

TABLE OF CONTENTS

Foreword.....	2
REVIEW OF TRUSTS LAW IN UGANDA.....	2
2.0. NATURE OF TRUSTS IN UGANDA	3
2.2 Public (Charitable)Trusts.....	4
2.3 Unit trusts	4
4.0 RATIONALE FOR THE REVIEW OF TRUST LAW IN UGANDA.....	5
4.1 Overall Objectives of the Review.....	6
5.0 PROPOSED ISSUES FOR CONSULTATIONS.....	7
5.1. Definition of a trust	7
5.2. Creation of trusts.....	8
5.3. Trust administration	9
5.3.1. Appointment and Removal of Trustees.....	9
5.3.2 Duties and Roles of a Trustee.....	10
5.3.3 Powers of trustees	10
5.3.4 Powers of a Trustee to delegate powers	11
6.0 Termination and Revocation of Trusts	13
7.0 The role of the Court.....	14
8.0 Dispute resolution in Trusts.....	15

Foreword

This issues paper presents a review of trust law, aiming to provide a comprehensive understanding of the principles, historical development, and contemporary application of trust law. Trust law is a fundamental legal concept that governs the creation and management of trusts, serving as a crucial tool for individuals and institutions to protect and manage assets, plan estates, and achieve various legal objectives.

This paper sets the stage for a detailed analysis of trust law, including the origins of trust law, key principles, and legal framework. It explores the evolving role of trust law in modern society and discusses emerging issues and challenges faced in the implementation of the law.

This issues paper explores key areas of concern in trust law, including transparency, flexibility, clarity, certainty, and accessibility of the trusts law, and suggests innovative reforms that can enhance trust administration, improve accountability, and align trust law with contemporary requirements. By critically assessing the existing legal framework and proposing reform measures.

This paper further puts forward consultation questions that will be answered to generate consensus among stakeholders and aims to stimulate further discussions and shape the future of trust law.

Signed
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REVIEW OF TRUSTS LAW IN UGANDA

2.0. NATURE OF TRUSTS IN UGANDA

A trust is a relationship that arises wherever a person (called the trustee) holds property for the benefit of some other persons (who are termed beneficiaries) or for some objects permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or objects of the trust.¹ The Hague Trust Convention defines a trust as a legal relationship created inter vivos or on death by a person, the settlor when assets have been placed under the control of a trustee for the benefit of a beneficiary or a specified purpose.²

A trust may be expressly created or implied by law. An Express trust is one which has been intentionally or deliberately created by the settlor him or herself, in respect of which the necessary formalities have been complied with. An express trust must fulfill the “three certainties” in equity that is: certainty of intention, certainty of subject matter, and certainty of object.³ Some trusts are not expressly declared by the intention of the settlor but rather implied by law. These include resulting or constructive trusts.

A Trust may be created as public (charitable) or private. For trusts to function efficiently and sensibly, it is necessary to have some relating to the administration and management of trusts and processes for decision-making and resolution of disputes that may arise.

¹ Keeton and Sheridan, *The Law Of Trusts* (10th Edition)

² Article 1 Hague Trusts Convention 1985.

³ *Knight V Knight* (1840) 3 Beav 148; 49 ER 58

2.2 Public (Charitable) Trusts

Trusts may be public (charitable) or private. Public/charitable trusts aim to benefit the public by achieving a charitable purpose and are enforced by the Minister.⁴ Public trusts may be incorporated under the Trustee's incorporation Act, for any religious, educational, literary, scientific, social, or charitable purposes.⁵

2.3 Private Trusts

A private trust is constituted for the benefit of one or more individuals who are ascertained. A private trust may be made by the settler/grantor inter vivos or by a testamentary instrument in the form of a will. Private trusts benefit individuals and may be enforced by the beneficiaries. Private trusts in Uganda are regulated by the Trustees Act, and the Succession Act, Cap 162 (as amended), if they are in the form of a Will.

2.3 Unit trusts

Recently Uganda has seen the emergence of commercial trusts being created for purposes of collective investments. A unit trust scheme is a collective investment scheme under which the property is held in trust for the participants by the trustee. Collective investment trusts are regulated by the Collective Investments Act, of 2003. Trusts formed for purposes of business may take the form of unit trust schemes and trading trusts.

⁴ Trustees Incorporation Act, Cap 164

⁵ibid section 1

3.0 RATIONALE FOR THE REVIEW OF TRUST LAW IN UGANDA

The current legal framework governing trusts is scattered in different pieces of legislation which confuses users especially those with no legal background. Further, many people have a rudimentary understanding of their rights and duties under a trust which makes implementation difficult. We believe that the answer to these problems is to lay in simplifying and codifying the general principles of trust law.

Reforming the laws relating to trusts in Uganda is crucial to bring the regulatory regime in line with other comparable common law jurisdictions. It will provide a more clearly defined framework that governs the respective rights and duties of parties to a trust, and better cater to the need of modern-day trusts. This will strengthen Uganda's competitiveness in the service industry and make Uganda the best destination center for international assets management.

A study conducted by the Uganda Law Reform Commission revealed that trust law in Uganda is outmoded and does not address contemporary issues which would enable a trustee to effectively carry out their duties, restricts the powers of the trustee, restricts power to invest, delegation among others.⁶ The study further found that the situation has been made more fragile because of the absence of provisions for the creation of a trust, appointment of trustees, and equally no rules or guidelines that guide the court in exercising its discretionary.⁷

⁶ Review of trusts law in Uganda study report by Uganda Law Reform Commission 2016. (not published)

⁷ Ibid

3.1 Overall Objectives of the Review

The overall objective of the review of trusts law is to:

- (a) review and reform the law relating to trusts to update it and align it to modern trends in trust regulations;
- (b) explore the need to consolidate the law relating to trusts;
- (c) harmonise the law relating to trusts, so as provide certainty, clarity, and predictability within the law;
- (d) to codify the principles relating to trusts management and administration developed by courts;
- (e) promote the use of a trust as a vehicle for wealth preservation and business management in Uganda.

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4.0 PROPOSED ISSUES FOR CONSULTATIONS

Legislative framework for trusts in Uganda

Issues for consideration

1. **Should the Public Trustees Act, Trustees Act, Cap 164 and Trustees incorporation Act be consolidated for ease of access to the law relating to trusts?**
2. **Is there a need to harmonise the various legislation relating to trusts to ensure clarity in the law and eliminate uncertainties?**
3. **From what jurisdictions can we borrow best and next practices in modern management and administration of trusts?**

4.1. Definition of a trust

The current legal framework does not define the concept of trust. The approach to defining a trust has been derived from courts of law and textbook authors.

Generally, a trust relationship exists where the settlor transfers property to trustees who administer the assets for the benefit of specific persons (the beneficiaries). What is certain is that a trust creates a fiduciary relationship, with respect to the property, between trustees and beneficiaries.⁸

In creating a trust, the three certainties are prerequisites: that is the certainty of intention to establish a trust (by the settlor), the certainty that the trust assets are unambiguously defined (property), and the certainty

⁸ Bristol and West Building Society v Mothew. (1998) Ch 1

that the beneficiaries are capable of being ascertained, “with *locus standing* to enforce the trust against the trustees and make the trustees account for their stewardship of the trust property.”

Issue for consideration

- 1. Should the law provide for the definition of a trust or the same be left to be determined by courts ?**

4.2. Creation of trusts

Generally, there is no statutory requirement to create trust by any instrument. A trust may be created through the express intentions of the settlor (which may be oral or written), implied from the conduct of the Settlor, or by operation of law⁹. Except for charitable trusts¹⁰ and unit trusts¹¹ which are created under a specific law, there are no statutory requirements or prescribed manner for the formation of private trusts. This is mainly because the concept of trust is a creature of courts of equity.

Issues for consideration

- 1. Should the law provide for the modalities and formalities for creating a trust. or it should be left to be determined by the parties as they so wish?**
- 2. Should the law establish a centralized place for the formalization of trust registration in Uganda?**

⁹ The trust is highly relevant in the day to day operations of social security funds. In this, the board of trustees holds the money payable on behalf of the workers who thus are the beneficiaries. Thus, all operations, investments

¹⁰ Trusts created under the Trustees Incorporation Act, Cap 165

¹¹ Unit trusts are created under the Collective Management

4.3. Trust administration

Generally, a trust is managed and administered by persons appointed by the settlor or grantor as trustees. Trustees are often appointed by the trust instrument on such terms and conditions as the settlor or grantor may deem fit. Accordingly, the appointment of trustees is a discretionary act of the settlor. The law allows both individuals and corporate persons to act as trustees.

4.3.1. Appointment and Removal of Trustees

Trustees may be appointed in accordance with the instrument creating a trust, by law or by the court. The current legal framework is silent on the mode of appointing a trustee and only leaves it to the instrument creating a trust. Further, the law does not provide for the qualification and mode of acceptance of trusteeship. This is a lacuna that leaves the law uncertain and unpredictable. It leaves persons creating trusts in uncertainties as to the enforceability or the qualification of persons appointed as trustees.

Issues for consideration

1. Should trusts legislation specify grounds on which a person is prohibited from being appointed or continuing to hold office as a trustee? What should those grounds be? Should they include:

- (a) persons who are below the age of eighteen;**
- (b) unfit and incapable persons;**
- (c) Persons who are bankrupt or insolvent and**
- (d) any other grounds?**

2. Who should have the power to remove a trustee? Should the trust instrument provide for the mode of removal of a trustee? Should courts have the powers to remove a trustee or should the law put in place a quasi-judicial system with the mandate to hear applications regarding the removal of a trustee? If so, under what circumstances should a trustee be removed by court or the quasi-judicial organ?

4.3.2 Duties and Roles of a Trustee

Trustees play a crucial role in ensuring that the wishes of the settlor are enforced or implemented for the benefit of the beneficiaries. Accordingly, integrity, skill, or other necessary expertise are key in the appointment of persons to hold the office of a trustee. Trustees are of central importance to trust management and administration. It thus follows that the trustee's duties must be specified to ensure certainty and clarity. The Trustees Act is silent on the duties of a trustee.

Issues for consideration

- (1) Should trust legislation contain a list of trustees' duties?**
- (2) To what extent should these duties be imposed on the trustees and which duties should be mandatory or default in enforcement?**
- (3) Are there any other duties that should be included beyond those listed?**
- (4) Which duties should be treated as core and mandatory duties that cannot be excluded?**

4.3.3 Powers of trustees

Trustees derive their powers from the instrument creating a trust or the Trustees Act, Cap 164, or a combination of both. The Trustees Act

provides that the powers conferred by the Act on trustees are in addition to the powers conferred by the instrument creating a trust.¹²

Issues for consideration

1. **Should trust law confer on a trustee the same administrative powers in relation to trust property that the trustee would have if the trustee were the absolute owner of the property?**
2. **What powers should a trustee have in relation to the trust property and how should this power be exercised?**
3. **What should be the exceptions to a trustee's powers?**
4. **If the law provides for the powers of a trustee, to what extent should the settlor, while stating the powers of a trustee in a trust instrument, diverge from the provisions of the law relating to any limitations on the powers of a trustee?**

4.3.4 Powers of a Trustee to delegate powers

The Trustees Act allows a trustee to delegate his or her powers during absence from Uganda for a period exceeding one month.¹³ The trustee is allowed to delegate all his trust powers, and discretion in relation to the administering of a trust. A trustee is liable to carry out the acts or defaults of the persons he or she delegates in the same manner as if they were his or her acts or defaults. The power to delegate takes effect only

¹² Section 2 of the Trustees Act

¹³ Section 25 of the Trustees Act, Cap 164

when the trustee has left Uganda and becomes revocable upon his or her return.¹⁴

Issues for consideration

(1) Should the restrictions on the power of a trustee to delegate their powers be opened and widened to cover administration and discretionary powers?

(2) Should the law specify which powers may be delegated and those to be restricted?

(3) What should be the liability of trustees upon delegating his or her powers? Should the law provide that a trustee bears the ultimate liability where the trustee delegates their powers?

4.3.5 Rights of Trustees

Trustees generally have a right to reimbursements and indemnity in respect of expenses and liabilities incurred in the administration and management of a trust. They are entitled to reimbursement and indemnity from the trust property or the beneficiaries. Accordingly, trustees have a lien on the income and capital of trust property, in priority to the claims of the beneficiaries and persons claiming under it.¹⁵ However, a trustee who has breached a trust is not entitled to reimbursements and indemnity until he has made good the breach.¹⁶

¹⁴Ibid Section 25 (2) and (3)

¹⁵ Halsburys laws of England Para 785

¹⁶ Re Knott, Bax V Palmer (1887) 56 LJ Ch 318 (there is no lien for costs incurred by reason of as breach of a trust unauthorized by the beneficiary.

Issue for consideration

Should the law state clear parameters of what acts a trustee should be liable for in relation to trust property and administration?

4.3.6. Provision for an enforcer

An enforcer is the settlor or any other person, body or association of persons who is appointed or replaced by the settlor or the beneficiaries in the absence of the settlor, to monitor the administration of the trust for the benefit of the beneficiaries.¹⁷ An enforcer is appointed for the purpose of monitoring the trustee's activities and the performance of the purpose of the trust.

Issue for consideration

Should the law make provision for an enforcer of a trust and state the functions of the enforcer in terms of trust administration?

5.0 Termination and Revocation of Trusts

A property owner who is thinking of creating a trust often poses questions that need answers if trust law is to be certain and clear. How far into the future should the law allow him or her to reach when tying up that property? Can he or she control the devolution of that property indefinitely? For a lifetime? For a fixed period of years? How far should one generation be given freedom to dispose of property in ways that will restrict the freedom of the next? The answers to these questions have always involved striking a balance between complete freedom to tie up

¹⁷ Section 2, Trustee (Perpetual Succession) Act, 2021

property in perpetuity on the one hand and the right to prescribe only the immediate devolution of the property on the other.¹⁸

The period for which a trust is to operate is usually expressly prescribed in the trust instrument. A settlor can state that the trust shall last until the beneficiary reaches a particular age or a particular event happens to the beneficiary. When the duration of a trust is not expressly fixed, the basic rule is that a trust will last no longer than necessary for the accomplishment of its purpose.

Issue for consideration

- 1. Should the law clearly state that a trust is irrevocable unless a power to revoke is specifically provided in the instrument creating the trust?**
- 2. How should a trust be terminated?**
- 3. Is there need for a statutory procedure for terminating a trust of it should be left to the trust instrument.**
- 4. Should the rule against perpetuities be abolished or maintained?**

6.0 The role of the Court

The courts should have the power to intervene in the administration and management of trusts to ensure that the purpose of the trust is achieved. However, the intervention of the courts should not be seen to override or interfere with the wishes of the settlor.

Issue for consideration

¹⁸ The UK Law Commission, *The Rules Against Perpetuities and Excessive Accumulations*

What should be the role of the court in enforcing trust instruments and the trustee's obligations?

7.0 Dispute resolution in Trusts

Disputes or misunderstandings may arise in the formation, management, and or administration of the trust. Today courts are more encouraging of alternative dispute resolution mechanisms to resolve family matters other than long court trial processes.

Alternative dispute resolution mechanisms such as mediation, reconciliation, and arbitration are more effective to resolve trust-related disputes because they are fast, cheap, and not time-consuming. These are particularly effective in probate or family disputes where personality or family issues predominate over the financial issues involved.

Issue for consideration

- 1. How best can trust-related disputes be resolved in a manner that is cost-effective and efficient?**