



Establishment of trusts in the Bahamas



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Recognition of trusts

The Bahamas is a common law country and accordingly Bahamian courts recognise trusts and the relationships that they create.

The Bahamas is not a signatory to the Hague Convention on the law applicable to trusts and their recognition (January 10 1986), and it is not anticipated that it will be.

Treatment of forced heirship rules

Under the Trusts (Choice of Governing Law) Act 1989, a settlor – whether he or she is resident in the Bahamas or not – may expressly declare in the trust instrument that the laws of the Bahamas shall be the governing laws of the trusts, and such a declaration will be valid, effective and conclusive regardless of any other circumstances.

The act further provides that all questions arising in regard to a trust which is governed by the laws of the Bahamas, or in regard to any disposition of property on the trusts thereof, shall be determined in accordance with the laws of the Bahamas – including questions as to:

- the capacity of the settlor;
- any aspect of the validity of the trust or disposition; and
- the administration of the trust and the existence and extent of the powers contained in the trust instrument.

Asset protection trusts

A trust can be established in the Bahamas specifically as an asset protection trust. Such a trust is designed to take advantage of the Fraudulent Disposition Act 1991.

The act provides that every disposition of property made with the intent to defraud at undervalue shall be voidable at the instance of the creditor being thereby prejudiced. However, the burden of establishing intent to defraud is on the creditor seeking to set aside the disposition and the action must be commenced in the Bahamas within two years of the date of the relevant disposition.

The disposition set aside pursuant to the act shall be set aside only to the extent necessary to satisfy the obligation to the creditor at whose instance the disposition has been set aside, together with such costs as the court may allow.

Further, unless the court is satisfied that a beneficiary of the trust has acted in bad faith, the disposition will be set aside subject to the right of such a beneficiary to retain any prior disposition made to him or her out of the trust by the trustee exercising a power or discretion vested in the trustee for this purpose and otherwise properly exercised.

Protective or spendthrift trusts

Assuming that the settlor does not become bankrupt within two years of the date of the settlement, and assuming that he or she can pay his or her debts at the date of the settlement without the aid of the property comprised in the settlements, protective trusts created for the benefit of the settlor will be effective to defeat the claims of the trustee in bankruptcy if they were carefully drafted. A settlor may not settle property on trusts for himself or herself subject to a proviso or condition that will be determined in the event of bankruptcy, as this would be a fraud on the creditors under the bankruptcy laws. However, a protective trust is not invalid where the event which will trigger the creation of the protective trust is a forfeiture of the settlor's interest or the alienation or charge of that interest, whether voluntary or involuntary. An example of a voluntary charge would be the mortgage of the settlor's defeasible life interest. An involuntary assignment would be a judicial charge created by a judgment or an order for the appointment of a receiver by way of equitable execution. After forfeiture of the settlor's life interest and vesting of the property on the protective trusts, the subsequent bankruptcy of the settlor would not invalidate any gift before bankruptcy.

Protector

It is becoming increasingly common to provide in the trust instrument for the appointment by the settlor of a protector. The protector is frequently appointed to act as a bridge between the settlor and the foreign trustee. The extent of this ability to act as a bridge depends on the powers that have been conferred on the protector in the trust instrument.

A protector is usually given the power to:

- remove and appoint trustees;
- change the proper law of the trust;
- remove and appoint beneficiaries;
- instruct the trustee in respect of disbursements and investment of the trust fund; and
- receive information.

The appointment of a protector usually provides the settlor a high degree of comfort, as he or she can exert indirect control over the trust fund assets via the protector. The protector is typically a close confidante or adviser of the settlor. It is advisable that the protector is not domiciled in the same jurisdiction as the settlor, as he or she would be subject to the jurisdiction of the same court as the settlor, which may not recognise the trust and may order the protector to instruct the trustee to do something which would defeat the settlor's original objectives when the trust was established.

A company may be the protector of the trust.

Bahamian trust structure

The assets of a trust are vested in trustees for the benefit of the beneficiaries. The assets may be held directly by the trustees or indirectly through holding companies whose shares are vested in the trustees. Trustees may be individuals or trust corporations. If a Bahamian company acts as trustee of a trust, it must have a trust licence issued by The Central Bank of the Bahamas under the Banks and Trust Companies Regulation Act. Individual trustees do not require a licence.

To establish a trust as a Bahamian trust, the trust must be governed by the laws of the Bahamas, but there need not be any other nexus with the Bahamas (ie, none of the assets, the settlor or any of the beneficiaries need be resident in the Bahamas or located there).

In order to minimise the risk of a future attack on the trust by an aggrieved plaintiff on the grounds that the transfer of the assets to the trust was invalid, it is recommended that the settlor first establish a holding company in the Bahamas and transfer the assets to the company in consideration for shares of the company. The settlor should then transfer the shares of the company to the trustee of the trust. Provided that the settlor owned or had valid dispositive power of the assets contributed to the holding company free of any proprietary interests of others, the plaintiff's challenge should be defeated, as the *lex situs* of the transfer of the shares to the trust would be the law of the Bahamas, which would uphold the transfer of the shares to the trust.

A licensed trust company is subject to the strict confidentiality laws of the Bahamas and must respect the confidentiality of the trust. The penalties for transgression are severe and include fines and imprisonment.

A trust may be established as a strict settlement or as a discretionary settlement. In a strict settlement the beneficiaries and their shares in the trust assets are definitively set out in the trust deed. In a discretionary settlement the trust assets are vested in the trustees with complete discretion vested in the trustees, alone to determine how capital and income will be distributed among the beneficiaries. The beneficiaries must be identified in the trust deed or be capable of identification.

A trust is established by a settlor executing a settlement and vesting trust assets in the trustee. Assets may later be transferred to the trustee by the settlor or other persons. Alternatively, a trust is constituted by the trustees declaring themselves trustees of the trust assets by a trust deed, in which case no settlor need be identified.

Perpetuity period

The perpetuity period in the Bahamas is governed by the Rule Against Perpetuities Abolition Act 2011, whereby:

- trusts established after December 30 2011 are not subject to the Rule Against Perpetuities Abolition Act and can last for an indefinite period; and
- trusts established before December 30 2011 are subject to the perpetuity period stated in the trust deed. However, the court may vary the period.

Purpose trusts

Purpose trusts in the Bahamas are governed by the Purpose Trust Act 2004. Under the act, a trust may be established for non-charitable purposes. The trust may also have beneficiaries that are persons (a mixed-purpose trust). Purpose trusts are not subject to the Rule Against Perpetuities Abolition Act.

Trustee Act 1998

The Trustee Act was enacted into law with effect from July, 27 1998. It is in seven parts, as follows:

- Part 1 – preliminary;
- Part 2 – investments;
- Part 3 – general powers of trustees and personal representatives;
- Part 4 – appointment and discharge of trustees;
- Part 5 – powers of the court;
- Part 6 – special provisions; and
- Part 7 – fiscal and regulatory provisions.

Part 1

In this act, 'trustee' includes a personal representative and 'trust' includes implied, constructive and resulting trusts and the duties incident to the office of a personal representative.

Section 3 is a new and important provision having regard to the debate concerning sham trusts. Section 3 provides that the:

"retention, possession or acquisition by the settlor of any of the matters referred to in subsection (2) should not invalidate a trust or the trust instrument or cause a trust created inter vivos to be a testamentary trust or disposition or the trust instrument creating it to be a testamentary document."

Section 3(2) includes the power to:

- postpone the sale of real estate comprised in the trust fund which is held on trust to sell the same;
- receive additional property into the trust fund;
- borrow on the security of the trust fund;
- lend any part of the trust fund to any person;
- vote securities held as part of the trust fund, deposit the securities in any voting trust and give proxies or powers of attorney in respect thereof;
- incorporate companies to hold the trust fund or any part thereof;
- apply the trust fund or income thereof in policies of insurance;
- apply the trust fund in purchasing, acquiring or making improvements or repairs to or on any land occupied or intended for occupation by any beneficiary;
- lay out part of the trust fund in the purchase of goods and chattels for the use of any beneficiary;
- grant options;
- hold bearer securities;
- pay duties, fees or taxes out of the trust fund, notwithstanding that the same will not be recoverable from the trustees or any persons interested under the trusts, or that the payment will not be to the advantage of these persons;
- institute, prosecute and defend lawsuits and compromise any matter of difference, or submit the same to arbitration;
- make any distribution of the trust fund *in specie*;
- obtain the opinion of counsel;
- engage an investment adviser;
- employ and pay out of the trust fund fees of any agent or agents in any part of the world;
- release, extinguish or restrict any power contained in the trust instrument or by law conferred on the trustees;
- omit to register bonds or securities; or
- act as a director, officer, manager or employee of any company whose shares or debentures may be comprised directly or indirectly in the trust fund, and retain fees paid for acting in this capacity.

Part 2

Section 4 provides that trustees have the full power of investment or of changing investments of individual beneficial owners absolutely entitled. It is unnecessary to spell out the trustees' powers in the trust instrument, but the powers will be subject to any consent or direction required by the trust instrument or any written law, and will apply only insofar as a contrary intention is not expressed in the trust instrument.

The trustees will act as a prudent investor would in making and retaining investments. Section 5 amplifies the requirements of prudent investor standards.

Part 3

Part 3 gives trustees wide-ranging powers to:

- effect transactions;
- contract and execute instruments;
- manage, repair and maintain real estate;
- have power of sale to sell by auction or private contract;

- postpone sales;
- give receipts;
- compound liabilities; and
- raise money by sale, mortgage or otherwise.

A purchaser or mortgagee paying or advancing money on a sale or mortgage will not be concerned to see that the money required, or no more than is required, is raised as to its application.

Section 24 gives the trustees power to insure. Trustees may insure against personal liabilities which they may incur in execution of the trusts.

Section 30 gives the trustees or personal representatives the power to employ agents and to execute or exercise any discretion or trust or power vested in the trustees in relation to any trust property. Section 30 applies only if and insofar as a contrary intention it is not expressed in a trust instrument and has an effect subject to the terms of that instrument.

Under Section 31, the trustee may, if expressly so permitted by the trust instrument, delegate the execution or exercise of any trusts, powers or discretions vested in the trustee to any person outside the Bahamas or any person in the Bahamas while the trustee is absent from the Bahamas.

Sections 32 to 36 contain the trustee's indemnities. There is no need to provide for the same in the trust instrument. The trustee may – on resignation, retirement, removal or otherwise ceasing to be a trustee – require a release and indemnity, and may withhold the trust property as the trustee in good faith considers necessary to pay outstanding liabilities or to satisfy the indemnity. The indemnity and right to withhold trust property do not extend to any liabilities for breach of trust.

Sections 37 to 39 provide for maintenance, accumulation of income, advancement and protective trusts. There is no need to spell out the same or any of them in the trust instrument.

Section 40 provides that the trust instrument may contain restrictions against alienation – including a provision that trust property may not be seized, sold, attached or taken in execution by process of law, and may not be alienated by bankruptcy, insolvency or liquidation. However, this provision may not benefit the settlor or any other person donating property to a trust.

Part 4

Section 41 provides that there may not be more than four trustees holding land in the Bahamas; otherwise, Part 4 essentially restates the provisions of the Trustee (1893) Act of the Bahamas.

Part 5

Section 48 gives the court power to appoint a new trustee or new trustees in substitution for or in addition to any existing trustee or trustees, and where there is no existing trustee.

Section 50 permits the court to authorise the trustee to charge remuneration.

Sections 51 to 69 make provision for the vesting orders which may be made by the court. If any such vesting order affects any land or interest therein, an office copy of the vesting order will be registered in the Office of the Registrar General.

Section 70 provides for the jurisdiction of the court to vary trusts, and Section 71 empowers the court to authorise dealings with trust property.

Under Section 73, the court has the power to relieve a trustee from personal liability.

Under Section 75, the trustees may pay moneys or securities belonging to the trust into court, where they will be dealt with according to the orders of the court.

Under Section 77, trustees and personal representatives, without commencing an action, may apply on a written statement for the opinion, advice or direction of the court or judge in chambers.

Part 6

The earlier drafts of the Bill for the Trustee Act made provision for purpose trusts of capital and income, but these provisions have been omitted from the act. They will be the subject of a separate act dealing only with purpose trusts.

Section 81 recognises the role of the protector and provides that the trust instrument may confer on the settlor or any protector any powers – including, without limitation, the power to do any one or more of the following:

- determine the law which shall be the proper law of the trust;
- change the forum of administration of the trust;
- remove trustees;
- appoint new or additional trustees;
- exclude any beneficiary;
- add any person as a beneficiary (including the settlor and any private and charitable trust or foundation);
- give or withhold consent to specified actions of the trustee; and
- release any of the protector's powers.

It further provides that any person exercising any one or more of these powers shall not, by virtue only of such exercise, be deemed to be a trustee. A protector may not charge any remuneration for his or her services unless otherwise provided for in the trust instrument.

Section 82 makes provision for a managing trustee and the exercise of powers to be reserved by the trust instrument to the managing trustee.

Section 83 deals with disclosure. The trustees must take reasonable steps to inform each beneficiary who has a vested interest of the existence of the trust and of the general nature of that interest. If there is no beneficiary with a vested interest, the trustees are under a legal obligation to take reasonable steps to ensure that at least one person who is capable of enforcing the trusts (whether as a beneficiary with a contingent interest or as the object of a discretionary power or otherwise howsoever) is aware of the existence of the trusts and of the general nature of the interest entitling him or her to enforce them. However, the trustees in their absolute discretion may determine that it is not in the best interest of the beneficiary to offer or withhold the information accordingly.

Generally, trustees are under no legal obligation to disclose the interest of the trusts to any beneficiaries interested only contingently or who are merely the objects of discretionary powers.

In Section 83(5), the act details provisions with respect to the disclosure of documents. When disclosing any documents or information to any beneficiary or other person, the trustees shall, if other beneficiaries have requested confidentiality, take all reasonable steps to secure the right to confidentiality of the other beneficiaries. Trustees will not be bound or compelled by any process or discovery or inspection. Nor will they be under any equitable rule or principle to disclose or produce to any beneficiary or other person, any memorandum or letter of wishes issued by the settlor, or any document disclosing any deliberations of the trustees as to the manner in which they should exercise any discretion. In addition, they are not bound to disclose the reasons for any particular exercise of any such discretion or any other document relating to the exercise or proposed exercise of any discretion of the trustees (including legal advice obtained by the trustees in connection with their exercise of any discretion).

No disclosure will be made by trustees in breach of any prohibition or restriction of the disclosure contained in the trust instrument.

Section 85 provides that no power for trustees, settlors, protectors or others to add to the beneficiaries of a trust, or to appoint trust property among a class of persons, or any discretionary trust, shall be invalid on the grounds that it is impossible to ascertain with certainty all potential beneficiaries of the power or trust, or on the grounds that the class of potential beneficiaries is unlimited or limited only by the exclusion of specified persons.

Sections 86 and 87 will nullify the rule in *Saunders v Vautier*. Beneficiaries who would otherwise be entitled to put an end to the accumulation of income may no longer do so where the trust instrument expressly directs the accumulation of income for a period that does not contravene the Perpetuity Act 1995. A beneficiary who is solely interested in the trust property, and all beneficiaries who together are all the persons interested in it, may no longer terminate or modify the trusts affecting the property if this would defeat a material purpose of the testator or settlor in creating the trust, unless the settlor is living and also consents. The material purpose of the settlor or testator may be ascertained from the trust instrument (directly or by inference) or by collateral evidence.

The act abolishes the rules of equitable apportionment between capital and income known as the Rule in *Howe v Earl of Dartmouth*, the Rule in *Re Earl of Chesterfield's Trust* and the Rule in *Allhusen v Whittel*. It gives power to the trustees, in their discretion, to apportion income receipts to capital and capital receipts to income of the trust property, as the trustees consider necessary, in order to restore a fair balance between beneficiaries interested in current income and other beneficiaries.

Section 90 will, if used, considerably shorten the average Bahamian trust instrument. It provides that the trust instrument may incorporate by reference any of the provisions set out in the first schedule to the act. The first schedule gives wide-ranging powers to the trustees, including:

- the widest powers of investment;
- the powers to dispose of and deal with the trust fund; and
- the powers to carry out any transaction in connection with the trust fund which is lawfully capable of being performed by beneficial owners to the same effect as if the powers were expressly conferred by the trust instrument and specified *in extenso*.

Part 7

For the first time, the act provides for a trust duty of \$50 to be affixed by means of a Bahamas revenue stamp to every trust instrument of which the proper law is the law of the Bahamas and which does not create a bare trust. A trust instrument not stamped and cancelled will not be admissible in civil proceedings. However, the court has discretion to admit the trust instrument into the proceedings on proof of payment of the trust duty plus a penalty of \$100 for each year from execution of the trust instrument. A trust instrument will be deemed stamped only when one of the persons executing the trust instrument cancelled the revenue stamp by writing on the stamp the name or initials of the trustee or person acting on behalf of a corporate trustee and the date of cancellation. It is unnecessary to produce any trust instrument to the Treasury, Post Office or other public body for the purposes of payment of trust duty. This section applies only to trust instruments executed after the act comes into operation.

Section 93 provides for exemptions from tax as follows:

- No income tax, capital gains tax, estate tax, inheritance tax, succession tax, gift tax, rate, duty, levy or other charge is payable by any beneficiary who is treated as non-resident for exchange control purposes in respect of any distribution to him or her by the trustee of any trust.
- Where all beneficiaries of a trust are persons who are treated as non-resident for exchange control purposes, the trust shall be exempt from the payment of stamp duty with respect to all deeds and other written instruments of appointment, and by which assets are transferred to or from the trustee of the trust, and all instruments relating to the transfer of beneficial interests in the trust, but the exemptions contained in Section 93 shall not apply to any trust which has as an underlying asset land in the Bahamas or which carries on a business or trade in the Bahamas.

The act provides for exemption from registration under the Registration of Records Act for the following instruments:

- any deed creating a trust;
- all deeds of appointment made pursuant to the terms of a trust; and
- all other deeds (but not including conveyances of Bahamian real property or personalty) executed by the trustees, settlors, beneficiaries or protectors of a trust. This exemption will apply to all deeds referred to therein executed before, on or after the date when the act comes into operation.

Registration under the Registration of Records Act is necessary to preserve priorities of deeds affecting any disposition of "lands, goods and other effects" in the Bahamas. The only deed which is invalid unless it is recorded is a deed of assent in the estate of a deceased testator. The act does not exempt from registration conveyances of Bahamian real property or personalty executed by trustees, which must be recorded to preserve priorities. It does not exclude deeds of assent executed by personal representatives of a deceased testator, which must still be recorded to be valid.

Section 95 provides that the Exchange Control Regulations Act shall not apply to any settlor, grantor, donor or beneficiary who is treated under the act as non-resident for exchange control purposes; and further, that the provisions of this section will apply to all trusts in existence at the time the act entered into force, as well as to those trusts coming into existence on or after the time the act entered into force. It is therefore no longer necessary for trustees to apply to the Central Bank of the Bahamas to have a trust designated as non-resident where it complies with the act.

The act, except where otherwise expressly provided, applies to trusts – including executorships and administratorships – constituted or created before, on or after the commencement of the act. Section 98 provides that the act and any order purporting to be made under the act shall be a complete indemnity to all persons for any acts done pursuant to the act, and further that it will be unnecessary to inquire concerning the propriety of the order or whether the court by which the order was made had jurisdiction to make it.

First schedule

The first schedule contains the trust provisions which may be incorporated by reference, either as to all the provisions or selectively. In addition to wide-ranging powers of investment, the first schedule, among other things, gives the trustees the power to:

- postpone the sale of real estate comprised in the trust fund which is held on trust to sell the same;
- receive additional property into the trust fund;
- borrow on the security of the trust fund;
- lend any part of the trust fund to any person;
- vote securities held as part of the trust fund, deposit the securities in any voting trust and give proxies or powers of attorney in respect thereof;
- incorporate companies to hold the trust fund or any part thereof;
- apply the trust fund or the income thereof in policies of insurance;
- apply the trust fund in purchasing, acquiring or making improvements or repairs to or on any land occupied or intended for occupation by any beneficiary;
- lay out part of the trust fund in the purchase of goods and chattels for the use of any beneficiary;
- grant options;
- hold bearer securities;
- pay duties, fees or taxes out of the trust fund, notwithstanding that the same shall not be recoverable from the trustees or any persons interested under the trusts, or that the payment shall not be to the advantage of these persons;
- institute prosecute and defend lawsuits, compromise any matter of difference or submit the same to arbitration;
- make any distribution of the trust fund *in specie*;
- obtain the opinion of counsel;
- engage an investment adviser;
- employ and pay out of the trust fund fees of any agent or agents in any part of the world;
- release, extinguish or restrict any power contained in the trust instrument or by law conferred on the trustees;
- omit to register bonds or securities; and
- act as a director, officer, manager or employee of any company whose shares or debentures may be comprised directly or indirectly in the trust fund and to retain fees paid for acting in this capacity.

The schedule contains the equivalent of a Lucking clause in respect of the business or affairs of any special entity whose shares, or some of whose shares, form a part of the trust fund. 'Special entity' means any company, partnership or other entity so designated in the trust instrument or subsequently in writing by the settlor or protector (if appointed).

Trustees have power to determine what part of the receipts of the trust is income and what capital.

The schedule provides that if the settlor becomes incapacitated, the rights or powers (if any) reserved to him or her during his or her incapacitation shall be exercisable by the protector (if appointed) or by any person appointed for that purpose by the court declaring him or her to be incapacitated. It further provides that if a beneficiary becomes incapacitated, the trustees may, during his or her incapacitation, apply income or capital of the trust fund for his or her benefit by paying the same to a court-appointed guardian, receiver or other such person without being liable to see to the due and proper application thereof.

There is provision that no trustee shall be liable for any loss to the trust fund arising by reason of any improper investment made in good faith or in consequence of the failure, depreciation or loss of any investment made in good faith, or the negligence or fraud of any agent employed by the trustee or by reason of any other matter except wilful and individual fraud and wrongdoing on the part of the trustee who is sought to be made liable.

The schedule provides that the trustees are entitled to exoneration and indemnification out of the trust fund for liability, loss or expense incurred and for any judgment recovered against and paid by the trustees as such other than liability, loss or expense or judgment arising out of the wilful misconduct or gross negligence of the trustees in bad faith.

The schedule provides that the trustees shall have power to secure from the settlor or any beneficiary a full and complete release from and indemnity against any and all liabilities whatever attributable to any act or omission to act with respect to the investment of the assets of the trust fund, retention of the assets, and sale or disposition of the trust assets. Any release or indemnity shall be conclusively binding on all beneficiaries and other persons having an interest in the trust fund (including minors and unborn issue, heirs or appointees who may then have or thereafter acquire any interest in the trust fund).

The act repeals the Trustee Act 1893, (Ch 164) and the Variation of Trusts Act (Ch 166).

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