

**A GUIDE TO
GUERNSEY TRUSTS**

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INTRODUCTION

Over the last three decades there has been widespread and increasing use of Trusts as a way of holding personal wealth confidentially. Trusts have been set up for a variety of reasons, often in offshore jurisdictions, some of which include:

- to alter the devolution of assets on death under forced heirship laws
- preserving confidentiality;
- placing assets in a safe jurisdiction when emigrating or temporarily working abroad;
- to hold property for minors;
- to preserve capital for future generations;
- to build up a pension fund;
- avoiding potential disputes among heirs and beneficiaries by securing the services of an impartial person to administer property;
- to avoid probate and to shelter assets from potential claims by creditors;
- to reduce tax liabilities;
- to hold property for charitable purposes.

A Trust is a relationship between a Trustee, who holds property, with Beneficiaries, who are the persons for whose benefit the property is held and to whom strict obligations are owed. This has been established by over 800 years of development of the law of equity. For a Trust to exist, three matters must be certain. The “Three Certainties” are:

- Identified Trust property;
- Clear terms for the Trust; and
- Identified or identifiable beneficiaries.

This guide has been compiled to give further insight into the above matters and provide the reader with information on Trusts in Guernsey.

GUERNSEY LEGAL BACKGROUND

The Bailiwick of Guernsey consists of the island of Guernsey (some 25 square miles) and the smaller islands of Alderney, Sark, Herm, Jethou and Brecqhou. Although only some 30 miles from the French coast and about 70 miles from the English coast, Guernsey is attached to the British Crown but maintains its own unique administrative and legal system. The Judicial system covers the whole of the Bailiwick, the islands of Alderney and Sark having their own courts, which are subject to the jurisdiction of the Royal Court of the Island of Guernsey.

Guernsey’s constitutional position is that it has internal self-government, fiscal autonomy and duty-free entry of produce to the EU.

The UK retains the ultimate responsibility for the good government of Guernsey. The UK government (or more strictly the Crown) is responsible for Guernsey’s external relations with

other countries and so represents Guernsey in external matters such as defence and international affairs, but only with the Island's consent.

The sources of law in Guernsey are:

- customary law;
- statute; and
- judicial decisions

Customary law derives from the laws of the old Duchy of Normandy and the customary law of Guernsey, not post-Revolution French civil law. The old customary law of Normandy is still cited in the Guernsey courts, particularly in such areas as property law and the law of succession.

Modern law, such as company and Trust law, is based on Anglo-Saxon concepts and, if a precedent is required, it is to the English Courts that the Guernsey courts refer to for guidance. The highest court of appeal is the Judicial Committee of the Privy Council, which sits in London.

GUERNSEY AND NON-Guernsey TRUSTS

Although Trusts have been established under the Guernsey customary law for many years this was first codified under the Trusts (Guernsey) Law 1989, as amended in 1990. Recently the legislation was updated to create a more flexible framework and ensures that Guernsey remains competitive and at the forefront of legislative developments as a jurisdiction for the establishment and administration of fiduciary structures. The current Trusts (Guernsey) Law, 2007 came into force on the 17th March 2008 (“the Law”).

A Trust is defined as where:

A person or company (a “Trustee”) holds or has vested in him, or is deemed to hold or have vested in him, property which does not form, or which has ceased to form, part of his own estate:

- for the benefit of another person (a “Beneficiary”), whether or not yet ascertained or in existence; and / or
- for any purpose, other than a purpose for the benefit only the Trustee.

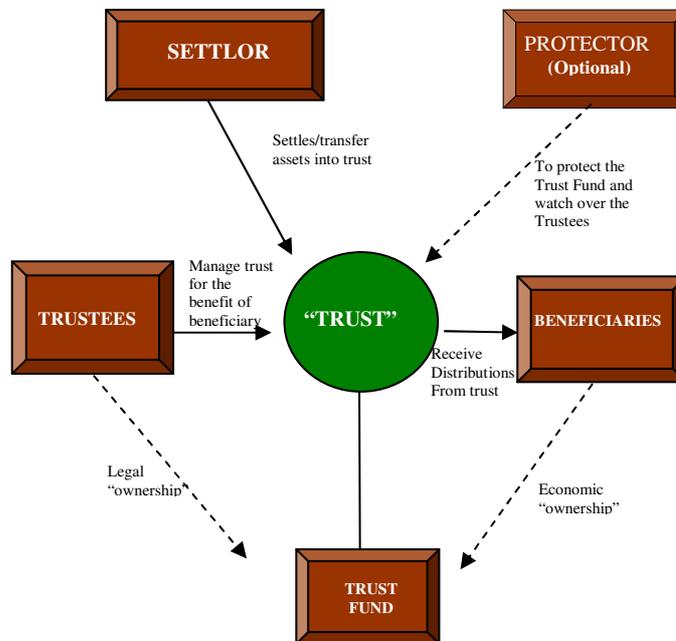
It is important to note that the legal ownership of the property is held by the Trustee, who holds the property on trust for the Beneficiary.

The person or entity transferring property to a Trustee is called a “Settlor”.

Where a Trust meets the above definition and is not a Guernsey law Trust, the Royal Court of Guernsey has jurisdiction if a Trustee is resident in Guernsey, if any Trust property is

situated or administered there or if its terms so provide that the Royal Court of Guernsey has jurisdiction. For a Guernsey law Trust, the Royal Court of Guernsey has jurisdiction.

A typical Trust structure can be illustrated as follows:



FEATURES OF GUERNSEY TRUSTS

Creation

A Trust may be created by an oral declaration, by an instrument in writing, or by conduct or otherwise, but a unit Trust and a Trust of real property situated in Guernsey must be created by an instrument in writing. In most cases the Trustee will be governed by a Trust Instrument (usually either a Declaration of Trust or a Settlement Instrument, and both commonly referred to as a Trust Deed).

Property

There is no restriction on the type of property that may be put into a Trust.

Beneficiaries

Beneficiaries must be identifiable by name or by reference to a class or a relationship to another person. A Settlor or a Trustee may be a Beneficiary. Where there is no identifiable or ascertainable Beneficiary the Trust, to be valid, must be created for a charitable purpose and /or for a non-charitable purpose in relation to which it is valid and enforceable.

Validity

A Trust will not be valid if it:

- purports to do anything contrary to the law of Guernsey;
- confers or imposes any right of function the exercise or discharge of which will be contrary to the law of Guernsey;
- has no identifiable or ascertainable beneficiary unless
 - (a) it is for a charitable purpose and / or
 - (b) it is for a non-charitable purpose in relation to which it is valid and enforceable; or
- the Royal Court declares that:
 - (a) it was established by duress, fraud, mistake, undue influence or misrepresentation of in breach of fiduciary duty;
 - (b) it is immoral or contrary to public policy;
 - (c) its terms are so uncertain that its performance is rendered impossible; or
 - (d) the Settlor was, at the time of its creation, incapable of creating such a Trust.

Trusts for non-charitable purposes

Non-charitable purpose trusts are now permitted under the Law by removing the requirement to have beneficiaries, provided certain requirements are met. Such Trusts must have an “Enforcer”, which can be a person or corporate entity, with a duty to ensure that the Trustees are accountable for their actions.

Duration

There is no limit on the period for which a Trust may continue to be valid and enforceable. It is possible to create a Trust with a defined period if so wished.

Trustees

The minimum number of Trustees is two unless:

- only one Trustee was originally appointed;
- the Trustee is a corporate Trustee resident in Guernsey;
- the terms of the Trust provide otherwise; or
- the Public Trustee is acting (i.e. the trustee of last resort).

The duties of Trustees in general are as follows:

- A Trustee shall, in the exercise of his functions, observe the utmost good faith and act “*en bon pere de famille*” (i.e. as a prudent administrator of family wealth in providing for his family).
- A Trustee shall execute and administer the Trust, and shall exercise his functions, in accordance with the provisions of the Law and, subject thereto:
 - (a) in accordance with the terms of the Trust Instrument;

- (b) only in the interests of the Beneficiaries or charitable purpose or non-charitable purpose, as the case may be.

A Trustee shall, subject to the terms of the Trust Instrument and to the provisions of the Law:

- ensure that the Trust property is held by or vested in him or is otherwise under his control;
- preserve and enhance, so far as is reasonable, the value of the Trust property;
- keep Trust property separate from his own property and separately identifiable from any other property of which he is Trustee.

A Trustee shall not, except with the approval of the Royal Court, or as permitted by the provision of the Law, or as expressly provided by the terms of the Trust Instrument:

- derive, directly or indirectly, any profit from his Trusteeship;
- cause or permit any other person to so derive any such profit; or
- on his own account enter into any transaction with his co-Trustees, or relating to the Trust property, which may result in any such profit.

Accounts and records

Trustees must keep accurate accounts and records of their Trusteeship and it is our policy to produce regular accounts. There is a duty subject to the terms of the Trust Instrument to act impartially between Beneficiaries or charitable purposes / non-charitable purposes. Trustees have the right to consult professional persons in relation to the affairs of the Trust and have a power (unless the Trust Instrument specifically provides against) to appoint investment managers and professional persons to act in relation to the affairs of the Trust or to hold any Trust property, but otherwise Trustees may not delegate their functions unless so expressly authorised.

Confidentiality

Beneficiaries, Settlers and Enforcers have access to full and accurate information on the state and amount of the Trust Property. With regard to Beneficiaries and Settlers, this right may be excluded in the Trust Instrument (and is subject to the Royal Court making an order for disclosure).

A Trustee is not compelled, other than under the terms of the Trust Instrument or by an order of the Royal Court, to disclose any documents which reveal:

- his deliberations as to how he should exercise his functions as Trustee;
- the reasons for any decisions made in the exercise of those functions;
- any materials upon which a decision was or might have been based;
- any letter of wishes.

A Guernsey Trust is thus a private document and third parties are not entitled to have access to the Trust Instrument or to any other information about the Trust unless the Royal Court makes an order compelling a Trustee to make disclosure. In practice, the Royal Court would not readily and without good reason make an order compelling disclosure of the Trust Instrument and affairs of a Trust to any third party.

Protectors

A Protector is a person with certain powers relating to the Trust. For example the Protector may have power to remove the Trustee, or the Trustee may be obliged to obtain consent before exercising a power or a discretion in the Trust Instrument. In family Trusts where the Trustees are not intimately involved with the family, the Settlor will often appoint a member of the family or some other trusted individual as Protector. A Protector can be an individual, an incorporated body or an unincorporated association.

Settlor Reserved Powers

The Law expressly provides for the reservation (or grant) of certain powers to the Settlor or third party but care must be taken that the reservation of such powers is appropriate and no adverse tax or other consequences may arise.

TYPES OF GUERNSEY TRUSTS AND THEIR USES

This is not an exhaustive list of the types of possible trusts but intended as a general guide to the most common types:

Guernsey Trusts

Trusts “the proper law of which is the law of Guernsey”.

Foreign Trusts

Trusts “the proper law of which is not the law of Guernsey”.

Private Trusts

Trusts for the benefit of private individuals or classes or individuals or companies or other private Trusts.

Public Trusts

Trusts for the benefit at large or sections of the public.

Non-Discretionary Trusts

Trusts which confer on the Beneficiary vested interests either immediately or at some future point in time to the whole or a determined portion of either the capital or income (or both) of the Trust (such interest may be absolute or for a specified time only). An example would be an “interest in possession” trust where there is an income Beneficiary who is entitled to all the income in the Trust but where the Trustees may have discretion as to the disposition of the capital of the Trust.

Discretionary Trusts

Trusts which confer on the Beneficiary a contingent interest of a hope of benefit in that the interest is dependent on the exercise of a discretion by some other person (normally the Trustee).

Accumulation Trusts

Trusts where the income accruing to the Trust fund is accumulated by the Trustee during a period and added capital.

Inter vivos Trusts

Inter vivos Trusts are trusts created by a Settlor during their lifetime or existence. It can be created by either a person or body corporate or unincorporated association. Each person who makes a settlement upon a Trust, is considered to be the Settlor of the assets so donated, albeit made on the same terms and conditions as the initial settlement to the Trust.

Testamentary Trusts

A testamentary Trust can only be created by an individual, not by a body corporate or unincorporated association, as it is created on death by a will.

Settlement

A Settlement is a Trust established by a Trust Instrument executed by both the Trustee and the Settlor and in which the Settlor is named.

Declaration of Trust

A Declaration of Trust is a Trust established by the Trustees declaring that they hold specified property for the benefit of the Beneficiaries defined in the Trust Instrument executed by them. The donor of the property will not be named in the Trust Instrument. The donor of any property to the Trust would be deemed to be a constructive or economic Settlor in respect of property so donated.

Asset Protection Trusts

Guernsey law has no provisions relating to asset protection Trusts (otherwise known as creditor protection Trusts). In particular, unlike some other jurisdictions, the Statute of Elizabeth has never applied in Guernsey.

To date there have been no reported cases before the Guernsey courts where the creditors have challenged the establishment of an asset protection Trust. There are, therefore, no precedents to turn to for guidance.

The general view held of the legal position is that for an asset protection Trust to be successfully challenged by creditors in the Guernsey courts they would need to show that before or as a result of making the transfer, the Settlor was or became insolvent or otherwise did not have the assets to meet legitimate claims against him or his estate and that the transfer was made or can reasonably be inferred as being made to prejudice or defraud the claims of creditors.

The court would consider whether there had been any conscious decision on the part of the Settlor to divest himself of his assets to avoid the reasonable demands of his creditors. Obviously the longer the period of time which elapses between the creation of the Trust and the date when the Settlor had knowledge of a claim or circumstances which could potentially lead to a claim, the greater the chance of the Trustees being able to fend off a challenge.

If the court was to rule that a transfer to a Trust was a fraudulent transfer of assets the Trust assets would no longer be available for the benefit of the Beneficiaries.

Employee Benefit Trusts (“EBT”)

Trusts established by a corporate body for the benefit of usually a wide class of Beneficiaries including present and former employees and their families.

Retirement Annuity Trust Schemes (“RATS”)

A pension Trust established for either specific individuals of classes of individuals resident in Guernsey.

Qualifying Recognised Overseas Pension Schemes (“QROPS”)

A pension Trust established for either specific individuals of classes of individuals either resident or non-resident in Guernsey and established mainly for individuals leaving or intending to leave the UK which can accept transfers of UK pension rights.

Employer Financed Retirement Benefits Schemes (“EFRBS”)

A pension Trust established by a corporate body for an employee and their family.

PROPER LAW OF A TRUST

Choice of Proper Law

The proper law of a Trust is that body of law by which a Trust is governed. The proper law will influence various aspects of the Trust including its form, validity, interpretation and the rights and obligations of the Trustee, Settlor and Beneficiaries. A clear and unequivocal choice of proper law is therefore of fundamental importance when creating a Trust.

Changing the Proper Law

It is possible for a Guernsey Trust to provide that, in the event of a specific event occurring, or at a particular point in time, the proper law of the Trust would be changed from the law of Guernsey to the law of another specified jurisdiction. In such an event, the Trustees would not have to take any action to effect a change of the proper law as the Trust instrument would automatically provide for such a change.

In the event of the Trust Instrument providing for a change of the proper law, it would, in normal circumstances, so provide that the Trustees, by a majority, would be entitled to change from the law of Guernsey to the law of another jurisdiction.

Foreign Laws – Conflict

Trusts which choose Guernsey law as their proper law will be valid, notwithstanding the fact that the provisions of the Trust Instrument may be in conflict with the law of the Settlor's domicile.

ESTABLISHMENT OF TRUSTS

Trust Property

Property is defined in the Law:

- to mean real and personal property of any description, wherever situated, and any share, right or interest therein, and includes tangible or intangible property and any debt or thing in action;
- in relation to rights and interests as including "rights and interests whether vested, contingent, defeasible or future".

What Property may be settled onto a Trust

Any property (as defined above) may be held on Trust, and a Trustee may accept property to be held on Trust from any person.

Guernsey law will recognise a transfer of property to a Guernsey Trust notwithstanding any rules of the foreign Settlor's domicile prohibiting it, if the Settlor has capacity to make the

transfer. The Settlor will be deemed to have a capacity to create the Trust or to make the transfer if he or she had the capacity to do so under Guernsey law alone.

Initial Settlement

It has become a common practice when a Trust is created to clearly state the property which is initially settled upon the Trust.

Subsequent Additions to the Trust

It is not unusual for an initial settlement of property to be made, and subsequent additions be made thereto at a later time.

Letter of Wishes

It is usual for the Settlor of a discretionary Trust to address a letter or memorandum to the Trustees setting out the guidelines he would like the Trustees to consider when exercising their powers in relation to the Trust, for example when exercising their discretion in making distributions or how certain of the assets of the Trust should be invested.

As the Trustees are obliged to act independently, the letter is no more than an expression of the wishes or desires of the Settlor and as such is not legally binding and can be totally ignored by the Trustees. It is, however, usual for the Trustees to take note of the wishes expressed by the Settlor, particularly where the Trust has been created by the Settlor for his immediate family.

Taxation

Guernsey income tax is the only local tax that may be applicable to Trust structures. Trustees may be Guernsey income tax payers and may be obliged to file tax returns when resident in Guernsey.

To establish if Guernsey income is payable, one must first distinguish between income from a Trust and income of a Trust.

- Income of a Trust: The Settlor will be liable to pay tax on the entire income arising to the trust only where the Settlor is liable for Guernsey income tax and they and/or their spouse can or may benefit under the trust or in any circumstances control the trust property.
- Income from the Trust: The position depends on the tax position of the Beneficiaries:
 - (a) Where the Settlor and Beneficiaries are non-Guernsey resident, Guernsey tax is payable on Guernsey source income (other than bank interest, although this may be subject to a retention tax under the EU Savings Tax Directive);
 - (b) Where the Settlor is Guernsey resident but excluded, Guernsey tax is payable in the hands of Guernsey resident Trustees – unless income is paid from a non-

Guernsey company. No tax is payable where the Trustees are not Guernsey resident;

- (c) Where the Beneficiaries are Guernsey resident, Guernsey tax is payable by them on what they receive, and the Trustees may be taxed on that amount on the Beneficiary's behalf.

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GENERAL DISCLAIMER

This guide is intended as a brief summary of Guernsey as a Trust jurisdiction, looking at the types of Trust available and their uses. It is very important that specific professional advice is obtained before establishing any Trust. Jupiter Trustees Limited cannot accept any responsibility for any loss arising from any inaction or action taken due to any content of this guide and will not be liable for any omissions or errors contained within this guide.

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May 2011