

DRILLING DOWN THROUGH A TRUST TO FIND WHO THE BENEFICIAL OWNERS ARE.

I will try to explain if the beneficiaries in a South African Trust can be the beneficial owners in a trust in terms of the FATF rules.

[The FATF defines a beneficial owner as "the natural person\(s\) who ultimately owns or controls a legal entity or arrangement, such as a company, trust, foundation, or partnership"¹. The FATF requires countries to take measures to prevent the misuse of legal entities and arrangements for money laundering or terrorist financing and to ensure that there is adequate, accurate and up-to-date information on the beneficial ownership and control of legal entities and arrangements that can be obtained or accessed in a timely manner by competent authorities².](#)

To identify the beneficial owner of a legal arrangement, such as a trust, there are four possible methods:

- The **trustee** approach: This method involves identifying the trustee(s) of a trust as the beneficial owner(s). ***This method may be sufficient for some types of trusts where the trustee(s) has full discretion over the assets and beneficiaries of the trust. However, if there are other parties involved in the trust who have significant influence or control over it, then the next method should be applied.***
- The **identity** approach: ***This method involves identifying all the natural person(s) who are entitled to benefit from a trust (the beneficiaries), either directly or indirectly.*** This may include identifying all potential beneficiaries if they are not named in the trust deed or if they are part of a class of beneficiaries. If no natural person(s) can be identified using this method, then the next method should be applied.
- The **control** approach: This method involves identifying all the natural person(s) who have power to appoint or remove trustees, protectors, enforcers, beneficiaries or assets of a trust (the settlor), or who have similar powers over a legal arrangement. If no natural person(s) can be identified using this method, then the next method should be applied.
- The **senior managing official** approach: This method involves identifying the natural person(s) who holds the position of senior managing official in a legal arrangement, such as the protector, enforcer, manager, etc. This method should only be used as a last resort when no natural person(s) can be identified using the previous methods.

Based on these methods, it is possible that beneficiaries can be the beneficial owners in a trust if they are identified by the identity approach or the control approach. However, this may depend on the specific characteristics and circumstances of each trust and its beneficiaries. For example, some beneficiaries may have a fixed or vested interest in the trust assets, while others may have a contingent or discretionary interest that depends on the trustee's decision. Some beneficiaries may have influence or control over the trustee's actions, while others

may not. Some beneficiaries may be natural persons, while others may be legal persons or arrangements themselves.

[According to South African law, there are two types of living trusts: vested trusts and discretionary trusts.](#) A vested trust is one where the beneficiaries have a fixed right to either the income or capital (or both) of the trust from inception. [A discretionary trust is one where the trustees have full discretion regarding how much income or capital \(or both\) each beneficiary is entitled to.](#)

Therefore, to determine if beneficiaries can be the beneficial owners in a South African Trust in terms of the FATF, it is necessary to apply the relevant methods and criteria to each case and to consider all relevant information available on the identity and role of the beneficiaries in relation to the trust.

I hope this helps you understand if beneficiaries can be the beneficial owners in a South African Trust in terms of the FATF.

HOW DOES THE ELEMENT OF CONTROL WORK

I will try to explain how the element of control can make a trustee and other persons not a beneficiary the beneficial owner in the trust.

[According to the Trust Property Control Act \(TPCA\), a beneficial owner of a trust is a natural person who directly or indirectly ultimately owns or controls the trust property. The TPCA also defines control as the ability to exercise effective control of the administration of the trust.](#) Therefore, the element of control can make a trustee and other persons not a beneficiary the beneficial owner in the trust if they have the power or influence to determine how the trust property is managed, distributed, or used.

[For example, a trustee may be considered a beneficial owner in the trust if they have full discretion over the assets and beneficiaries of the trust, or if they have voting rights, veto rights, or other decision-making authority over the trust affairs. Similarly, a settlor, protector, enforcer, or manager of a trust may be considered a beneficial owner in the trust if they have the power to appoint or remove trustees, beneficiaries, or assets of the trust, or if they have similar powers over a legal arrangement.](#)

The element of control can also make a trustee and other persons not a beneficiary the beneficial owner in the trust if they act on behalf of another natural person who ultimately owns or controls the trust property. For example, a nominee or intermediary may hold shares or rights in a trust on behalf of another natural person who is the actual beneficial owner. [In this case, the nominee or intermediary would also be considered a beneficial owner in the trust and would have to disclose their principal or beneficiary.](#)

[The purpose of identifying the beneficial owners in a trust is to prevent the misuse of legal arrangements for money laundering or terrorist financing and to ensure that there is adequate, accurate and up-to-date information on the beneficial ownership and control of trusts that can be obtained or accessed in a timely manner by](#)

competent authorities. The TPCA requires trustees to establish and record the beneficial ownership of trusts, keep a record of the prescribed information relating to the beneficial owners of trusts, lodge a register of the prescribed information on the beneficial owners of trusts with the Master's Office, and ensure that the prescribed information is kept up to date.

I hope this helps you understand how the element of control can make a trustee and other person not a beneficiary the beneficial owner in the trust. 7