A Guide to Trusts in Bermuda

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Preface

This Guide to Trusts in Bermuda addresses the unique nature of the trust relationship and its most common uses. The Guide demonstrates the flexibility and security that a trust offers as a vehicle for holding assets.

The information contained in this Guide is for informational purposes only and should not be considered as constituting legal advice. Readers are encouraged to consult their professional advisers before making decisions or taking actions on the numerous and complex issues involved in the establishment of trusts.

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We acknowledge that certain segments in Bermuda’s section in Tolley’s “Planning and Administration of Offshore and Onshore Trusts”, published by Butterworths Division of Reed Elsevier (UK) Limited of Halsbury House, 35 Chancery Lane, London WC2A 1EZ, have been referred to in the preparation of this Guide.
1. INTRODUCTION

Bermuda has been in the business of trusts for the past 50 years and has developed a formidable reputation as being one of the premier offshore jurisdictions in which to develop trust structures. Bermuda’s practitioners have considerable experience in the field of trusts and are used to dealing with trust matters with people from all over the world, particularly with individuals whose legal systems do not derive from the English common law.

Bermuda has been at the forefront in the creation of the purpose trust, which was first introduced by the Trusts (Special Provisions) Act 1989. This statute has recently been amended by the Trusts (Special Provisions) Amendment Act 1998 and has led to expanded opportunities for the use of purpose trusts. Purpose trusts are discussed later in this Guide.

Bermuda’s principal statute governing trusts and their administration is the Trustee Act 1975. This statute is largely patterned on the English Trustee Act 1925. In a continued response to the need to reform Bermuda’s trust law the Trustee Amendment Act 1999 was introduced to modernise a number of important trust administration provisions such as the field of trustee investments.

More recently, the Trusts (Regulation of Trust Business) Act 2001 has introduced an extensive system of trust licensing regulated by the Bermuda Monetary Authority. This has tightened up the requirements for trustees to be licensed and, in particular, requires that all public trust companies possess an unlimited trust licence.

The Bermuda Monetary Authority vets and continually monitors licensed trustees to ensure, among other things, that they are controlled by fit and proper persons, meet minimum net asset requirements, have adequate insurance, records, systems and controls and also that they carry out their business with integrity and skill.

Butterfield Trust (Bermuda) Limited holds an unlimited trust licence and is therefore able to offer trust services to the public.

Following the enactment of The Trusts (Regulation of Trust Business) act 2001 the opportunities for an individual to serve as trustee are limited. Subject to certain exceptions, it is a criminal offence to act as a trustee in Bermuda as a business, trade, profession or vocation without a licence. One such exception is where a co-trustee is licensed. Unlike Trust Companies, individuals may only apply for a limited trust licence.

2. WHAT IS A TRUST?

A trust is a legal relationship and not a separate legal entity. The relationship is created by the person wishing to create the trust (“the settlor” or “the grantor”) and the trustees (the persons willing to undertake the office of trustee). As part of this relationship
property ("the trust fund") is declared to be held by the trustees for the benefit of certain parties ("the beneficiaries") or for certain purposes.

A trust has the following characteristics:

a. The assets constitute a separate fund and are not a part of the trustee’s own estate.

b. Title to the trust fund stands in the name of the trustee or in the name of another person on behalf of the trustee.

c. The trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The following diagram illustrates the relationships:

The following diagram illustrates the relationships:

3. **WHO CAN CREATE A TRUST?**

A person who creates the trust is called the settlor or the grantor and can be any adult individual (i.e. a person over 18 years of age). Corporations can also act as settlors or
grantors. The identity of the settlor or grantor will not always be apparent on the face of the document constituting the trust as where a trust is created solely by the trustee.

A person can validly create a trust under Bermuda law during his or her lifetime of any type of property.

4. WHO CAN SERVE AS TRUSTEE?

There is no requirement that the trustees be resident in Bermuda although there may be stamp duty implications if no trustee is resident in Bermuda. There may also be other benefits to having a Bermuda trustee. Individuals, public trust companies or private trust companies are eligible and most commonly serve as trustees. The differences are as follows:

a. **Individuals**

   A settlor or grantor may have, as one of his trustees, a relative, trusted friend or adviser, or may choose his trustees from bank or other professional personnel. Ordinarily, care should be taken to avoid appointing as a trustee someone who is a beneficiary of the trust, even where the trust document itself does not expressly prohibit this appointment. Care must be taken not to contravene the trust licensing rules (see introduction).

b. **Public Trust Companies**

   In an international setting, the trustee is usually one of Bermuda’s licensed trust companies, acting either alone or with one or more individual co-trustees. At present, Bermuda has some 35 licensed trust companies, ranging from trust companies owned by law firms and accounting firms to large public trust companies owned by banks. Public trust companies are licensed and regulated under The Trusts (Regulation of Trust Business) Act 2001. The Bermuda Monetary Authority is the appointed regulatory body under that Act and must comply with the general policy directions issued by the Ministry of Finance.

c. **Private Trust Companies**

   Private trust companies tend to be very popular with clients from civil law countries. Most private trust companies are not subject to the licensing regime of the Trusts (Regulation of Trust Business) Act 2001. However, some companies may require licenses and advice should be taken in each case on the question of whether a licence is required or not. The companies’ objects will expressly authorise it to act as the trustee of a specified trust or class of trusts, for instance, the ABC Trusts.

   Private trust companies may include “trust” or “trustee” or some variant in their names so long as the word “private” or the abbreviation “(Pvt.)” is also included.
5. **WHAT IS THE TRUST FUND?**

It is common to establish a trust with a nominal cash sum. This, together with the property subsequently contributed (and property from time to time held by the trustees under the terms of the trust deed), is generally referred to as the “trust fund” (and sometimes, by definition, as the “trust property”, the “trust assets” or some other variant). The trust fund may consist of any type of property. For example, cash, land, securities and interests in property, including interests under other trusts.

It is quite usual for trust assets to be held through the medium of a company wholly owned by the trustees. This may, in any event, be desirable or necessary - for instance, so as to confer on the trustees the benefits of limited liability or because the laws of the jurisdiction where the asset is situated requires ownership by a person or corporation resident in that jurisdiction. Where such a company is employed in this way, the trustees will wish to ensure that its issued shares are fully paid-up and not subject to a contingent liability. In addition, professional trustees will require a regular flow of information regarding a company in which they have a controlling interest.

6. **WHO CAN BENEFIT?**

Any legal person (i.e. either individuals or corporations) can be a beneficiary. Charitable trusts have charitable objects and special purpose trusts are created for purposes or non-charitable objectives.

7. **HOW LONG CAN A TRUST LAST?**

The traditional position is that a trust cannot last indefinitely. It is usual to stipulate a fixed term lasting up to 100 years. An exclusively charitable trust, however, can be drafted so as to have the theoretical possibility of lasting indefinitely. A non-charitable purpose trust can also have an indefinite life, however, if a term of years is stipulated, it can last for a fixed term of not more than 100 years.

8. **WHAT NEEDS TO BE CONSIDERED WHEN PREPARING A TRUST DEED?**

A trust is usually created by firstly consulting with a lawyer who specialises in the area of trusts. The trust is established by deed or document under seal. The settlor or grantor and advisers will need to consider which of the following are important to be included in the trust deed:

- **Trust Deed** – A trust can be established by a deed signed by the settlor or grantor and the trustees. Alternatively, a trust may be created by way of a deed called a declaration of trust signed by the trustees alone.

- **Trust Fund** – What assets are intended to form the trust fund? This will have an influence on the type of trust deed that is prepared.
• Beneficiaries – Who will benefit from the trust? The beneficiaries can be named specifically in the deed or may be referred to by class in a schedule to the deed.

• Trustees – It will be necessary to consider whether individuals or a public or private trust company will be appointed as trustee of the trust and to set out their full names and addresses where possible in the deed. Where professional trustees are selected, the trustees’ compliance standards and fees will need to be discussed with them, as well as any special administrative powers that need to be included in the trust deed.

• Will the trustees or some other person have the power to add or remove beneficiaries? This may be an important point to be discussed especially when maximum flexibility is desired.

• Trustees’ Powers – It is usual to confer wide investment powers on trustees and include the power not to diversify the trust fund if holding securities in a single entity or investment is important. The trust deed will also contain a broad range of administrative powers designed to facilitate the trustees’ administration. These powers must be examined carefully and agreed before the trust deed can be finalised.

• Removal of Trustees – Terms will be included in the trust deed providing for the removal of trustees and the appointment of new trustees. This power will often be vested in named or described persons successively and may rest with the protector or, if none, with the settlor or grantor.

• Protector – If a protector is to be appointed, the first protector will usually be named in the deed and provisions for the removal and appointment of successor protectors will be set out in the trust deed. The appointment of a protector can facilitate checks and balances, particularly where the settlor or grantor needs to be removed from the trust. Careful consideration needs to be given to what powers can and should be given to the protector. (See further discussion later in this Guide).

• Revocable/Irrevocable – The trust deed may be expressed to be irrevocable or a provision may be included conferring a power of revocation or amendment on some person (usually the settlor or grantor). Tax considerations in the relevant foreign jurisdiction generally dictate whether or not a trust should be created so as to be revocable or irrevocable.

• Fixed/Discretionary – Will the interests under the trust be fixed, or will the trustees be allowed to use their discretion when distributing the trust fund? In the case of a discretionary trust, the trust deed will confer wide powers on the trustees enabling them, at their discretion, to appoint or pay or apply income or capital to or for the benefit of any one or more of the beneficiaries. (The benefits of a discretionary trust are discussed later in this Guide.)

• Letter of Wishes/Client Attorney Privileged Memorandum – Where a discretionary trust is established, the settlor or grantor will usually want to express his or her wishes with respect to the administration of the trusts and distribution of the trust fund to the
beneficiaries. This is usually expressed by way of a letter of wishes or client/attorney privileged memorandum so that the trustees are aware of the settlor’s or grantor’s intentions. This will be discussed in the next section.

- Jurisdiction – What law will govern the trust? Which courts will hear disputes that arise concerning trust matters? This is another decision the settlor or grantor will have to make when establishing the trust. In general, a trust governed by Bermuda law will ordinarily have one or more trustees resident in Bermuda and these trustees will be subject to the jurisdiction of the Supreme Court of Bermuda. The power to change the proper law of the trust will be granted to an individual or company and the terms dictating the change of law will be included in the trust deed.

9. WHAT IS A LETTER OF WISHES?

While, in the case of a discretionary trust, the trustees will have wide discretionary powers (although they may sometimes be constrained by the requirement for the consent of a third party such as the protector), the trust deed will often be supplemented by an informal and confidential letter from the settlor or grantor to the trustees setting out his wishes on such matters as the amount and timing of distributions, investments, employment of advisers, those who should be regarded as primary beneficiaries and so forth. While this letter is non-binding and intended for the trustees’ guidance only, the trustees will generally respect the settlor or grantor’s wishes and strive to act in accordance with them.

Some advisors prefer to see an attorney/client privileged memorandum, which is not supplied to the trustees, but instead retained on the attorney’s file. Another way of recording the settlor or grantor’s wishes is for the trustees to prepare a note of those wishes. Whichever method is chosen it should not be seen as a substitute for maintaining an ongoing dialogue between the trustees and the beneficiaries and the settlor / grantor so that a relationship can be built based on mutual understanding.

10. WHAT IS A PROTECTOR?

It is not uncommon for the trust deed to provide for the appointment of a protector. There is no statutory definition of a protector; the function of a protector and his duties and responsibilities are essentially whatever the trust deed provides.

The protector is often a close friend or professional adviser of the settlor or grantor, and should be familiar with the circumstances and needs of the beneficiaries, the family background and dynamics, and the wishes of the settlor or grantor. The protector may be an individual or a committee, or combination of individuals, or a corporation.

The powers and duties of a protector may vary from case to case, but almost invariably the protector will be given the power to appoint and remove trustees and, perhaps, to change the law which governs the trust. There may also be a requirement for the trustees to obtain the protector’s consent before exercising certain of their powers (for example, powers to add or remove beneficiaries, to appoint investment managers, to declare an
early termination date and so forth) or to act in accordance with directions given by the protector.

A decision needs to be made whether the protector is to be given fiduciary obligations or not and the trust deed will reflect this decision.

11. WHAT NEEDS TO BE DISCLOSED TO THIRD PARTIES?

The trust deed and other trust documents are private and confidential. There is no requirement to seek any governmental or other approval for the establishment of a trust. There are no filing requirements with respect to trusts.

However, in those cases where the trustees apply to the authorities for consent to incorporate a Bermuda “exempted company” or to acquire its shares, it is necessary for the existence of the trust to be disclosed on a wholly confidential basis and for bank references to be supplied in relation to the settlor or grantor or the principal beneficiaries. However, the information regarding the settlor and beneficiaries must by statute be kept confidential. In broad terms, an exempted company is a company incorporated by or on behalf of non-Bermudians for the purpose of conducting business outside Bermuda.

A quite separate issue in terms of disclosure relates to the issue of what information the beneficiaries are entitled to receive with respect to a trust and its administration.

At the very least, a beneficiary has the right to require a trustee to provide him with information that will enable him to determine whether the trust is being administered correctly. Thus, he has a right to see the trust’s accounts and all other reasonable information regarding the management of the trust property. Generally speaking, beneficiaries will be entitled to see the information disclosed in trust documents. Where, however, trustees exercise discretionary powers, they cannot be required to disclose the grounds for the exercise of these powers.

12. TAXATION IN BERMUDA

In Bermuda there are no taxes on profits, income or dividends, nor is there any capital gains tax on trusts. There is a nominal stamp duty on certain trust documents where the trust fund holds non-Bermuda property. The position, however, is different where the settlor is a Bermudian national or where the assets are Bermuda dollar assets.

Stamp duty no longer applies to (i) pension trust funds which are registered under the Pension Trust Funds Act 1966; and (ii) trusts of non-Bermuda property which are executed by a local trustee. Settlements to which an international business (such as an exempted company acting as a trustee) is properly a party are exempt by reason of the International Businesses (Stamp Duty Relief) Act 1990. Under the same Act, transactions in shares in Bermuda exempted companies are not subject to stamp duty.
13. **USES OF TRUSTS**

Trusts can be used in a multitude of ways with each form of trust having distinct advantages depending on the nature and complexity of the client’s business and situation at hand.

a. **Purpose Trusts**

A purpose trust is essentially a trust for a specific purpose and must not have ascertainable beneficiaries. It exists solely to fulfil the purpose for which it has been established. The concept was introduced in the Trusts (Special Provisions) Act 1989 and was conceived, not primarily as a means of saving those trusts which were worthy rather than charitable, but rather to respond to the need for a trust to be able to fulfil a useful role in a commercial setting - the role of insulator.

- The introduction of the Trusts (Special Provisions) Amendment Act 1998 refined the law relating to trusts created for non-charitable purposes by requiring certain conditions to be satisfied.
- The purpose or purposes of the trust, must be sufficiently certain to allow the trust to be carried out.
- The trust must be lawful and it must not be contrary to public policy.
- It is usual to provide that a purpose trust last either indefinitely or, if for a term of years, for 100 years.
- The trust deed will usually appoint an enforcer, which is a role that is similar to that of the protector. However, the appointment of an enforcer to enforce the trust and provide for the appointment of successors is not a requirement in purpose trusts as the statute gives the settlor, a trustee, or any person with a sufficient interest in the trust, the power to make application to the court to enforce the trust. In default of any other arrangements, the final power of enforcement rests with the Attorney General.
• Bermuda has seen a growing number of transactions making use of purpose trusts or charitable trusts as a medium of ownership in commercial set-ups.

For those clients who are looking for a neutral party in a network of commercial transactions, the purpose trust, in combination with a company wholly-owned by such a trust, has provided the means by which bankruptcy remoteness can be achieved, while enabling the transaction to be effected “off balance sheet” or as an “orphan” structure in relation to its originator. Purpose trusts have been used in conjunction with asset financing transactions, securitisations and private trust companies. For example, the purchase by a specially incorporated company of a ship or aircraft with finance provided by a lending institution. They are particularly popular in credit enhancement and in financing transactions.

In its commercial role, the trust is established for the purpose of acquiring and holding the shares of the company, which is to engage in particular transactions.

Purpose trusts have also been used for philanthropic purposes, which are slightly outside the tax definition of charitable. They have been established in Bermuda so that they are tax neutral. Examples of trusts created are those for humanitarian assistance and promotion of peace.

Purpose trusts have also had considerable appeal when used in tandem with private trust companies (referred to above). Here again, their insulation qualities come into play, providing an opportunity to separate the settlor or grantor from the ownership of the company, which acts as the trustee of a family trust. Economic benefit accruing within the purpose trust is not an issue here because the required capitalisation of a private trust company is relatively nominal. A licensed trust company will often factor into the planning by creating the purpose trust by way of declaration. The purpose of the trust in turn will be to hold shares in the private trust company. Family members can sit on the board of this trust company. This structure is illustrated below:
b. **Discretionary Trusts**

A discretionary trust is the form of trust most commonly found in Bermuda. It should be contrasted with a “fixed trusts” settlement under which the interests of the beneficiaries are precisely delineated and quantified.

A principal feature of a discretionary trust is that none of the beneficiaries has a legally enforceable right to any part of the trust property. Whether or not a beneficiary receives a benefit under the trust is generally a matter for the trustees’ unfettered discretion. In this connection, mention has been made earlier of the settlor or grantor’s letter of wishes to the trustees and its significance.

The advantages of a discretionary trust are essentially two-fold:

i. The flexibility, which such a trust confers, allows the trustees, in the exercise of their discretion, to take into account factors that were not foreseen at the time of the trust’s creation. Such flexibility also enables the trustees to act protectively with respect to the beneficiaries, in the sense of protecting a beneficiary from, for instance, the consequences of a spendthrift nature, claims made by creditors or the influence of those who might seek to take advantage of the beneficiary's vulnerability.

ii. Because none of the beneficiaries has a legally enforceable interest or entitlement in any part of the trust fund, discretionary trusts may have beneficial tax consequences in the country of domicile, residence or citizenship of the beneficiary.

c. **Insurance Trusts**

Bermuda has played a leading role in the development by major insurance companies of insurance companies who are selling US dollar denominated life and annuity policies to non-US and US persons. Many of these policies are owned by trusts created by the insurance companies in order to characterise them as investment products rather than insurance.

In addition, trusts are also being created by individuals to buy and to hold individual life or annuity policies. Persons who are concerned about asset protection, political risk, forced heirship or other family tax or investment reasons are purchasing these policies. US persons who buy insurance policies owned by trusts drafted to meet US tax requirements are able to achieve considerable tax planning and asset protection benefits particularly where the policy is issued by a company having segregated accounts.

d. **Trusts for Tax and Estate Planning**

The trust was originally a valuable tax and estate planning tool available to a broad range of potential clients who, by transferring assets to trustees located in a jurisdiction such as Bermuda, could mitigate the burden of taxation in their country of domicile or residence.
Except in those cases where the law of the home jurisdiction imposing the tax effectively dictated otherwise, the trust usually took a discretionary form (see Discretionary Trusts above). Provided appropriate precautions were taken, largely directed at distancing the settlor from the assets placed in the trust in terms of control and benefit, the offshore trust offered tax and estate planning opportunities.

While those opportunities for some clients have been progressively reduced by legislative measures taken in the United States, Canada, the United Kingdom and elsewhere, they still exist - particularly for those whose domicile, residence or even citizenship are prospectively in transition; those whose families are scattered abroad or at least resident elsewhere; and those whose principal motivation is not the avoidance of taxation, but the desire to dispose of one's estate on death freely and without regard to forced heirship laws. Also, the protective qualities of a trust make it an increasingly appealing vehicle in estate planning terms for individuals in those parts of the world where the concept is still relatively unknown.

e. Asset Protection Trusts

Asset protection can mean many things (protection from exchange controls, taxation or expropriation, by way of example), but the term is more commonly used in legal circles to mean protection from one's creditors. It may be possible to achieve such protection by transferring assets to a trust, or to a company owned by a trust, established in a suitable offshore location.

Asset protection trusts have become a fashionable product in the offshore world. However, Bermuda has taken a conservative position about following other jurisdictions, which have legislated in this area. Any validly created trust has inherently protective qualities. Nevertheless, in 1994, Bermuda produced its own version of asset protection legislation, believing it to be necessary to bring certainty to the law and to cap the open-ended exposure of transfers of property by way of gift or trust to the possibility of their being set aside at the instance of aggrieved creditors.

In general terms, the legislation of certain other common law jurisdictions has severely restricted the rights of creditors, being defined as those to whom there is an obligation to pay a sum of money. Bermuda has attempted to establish a reasonable balance between the interests of the well-intentioned individual with those of that individual's legitimate creditors. Unlike other jurisdictions, which have legislated in this area, Bermuda has not foreclosed on all future creditors. Instead it has adopted the concept of the 'eligible creditor'. A creditor may qualify as such during a period of two years following the making of a transfer (to a trust) of an asset below market value with the main intention of defrauding creditors.

f. Employee Benefit and Pension Trusts

It is becoming more and more popular in Bermuda to establish a trust to house a pension fund, to act as a vehicle for a savings or severance scheme, or to facilitate
stock purchase by employees. The advantages to establishing a trust of this nature include the ability to pay benefits in any currency and free of taxes in Bermuda.

g. **Trusts as Security Devices**

Because an essential feature of a properly established trust is that the trust fund is kept completely separate from both the trustee’s and the beneficiary’s assets, it can be used to provide or enhance security, particular in a commercial context. For example, a trust can be used to create a secure sinking fund to fund large future expenditures, such as the replacement of oil drilling rigs, environmental land reclamation after working out a mine, or major repairs to a building.

14. **CAN THERE BE A MANAGING OR CUSTODIAN TRUSTEE?**

It is often the case that trustees have different capabilities and expertise when dealing with trust matters and it may be practicable for certain trustees to delegate functions to a co-trustee or to a delegate most able to complete the task.

Most practical functions of an administrative or managerial nature may be delegated. However, there are certain functions which must not be delegated. These include the following: the formulation of investment policy criteria; the exercise of discretionary duties or powers concerning distribution of income or capital; the exercise of any power to determine or alter the interests of persons beneficially interested under the trust; and the exercise of any power to appoint or remove trustees. Importantly, trustees may not delegate the power to change the proper law of the trust or any severable aspect of it.

The exercise of delegation, however, is reliant on a mutual confidence between trustees since all trustees will be jointly liable for the resulting negligence of one of their numbers. In complicated commercial transactions, delegation and liability must go together and the Bermuda lawmaker has introduced the concept of a managing trustee.

The trust deed may allocate responsibilities amongst the trustees and may reserve certain powers to a managing trustee. The other trustee or so called custodian trustee will then simply hold title to the trust assets and will follow the directions of the managing trustee:
15. **CONCLUSION**

Bermuda’s legal position with respect to its law and limitation periods is conservative, but attractive to the client who wishes to embark on asset diversification and ownership as part of an overall estate planning exercise. Bermuda’s sensible and responsible regulation ensures that it is an excellent jurisdiction for the creation of many types of trusts. Indeed Bermuda has led the international world in many areas including, among others, the creation of the purpose trust and licensing and regulation of public trust companies.

While the use of a Bermuda trust may be available to an increasingly broad range of potential clients in many parts of the world, clients should always consult professional advisers in their home or other relevant jurisdictions before making a final decision to go forward.
For more specific advice on trusts in Bermuda and to discuss the steps involved in establishing a trust, we invite you to contact:

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