

A Trust – What is it?

Essentially, a trust is a relationship or an obligation whereby legal and beneficial ownership is separate and distinct and where property is vested in a person who holds this property on trust for persons, who are called beneficiaries or for a specified purpose. Additional property can be transferred subsequent to the creation of the trust.

The legal title to the property is held by a person called or known as the trustee and the beneficial title to the property belongs to beneficiaries – the beneficiaries are entitled to benefit from the property or assets under the trust. It is essential that legal title to the property which is to constitute the trust is actually transferred from the settlor to the trustee in order for there to be a trust.

A trust, unlike a company, has no legal personality so it would be the trustee who would act for and on behalf of the trust, including suing third parties or is the person who would be sued if there is an action involving the trust or trust property. All assets of the trust are under the control of the trustee.

Bahamian law regarding trust is comprised of principles established in the equity courts of England and Wales and statutory provisions as set down in the Trustee Act, 1998 (the "Trustee Act").

THE PLAYERS:

The Settlor: This is the person who creates the trust.

The Trustee: This is the legal owner of the trust property who holds the trust property on trust for the beneficiaries or for a specified purpose. The trustee owes an obligation to the beneficiaries.

The Beneficiaries: The beneficiaries are the persons under the trust who are entitled to benefit from the property being held on trust.

The Protector: The trust instrument may provide for the appointment of a "protector". The powers of such person would depend on what is provided for in the trust instrument. For example, the protector may have to approve certain actions of the trustee or he may be authorized by the trust instrument to override certain decisions of the trustee or he may be able to appoint a new trustee.

Who can be a trustee and is there a requirement for the trustee to be located in The Bahamas?

Any individual of legal age and capacity or a company can be appointed as trustee of the trust. If however a company is engaging in "trust business" as defined in the Banks and Trust Companies Regulation Act (the "BTCRA"), from within The Bahamas, regardless of whether or not such business is carried on in The Bahamas, then such entity would require a licence from the Central Bank of The Bahamas in order to conduct such business. The BTCRA defines "trust business" as, "the business of acting as trustee, executor or administrator."

There is no requirement in Bahamian law for the trustee (or any trustee if there is more than one) of a trust to be located or resident in The Bahamas.

Can the settlor also be a beneficiary? Yes, the settlor can also be a beneficiary.

Can the trustee also be a beneficiary? A trustee of a trust can also be a beneficiary provided that such trustee is not the sole trustee as he cannot hold assets on trust for himself. There is no trust if the entire legal and equitable estate is vested in the same person.

THE THREE CERTAINTIES:

In order for there to be a duly constituted trust, the three certainties must be present – these are:

- (i) certainty of intention;
- (ii) certainty of objects; and
- (iii) certainty of subject matter.

Certainty of intention - there must be a clear and manifest intention for a trust to be created. Words such as "in trust for" or "upon trust to" would be sufficient to establish this intention; however even if such words are not used, if it is clear that a person has vested property in another person and the intention is there that such property is to be applied or used for the benefit of certain persons (see certainty of objects), an express trust will be said to have been created.

Certainty of objects – the trust must be for the benefit of clear and defined objects/ purposes or persons.

Certainty of subject matter – the property which is the subject of the trust must be clear and specific. There are no restrictions in the Trustee Act as to what may or may not comprise the subject matter or assets of a trust.

RESERVATION OF POWERS BY THE SETTLOR:

Section 3 of the Trustee Act permits a settlor to reserve to himself certain powers under the trust. For example, although there may be a trustee in place, the settlor may wish to reserve powers regarding investment of the trust property. This is permitted under Bahamian law without invalidating the trust and neither will the trust in such a case be considered a sham.

DOES A TRUST HAVE TO BE IN WRITING?

No, but you will find that in cases where a licensed trust company is acting as trustee, they will require that there be a written trust deed or trust instrument.

TRUST USES:

Some common uses of trusts are as follows:

Asset Protection:

Assets of the settlor are transferred to the trust. By virtue of the Fraudulent Dispositions Act, a certain level of protection is available in respect of the transfer of property from a settlor to a trust, from claims of creditors, known or unknown, against such assets.

Specified purpose:

The Purpose Trust Act permits a trust to be created for an authorized or specified purpose and/or for the benefit of individuals. For example, to be the owner of shares (in the name of the trustee) in an underlying company.

Charitable Trust:

These are trusts that are formed for the benefit of the public. For example, money or assets can be put into a trust which is to be used to assist with relieving poverty or hunger in a community or to assist with educating the youth in a community.

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