



Guide to Bahamian Trusts

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Contents

Preface	2
1. What is a Trust?	3
2. Who is the Settlor?	3
3. Reserved Powers of the Settlor	3
4. Termination of Interest in Trust Upon Challenge to the Trust	3
5. Establishing & Maintaining a Trust	3
6. Who is the Trustee?	3
7. Duties of the Trustee	3
8. Trustees & Disclosure	4
9. Who is the Protector?	4
10. Types of Trusts	4
11. Private Trust Companies	6
12. Anti-money Laundering Obligations	7
13. Conflict of Laws	8
14. Perpetuity	8
15. Trust Dispute Resolution by Arbitration	8
16. Bahamian Trusts	9
17. Taxation	9



Preface

The Bahamas has been and is regarded as one of the premier offshore financial centres with steady growth and experience in financial services. An independent nation since 1973, The Bahamas has passed legislation to meet the requirements of an increasingly sophisticated financial services marketplace and its reputation as an experienced and knowledgeable player in this area is universal. In fact, many of the world's largest and most prestigious financial institutions have branches or subsidiary operations in The Bahamas, taking advantage of the country's stable political and economic system. In using Bahamian vehicles, planners do not need to take local taxes into consideration, as there are no income, capital, gift or estate taxes in the jurisdiction.

WHAT IS A TRUST?

The trust is a unique relationship which allows an individual or a legal entity known as the **settlor** to transfer assets which may be of almost any type to a third party or the trustee. Such assets are to be administered for the benefit of the **beneficiaries**, the persons chosen by the settlor in accordance with the provisions of the trust deed. The concept is based on the separation of legal ownership of the trust assets which rests with the trustees from the beneficial ownership which rests with the beneficiaries.

Trusts in The Bahamas are governed by the Trustee Act, 1998 and the Trustee (Amendment) Act, 2011.

WHO IS THE SETTLOR?

The settlor, the creator of the trust, is any person, including a corporation, who has the legal capacity to enter into a contract. Under the trust relationship, the settlor divests himself of legal ownership/title in the assets and unless he has specific powers reserved the settlor also divests himself of the ability to control such assets. It should be noted that a trust is not and does not create a new entity or new legal person.

RESERVED POWERS OF THE SETTLOR

Under Bahamian Law, the settlor may reserve powers to himself. Further, the retention by the settlor of certain powers is expressly declared not to invalidate a trust or cause a trust created *inter vivos* to be a testamentary trust. The powers include but are not limited to:

- powers of revocation;
- powers of appointment over any part of the trust property;
- powers of amendment;
- powers of addition or removal of trustees, protectors, or beneficiaries; and
- powers to direct the trustee in connection with the exercise of any of their powers or discretions.

It is quite common for a settlor to reserve powers of investment to himself.

TERMINATION OF INTEREST IN TRUST UPON CHALLENGE TO THE TRUST

A settlor, may include a provision in the trust, the effect of which terminates the interest of a beneficiary if the beneficiary challenges the validity of the whole or any part of the trust, or if any action is taken to assist, promote or encourage such a challenge. The beneficiary's interest will terminate whether or not the challenge, and or the

assistance, promotion or encouragement of a challenge is made in good faith.

ESTABLISHING & MAINTAINING A TRUST

The length of time to establish a trust varies depending upon the complexity of the trust instrument and the type of assets. Once the trustee has vetted the trust instrument and all due diligence has been met, the time taken to complete the set up of a trust can be as little as one day or as long as six months.

There is no requirement to register or record a trust. In fact, there is no register of trusts and it is unusual for a trust to be recorded unless real property is being conveyed by the trust instrument. Under the Trustee Act, 1998, trust deeds are exempt from registration under the provisions of the Registration of Records Act; however, if the trust is contained in a conveyance with respect to Bahamian real property then it would be prudent to register that conveyance.

The basic annual cost of maintaining a trust varies considerably. Much depends on how a trust company calculates its fees. Some companies charge a minimum annual fee of say \$4,000 and others charge a percentage of the trust assets annually e.g. 0.5%.

WHO IS THE TRUSTEE?

Upon the settlor appointing a **trustee**, the trust property is vested in the trustee who is the legal owner of the property. The trustee holds and manages the assets of the trust. The trustee can be any individual who has the legal capacity to enter into a contract or any corporation licensed by the Central Bank of The Bahamas under the Banks and Trust Companies Regulation Act. As regulator, the Central Bank licences institutions, determines whether a licensee retains its licence and may examine the books and records of the trust company and conduct onsite examinations.

DUTIES OF THE TRUSTEE

Ordinarily, it will be the duty of the trustee to hold, invest and administer the trust assets. A trustee must act with reasonable care and skill, bearing in mind any special knowledge or experience he has. This is particularly relevant for professional trustees who may reasonably be expected to have special knowledge or experience. As a matter of general law, if a trustee has acted in good faith, he will be entitled to be indemnified from the trust assets in his possession. Where a trustee enters into a contract on behalf of a trust and expressly contracts as trustee and

limits his liability to the extent of the trust assets in his possession, the trustee's personal exposure should be avoided.

With respect to a trustee's powers of investment, under the Trustee Act, 1998, a trustee is bound, barring special revisions in the trust instrument, to make, retain and change investments as a prudent investor would, having regard to the distribution requirements, purposes and other circumstances of the trust. A special onus is put on the trustee who professes to have or ought to have special skills or expertise to use such skills or expertise. A trustee is also under a duty to seek professional advice on matters in which he is not competent. Such advice may be obtained prior to exercising any powers of investment. The trustee is absolved from liability with respect to any action taken pursuant to such advice.

However, under the Trustee (Amendment) Act, 2011, the obligation to act as a prudent investor does not apply to a trustee if the trust instrument provides that the Trustee's power of investment is exercisable only upon direction of the person with the power to direct investments. The trustee, in this instance, is not liable if the trustee acts in accordance with the direction, failed to do anything other than act in accordance with the direction or fails to act if no direction is given.

The court has discretion to relieve a trustee of personal liability for a breach of trust where the trustee has acted honestly and reasonably. In some circumstances where the breach of trust may have been requested or even approved by a beneficiary, the court may order that the trustee be indemnified for losses from the trust property in which that particular beneficiary is interested.

These duties can be excluded or varied by the terms of the trust instrument.

TRUSTEES & DISCLOSURE

Trustees need not disclose certain documents to any persons without a vested interest but are obliged to take reasonable steps to ensure that at least one person who is capable of enforcing the trust is aware of the existence of the trust. The trust instrument may vest in a person the power to request or approve such disclosure. Such documents include:

- the trust instrument and all other documents in which the terms of the trust or any exercise of any trust, power or discretion are to be found;

- all financial statements of the trust; and
- all financial statements of companies wholly owned by the trustees as trustees of the trust.

Trustees are also under a legal obligation at the request and expense of any beneficiaries having vested interests to disclose the above mentioned documents to such beneficiaries.

WHO IS THE PROTECTOR?

It is quite common for a trust deed to provide for the appointment of a protector. A **protector** is often appointed pursuant to the terms of the trust and has such duties and functions as prescribed by the trust. It would not be advisable for persons holding trust property to act as protector of the trust.

Subject to the terms of the trust, the protector may have the power (without limitation) to do any one or more of the following:

- determine the proper law of the trust;
- change the forum of administration of the trust;
- remove trustees;
- appoint new or additional trustees;
- exclude any beneficiary as a beneficiary of the trust;
- add any person as beneficiary of the trust in addition to any existing beneficiary of the trust;
- give or withhold consent to specified actions of the trustee either conditionally or unconditionally; and
- release any of the protectors' powers.

The exercise by the protector of certain powers will not cause him to be deemed a trustee. Further, the protector can only charge remuneration for his services as protector if authorised by the trust instrument. Unless otherwise specifically provided in the trust instrument, the protector will not be liable to the beneficiaries for any bona fide exercise of his powers.

TYPES OF TRUSTS

Asset Protection Trusts

These trusts offer significant asset protection because, upon creation, the settlor transfers assets from his personal estate to the trust subject to the terms of the trust. The measures to protect assets in a trust from the claims of future and unknown creditors were introduced by the Fraudulent Dispositions Act which came into force on 5th April, 1991. This Act limits an attack on trust assets by creditors in a number of ways so that a transfer of assets

will be voidable if the following elements are present:

- the liability to creditors must have existed at the date of transfer;
- the transfer must have been at an undervalue;
- in making the transfer there must have been an intent to defraud the creditor;
- the transfer is voidable by the creditor who is prejudiced to the extent of his claim; and
- the creditor must bring his action within two years of the transfer.

Accordingly, any disposition of property made with intent to defraud is voidable at the instance of the creditor seeking to set aside the disposition.

Charitable Trusts

Charitable trusts are public trusts as they are of value and importance to the public at large. These trusts are created specifically for charitable purposes, which must fall within the following categories: (i) the relief of poverty; (ii) the advancement of education; (iii) the advancement of religion; or (iv) any other purpose beneficial to the community. Charitable Trusts are not required to benefit named beneficiaries or classes of beneficiaries.

Because charitable trusts are established for public purposes, the Attorney-General, as representative for the Crown, acts on behalf of charities and represents the beneficial interests of the charity. Further, if the trustee of a charitable trust fails to uphold his fiduciary duty to the trust, it is the duty of the Attorney-General to inform the court.

Authorised Purpose Trusts

Under the Purpose Trust Act, 2004, and the Purpose Trust (Amendment) Act, 2011, authorised purpose trusts can be established for non-charitable purposes and/or individuals, and include trusts which have undefined termination dates.

An amendment which became effective April 3, 2007 provides that a trust may create an authorised purpose trust of capital or income of any property which may have fixed interests, discretionary interests, or a combination of both. Further, the capital or income of the authorised purpose trust may be disposed of in any of the following ways:

- to persons who may be of any number;
- for purposes which may be of any number or kind, charitable or non-charitable; or

- to any combination of persons or purposes aforementioned.

A trustee of an authorised purpose trust who carries out trust business in The Bahamas must be either a licensed bank or trust company or an individual who is licensed as a financial and corporate service provider.

An authorised purpose trust may not hold land or an interest in land in The Bahamas directly or indirectly but it may lease office premises for the purpose of its business.

In The Bahamas, there is no provision for an “enforcer” as such but rather for authorised applicants who would carry out similar functions, i.e. persons appointed as such under the trust instrument. Authorised applicants have the following rights:

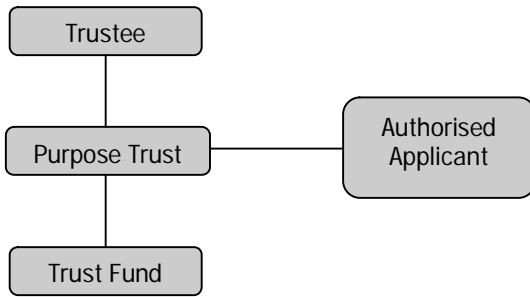
- standing to make application by originating summons to the court in respect of the allocation of income and capital amongst the different purposes of the trust.
- standing to apply to the court to resolve an uncertainty as to the administration of the trust.
- standing to apply to the court to reform the trust *cy-près*.
- the same rights *inter alia* as beneficiaries of an ordinary trust to bring and prosecute administration proceedings and proceedings for the recovery of trust property.
- the right to such accounts and inquiries and such other personal and proprietary remedies and relief, for the benefit of the trust, as could be obtained by a beneficiary of an ordinary trust.
- standing to apply to the court for an opinion, advice or direction in connection with the trust.
- in addition to rights specifically conferred in the trust instrument, the right to inspect and make copies of the instruments, registers and documents of the trust kept by the trustee, all other records and documents of the trust, and the opinions and legal advice of counsel in the general administration of the trust.
- the same rights to information and access to documents as the authorised applicant would have if the authorised applicant were a beneficiary with a vested interest under the trust.

Purpose trusts have many estate planning and commercial uses including:

- the holding of shares of a private trust company. In this structure the settlor and members of his family and his advisors may be appointed directors of the private trust company and thereby assume some responsibility for the management of the trust. This is often useful when the assets of the trust are of an

- unusual nature.
- a trust which has both philanthropic and charitable purposes.
- asset purchase or financing transactions to provide security for an entity which finances the purchase.
- separating voting rights from economic control.

Purpose Trust Relationships



PRIVATE TRUST COMPANIES

Previously, in The Bahamas private trust companies were licensed by the Central Bank of The Bahamas (the “Central Bank”) with a restricted trust license. Under such license, a minimum capital of US\$100,000 and an annual audit was required. This process was very expensive and time consuming. Hence, the government of The Bahamas recently introduced The Banks & Trust Companies Regulation (Amendment) Act, 2006 and The Banks & Trust Companies (Private Trust Companies) Regulations, 2007 to facilitate and regulate private trust companies. As private trust companies can allow the settlors and beneficiaries more involvement and control in administration of the trust, the new regime, granting numerous regulatory exemptions should give The Bahamas a renewed prominence in the field.

A private trust company (which can be a company incorporated either under the Companies Act, 1992 or the International Business Companies Act, 2000) must state in its memorandum and articles of association that it acts as a trustee only for a trust(s) created by or at the direction of a **designated person**, an individual who is named in a designating instrument. If there is more than one designated person named, then each designated person must be a blood relative of or related by some other family relationship to a designated person. It should be noted that the beneficiaries of trusts administered by private trust companies are not restricted in any way. Private trust companies must have a paid up share capital of a minimum of \$5,000. Licence fees for private trust companies are \$5,000 annually.

Private trust companies will be exempt from some of the

obligations of ordinary trust companies. For instance, a private trust company need not have a licence from the Central Bank of The Bahamas to operate. Also, private trust companies will be exempt from the requirements of the Business Licence Act.

The **registered representative** is a separate legal entity, which is either a Central Bank licensee or a financial and corporate service provider which has obtained prior approval of the Central Bank and whose sole business is acting as a registered representative. The registered representative must be a resident of The Bahamas and maintain a minimum share capital of \$50,000. The fee payable to act as the registered representative of a private trust company is \$2,500 annually.

Functions of the registered representative include that of secretary, director, and Bahamas agent (which must be under a service agreement). Such services may also be provided by the duly appointed officers of the registered representative. The registered representative is responsible for ensuring that the private trust company is established for a lawful purpose and that it operates as a private trust company. When the private trust company ceases to meet the requirements for exemption, it is the duty of the registered representative to inform the Governor of the Central Bank.

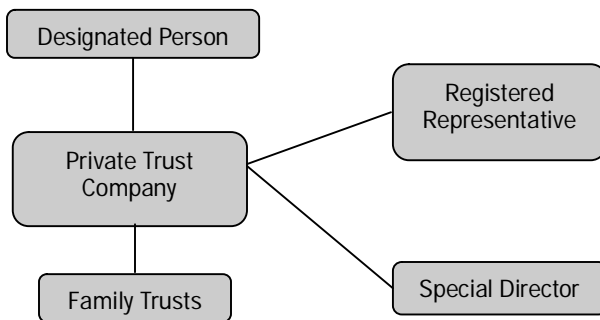
The registered representative must obtain an annual compliance certificate from the directors of the private trust company and receive information on request from the private trust company about the private trust company's transactions. The regulations provide that the registered representative must maintain the following books and records in The Bahamas:

- memorandum and articles of association of the private trust company (which do not name the trusts but do limit the activity of the private trust company);
- designating instrument;
- professional résumé of special Director;
- trust instruments for each trust; and
- a list of all private trust companies for which the registered representative acts.
- At the discretion of the registered representative, form of acknowledgement, whereby the settlor acknowledges that he is aware that the following are not required for private trust companies:
 - the directors possess expertise in trust administration;
 - fidelity bond;
 - capital exceeding \$5,000; and
 - an annual audit.

According to the regulations, the registered representative must also fulfill know-your-customer requirements in accordance with the Financial Transactions Reporting Act. Such requirements include the registered representative verifying the identities of the settlor and any person providing the funds or assets which are subject to the trust, the designated person, the protector of any trust in which the private trust company is trustee, and the vested beneficiaries of any trust of which a private trust company is a trustee. Further, the registered representative shall report any suspicious transactions to the Financial Intelligence Unit.

In addition to the registered representative, a private trust company must have at least one **special director** who has knowledge of trust administration or at least five years experience in a discipline relevant to trust administration. Such disciplines include law, finance, commerce, investment management, or accountancy. The special director need not be a resident of The Bahamas or possess expertise. Where the registered representative acts as a director of the private trust company and the registered representative is a licensee of the Central Bank, the requirement for a special director is waived.

Private Trust Company Relationships



If a private trust company is incorporated under the International Business Companies Act, 2000, it can have just one shareholder. A record of the beneficial owners of the shares and a register of shareholders must be maintained. There is no public record of the names of the shareholders or beneficial owners.

ANTI-MONEY LAUNDERING OBLIGATIONS

In 2000, the government of The Bahamas enacted nine new laws relating to anti-money laundering. These new laws provide for more comprehensive and enhanced supervision of financial institutions, corporate service providers and international business companies and establish a more coordinated system of deterrence against money laundering and other criminal abuses within the financial sector and provide for greater international

cooperation in the oversight of the financial system. The new laws are as follows:

- The Banks and Trust Companies Regulation Act, 2000
- The Central Bank of The Bahamas Act, 2000
- The Financial Intelligence Unit Act, 2000
- The Proceeds of Crime Act, 2000
- The Financial and Corporate Service Providers Act, 2000
- The Financial Transactions Reporting Act, 2000
- The International Business Companies Act, 2000
- The Evidence (Proceedings in other Jurisdictions) Act, 2000 and
- Criminal Justice (International Cooperation) Act, 2000

Key features of the enactments included: enhanced powers of the Governor of the Central Bank in respect of licensees; operational independence of the Central Bank in supervision and regulation of banks and trust companies; increased information sharing with other regulators for supervisory purposes. In addition the legislation upgraded banking supervision, including, but not limited to, on-site examination of banks and trust companies, as well as examinations by appropriate overseas supervisory authorities; know-your-customer requirements and suspicious and unusual transactions reporting were enhanced. **A Financial Intelligence Unit** was established and the legislation introduced the licensing of financial and corporate service providers such as lawyers, accountants and management companies. In 2003, the Government enacted amendments to the Financial Transactions Reporting Act and the Financial Transactions Reporting Regulations which provided the basis for financial institutions to implement a risk-based approach to customer due diligence and anti-money laundering procedure. The amendments realign The Bahamas' know-your-customer regime with the Financial Action Task Force's Revised 40 Recommendations issued in June 2003 with specific regard to the implementation of a risk rating framework for assessing the money laundering risks that client relationships pose to licensees.

Additionally, in 2004 Parliament enacted the Anti-Terrorism Act, 2004, which addresses several of the Financial Action Task Force's Special Recommendations. The law defines the offence of terrorism and criminalising the financing of terrorism and provides for the seizure and confiscation of terrorist assets; reporting of suspicious transactions related to terrorist financing; and strengthening of existing mechanisms for cooperation in this regard between The Bahamas and other countries.

The anti-money laundering legislation in The Bahamas is considered to be as advanced as that of any Organisation for Economic Co-operation and Development member country.

A trust company, like other financial institutions, has specific duties with regard to (a) identification (b) record keeping and (c) internal reporting procedures. These duties exist irrespective of whether it accepts appointments to a new trust or it administers an existing trust. Under the Financial Transactions Reporting Act, a trust company must “verify” the identity of beneficiaries with a vested interest under a trust.

A trust company must disclose information to the appropriate supervisory authority if it knows or reasonably suspects that another person is engaged in money laundering. A trustee is given protection from criminal or civil liability for bona fide disclosure of information; however, he should exercise caution regarding the extent of the information divulged.

CONFLICT OF LAWS

The Trusts (Choice of Governing Law) Act 1989 is expressly designed to confront problems over jurisdiction and conflict of laws in relation to trusts created in The Bahamas. This legislation is particularly useful in respect of the forced heirship provisions in civil law countries as they relate to trusts in The Bahamas. The principal provisions of this Act are as follows:

- a term of a trust declaring that the laws of The Bahamas shall govern the trust is valid, effective and conclusive;
- a term of a trust that the laws of The Bahamas shall govern a particular aspect of a trust, or that The Bahamas shall be the forum for the administration thereof, is conclusive evidence that the settlor intended the laws of The Bahamas to be the governing law of the trust;
- where a term of a trust so provides, the governing law of a trust may be changed to or from The Bahamas in certain circumstances;
- in determining the governing law of a trust, consideration shall be given first to the terms of the trust and to any other evidence therein of the intention of the parties and the other circumstances shall only be considered if there is a failure in this respect;
- with certain exceptions, all questions arising in regard to a trust governed by the laws of The Bahamas – including the capacity of the settlor or donor, any aspect of the validity of the trust, the administration of the trust and the existence and extent of the powers

conferred or retained – shall be determined by the laws of The Bahamas. Generally, if one is dealing with real property located in The Bahamas, or personal property located in any part of the world, which has been placed into a Bahamian trust, the proper law for determining the validity of questions which may arise in respect thereof is Bahamian law, which does not recognise heirship rights in respect of such property.

- The amendments to the Trusts (Choice of Governing Law) Act 1996 clarified the definition of heirship rights and made foreign judgments which relate to heirship and matrimonial claims unenforceable in a Bahamian Court.

PERPETUITY

A perpetuity period is the period contained in a trust deed, which defines the termination date of the trust and restricts the period in which the income of the trust may accumulate. Prior to December 30th 2011, all trust instruments had a perpetuity period which was either incorporated into the trust instrument, or if not incorporated, was prescribed by statute; this mandatory period was a product of the “rule against perpetuities” which prohibited trusts of excessive duration. The Bahamas, under the Rule Against Perpetuities (Abolition) Act, 2011, has abolished the rule against perpetuities and as a result, trusts created on or after December 30th 2011 do not require a perpetuity period to be incorporated into the trust instrument, and have no statutory prescribed perpetuity period.

Under the Trustee (Amendment) Act, 2011, the power of amendment under trusts created before December 30th 2011 and which have perpetuity periods of 80 years or less, may be used to extend the perpetuity period up to, and not exceeding 150 years.

If a disposition of an interest in property was made before December 30th 2011, a trustee can make an application to the Court under the Rule Against Perpetuities (Abolition) Act, 2011 to remove the perpetuity period of that trust. The court, upon such an application will make such an order subject to terms which protect the interest of the persons affected by the disposition.

TRUST DISPUTE RESOLUTION BY ARBITRATION

Before the Trustee (Amendment) Act, 2011 came into force it was doubtful whether an arbitration clause in a trust instrument was enforceable against individuals who were not parties to the instrument. The Trustee (Amendment) Act, 2011 has removed this doubt by ena-

bling any dispute or administration question to be referred to arbitration.

Where a trust instrument provides that trust disputes must be referred to arbitration, that provision will bind all parties, including Beneficiaries (whether or not ascertained or in existence and charities), as if those parties were parties to an arbitration agreement.

The trust dispute will be governed by the terms of the trust instrument and the laws of The Bahamas. Ultimately, the Settlor, subject to public interest considerations, has the power to determine how trust disputes are resolved.

BAHAMIAN TRUSTS

The courts of The Bahamas have jurisdiction to hear and determine any claim concerning a Bahamian trust. A trust is considered a Bahamian trust where:

- the trust is governed by the laws of The Bahamas,

- the trustee is ordinarily resident or incorporated in The Bahamas,
- any of the trust property is situate in The Bahamas or the administration of the trust is carried on in The Bahamas,
- the courts of The Bahamas are otherwise the natural forum for the litigation, or
- the trust instrument confers jurisdiction on the court.

TAXATION

There are no income, capital gains, wealth or estate taxes in The Bahamas. The Trustee Act, 1998 exempts trusts for non-resident beneficiaries (for exchange control purposes) specifically from taxation except for a Trust Duty of US\$50 on the creation of a trust. There is a penalty of US\$100 per annum for failure to pay this duty. Stamp duty on an ad valorem basis will only be charged when Bahamian real estate is conveyed to the trustees or non-beneficiaries.