity in that it is not the Master's duty to check for validity.

There are various reasons that could render a trust deed invalid. One of these is the different legal systems that apply in the South African Trust Law.

However, the main culprit may be that the trustees have been allowed too wide a discretion when it comes to the choice of beneficiaries. This allows them a so-called general power of appointment or right to choose, which then also causes the object of the trust to become vague.

Another source of invalidity pertaining to trust deeds is that they are often merely created without any proper agreement between the founder and the trustees.

Family feuds

There are also other problems that may not necessarily render the trust invalid, but can cause serious family feuds, unnecessary legal costs and court applications for trustees and beneficiaries of these ill-fated trust deeds.

These include the incorrect structuring of the beneficiaries, such as by stating that the beneficiaries shall include "blood and other relations", as well as de facto control given to one or more trustees, which may cause the trust deed to become his alter ego.

There are also testamentary reservations, a lack of power to create roll-over trusts and the unbundling of trust assets.

The moral of the story: prevention is better than cure - and in this case much cheaper too. Have your trust deed properly checked, analysed and rectified before any of these disputes may occur.

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Professor Willie van der Westhuizen is an expert in the field of trusts and co-author of Wills and Trusts, a LexisNexis publication. He is a director and practicing attorney and specialises in Trust Law and Holistic Estate Planning. He also serves as professor in Private Law at the University of the Free State, with special instruction in Trusts and Estate Planning Law.

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