

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 also demonstrates the flexibility and security that a trust offers as a vehicle for holding assets.

This Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they should be addressed to any member of the Private Client & Trusts Department, using the [contact information](#) provided at the end of this Guide.

Appleby

Bermuda

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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 Butterworth's 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 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 familiar with trust matters involving people from all over the world, particularly with individuals whose legal systems do not derive from the English common law.

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. Bermuda also has an extensive system of trust licensing regulated by the Bermuda Monetary Authority (**BMA**) for trustees requiring all public trust companies to possess an unlimited trust licence. The BMA 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.

The opportunities for an individual to serve as trustee are limited. It is a criminal offence to provide services as a trustee in Bermuda as a business, trade, profession or vocation without a licence, unless specifically exempted. One such exemption applies where a co-trustee is licensed. Unlike trust companies, individuals may only apply for a limited trust licence.

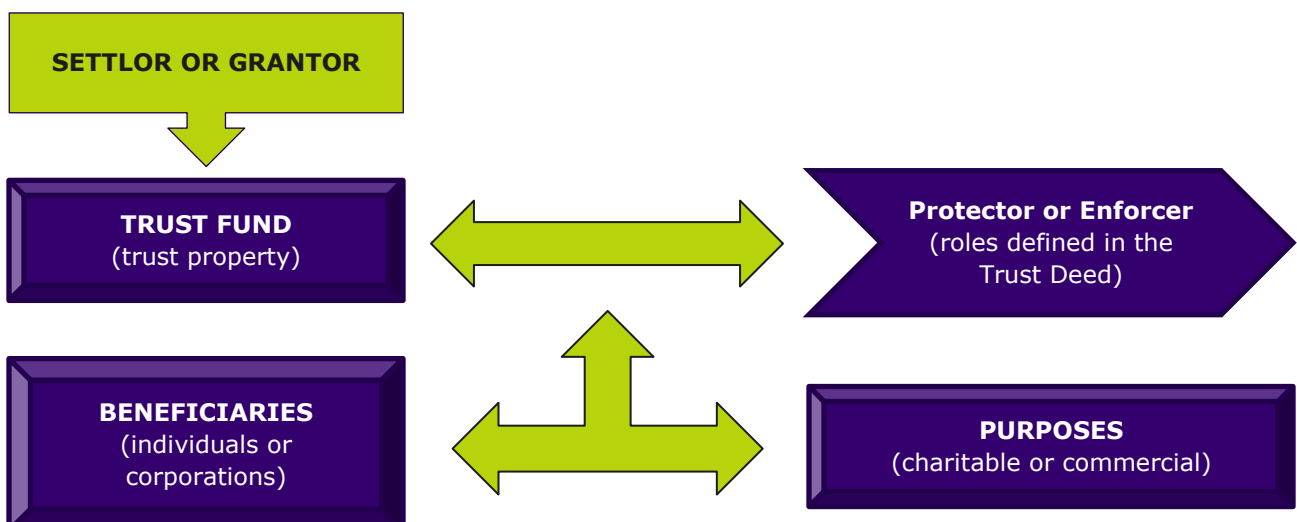
2. WHAT IS A TRUST?

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

A trust has the following characteristics:

- The assets constitute a separate fund and are not a part of the trustee’s own estate.
- Title to the trust fund stands in the name of the trustee or in the name of another person on behalf of the trustee.
- 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 trust 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, for instance where a trust is created solely by the trustee.

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, for example to ensure that the provisions of the Bermuda legislation would be applied to protect the trust assets. Individuals, public trust companies or private trust companies are eligible and most commonly serve as trustees. The differences are as follows:

4.1 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).

4.2 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. Public trust companies are licensed and regulated. The BMA is the appointed regulatory body and must comply with the general policy directions issued by the Ministry of Finance.

4.3 Private Trust Companies

A private trust company is expressly authorised by its objects to act as trustee of a special trust or class of trusts, for instance, the ABC Trust. A private trust company is generally exempted from the licensing regime. However, some companies may require licences and advice should be taken in each case on the question of whether a licence is required. 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 common 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, in order 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 should 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 Perpetuities and Accumulations Act 2009 (the **Act**), states that the rules against perpetuities and excessive accumulations do not apply in relation to instruments taking effect on or after 1 August 2009, except to the extent that the instrument or power of appointment relates to land in Bermuda. Accordingly, it is possible to create a perpetual trust. Therefore, a Bermuda trust may be used to “tie up” property (except Bermuda land) indefinitely, permitting persons, including wealthy families to establish perpetual dynastic Bermuda trusts that may be more beneficial from an estate and tax planning perspective. The Act is not retrospective but does contemplate that a trustee or other interested party may wish to apply to the Bermuda courts to extend the trust period of a pre-August 2009 trust to more than 100 years. The Act also abolishes restrictions on accumulation of income by trustees. Allowing trustees to accumulate trust income for such period as they think appropriate, given the particular needs of the trust in question. A charitable trust 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, a term of years can be stipulated. A registered pension trust may also have an indefinite life.

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

Before setting up a trust, it is advisable to first consult 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 his advisers will need to consider the following matters for the purposes of drafting the trust deed:

- **Trust Deed:** A trust can be established by a deed of settlement signed by the settlor (or grantor) and the trustees; or alternatively, by a deed called a declaration of trust signed by the trustees alone.
- **Trust Fund:** What assets are intended to be transferred to the trustees 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.
- **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 of the trust. These powers must be examined carefully and agreed before the trust deed can be finalised. Such powers can include the power to add or remove beneficiaries (which could be vested in some other person such as the protector). This may be an important point of discussion especially when maximum flexibility is desired.

- **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).
- **Settlor:** A settlor may reserve a wide range of powers to himself in order to retain influence over the management or distribution of trust property. Careful consideration needs to be given to what powers can and should be reserved to the settlor.
- **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. (See further discussion on the benefits of a discretionary trust 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. (See further discussion on this 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 person who has the power to change the governing law of the trust and the terms dictating a change of the governing law will be specified 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 these may sometimes be constrained where the consent of a third party such as the protector is required), 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 advisers prefer to see an attorney/client privileged memorandum, which is not supplied to the trustees, but instead retained on the attorney's file.

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 powers conferred on them (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 or not the protector is to be given fiduciary obligations and the trust deed will reflect this decision. Furthermore, the nature and extent of the authority given, exemptions from liability for negligence, the need to provide indemnity and whether remuneration is necessary, needs to be considered.

11. **WHAT NEEDS TO BE DISCLOSED?**

11.1 **To Third Parties**

The trust deed and other trust documents are private and confidential. Bermuda does not maintain a register of trusts. Consequently, there is no register or other source of information in the public domain from which any third party can obtain information in relation to the trusts. There is no requirement to seek any governmental or other approval for the establishment of a trust and 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 the shares of a Bermuda exempted company, it is necessary for the existence of the trust to be disclosed on a wholly confidential basis and for Compliance Forms to be supplied in relation to the settlor or grantor or the principal beneficiaries. However statute requires the information regarding the settlor and beneficiaries be kept confidential. In broad terms, an exempted company is a company incorporated in Bermuda by or on behalf of non-Bermudians for the purpose of conducting business outside Bermuda.

11.2 **To Beneficiaries**

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 does not apply 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. Transactions in shares in Bermuda exempted companies are also 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 the situation at hand.

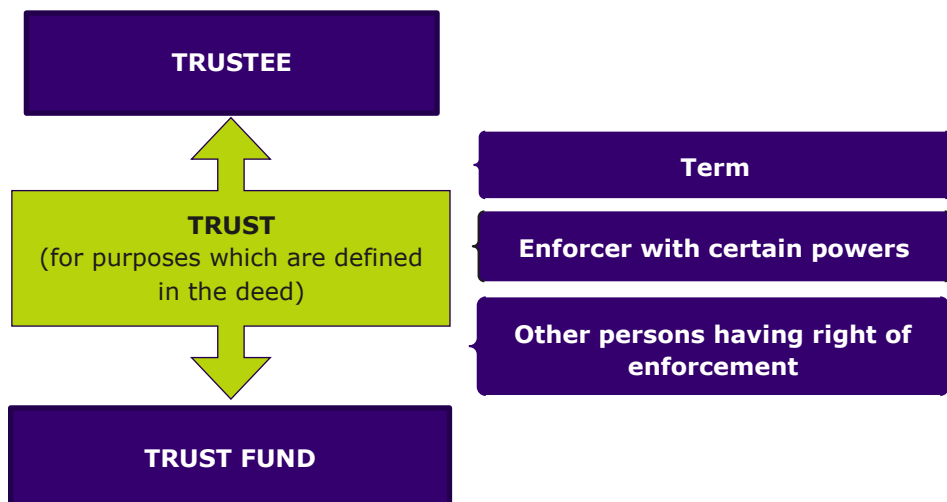
13.1 Purpose Trusts

A purpose trust is a trust to fulfil purposes rather than one for beneficiaries. The concept was conceived, primarily to respond to the need for a trust to be able to fulfil a useful role in a commercial setting - the role of insulator. Hybrid trusts which have defined purposes as well as identifiable beneficiaries may also be utilised in order to achieve particular objectives.

Certain conditions must be satisfied when establishing a purpose trust:

- 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, for a specified term of 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.

PURPOSE TRUST RELATIONSHIPS



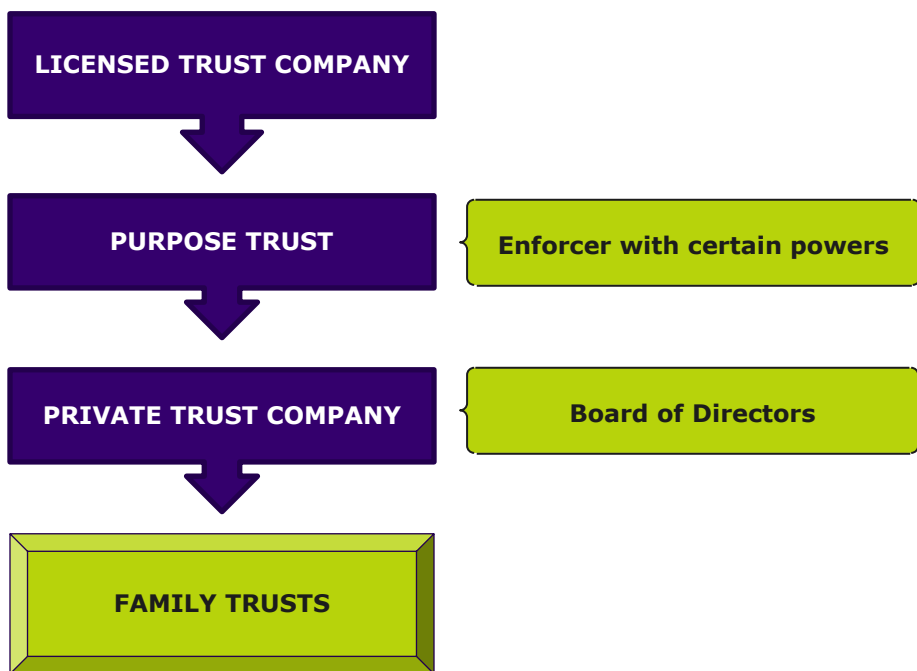
- Many transactions in Bermuda make use of purpose trusts or charitable trusts as a medium of ownership in commercial set-ups.
- For those clients who are looking for a neutral party in a network of commercial transactions, the purpose trust, in combination with a company wholly-owned by such a trust, 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 such trusts include 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). Through the use of a purpose trust, the settlor or grantor is separated 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 creates the purpose trust by way of declaration. The purpose of the trust is to hold shares in the private trust company. Family members can then sit on the board of this private trust company. It may also be used to insulate a licensed trustee from the risk associated with holding directly shares of a trading company. This structure is illustrated on the page below:

PRIVATE TRUST COMPANY STRUCTURE



13.2 Discretionary Trusts

A discretionary trust is the form of trust most commonly established in Bermuda. It should be contrasted with a "fixed trust" 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 regard, 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:

- 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 protect the trust fund from dissipation by spendthrift beneficiaries, or from the claims of their creditors.
- 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.

13.3 Reserved Power Trusts

A settlor of a Bermuda law trust may reserve for himself or grant to any other person (such as a protector) any limited beneficial interest in the trust property or certain powers. Such powers include, but are not limited to, the power to revoke the trusts in whole or in part, the power to vary or amend the terms of a trust instrument or any of the trusts, purposes or powers arising thereunder and the power to appoint, add, remove or replace any trustee, protector, enforcer or any other office holder or adviser. Bermuda law expressly provides that a settlor's reservation or granting of powers does not invalidate the trust, prevent the trust taking effect in accordance with its terms or cause any or all of the trust property to be part of the estate of the settlor.

13.4 Insurance Trusts

Bermuda played a leading role in the development of insurance trusts by having major insurance companies sell 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 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.

13.5 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 largely directed at distancing the settlor from control and benefit of the assets placed in the trust were taken, 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. In addition, the trust is an appealing estate planning vehicle for individuals in civil law jurisdictions where the trust concept is relatively unknown.

13.6 **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 a legal context, 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 are a fashionable product in the offshore world. Bermuda is not an "aggressive" asset protection jurisdiction; however, it has taken a conservative position about following other jurisdictions, which have legislated in this area. Any validly created trust has inherently protective qualities. Bermuda has its own version of asset protection legislation, in order to bring certainty to the law pertaining to the rights of creditors with respect to property that is transferred into trust.

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 established 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 adopted the concept of the "eligible creditor" who is entitled within two years of the disposition to challenge a transfer (to a trust) of an asset below market value with the main intention of defrauding creditors.

13.7 **Employee Benefit and Pension Trusts**

It is 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.

13.8 **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, particularly 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 on a mine, or major repairs to a building.

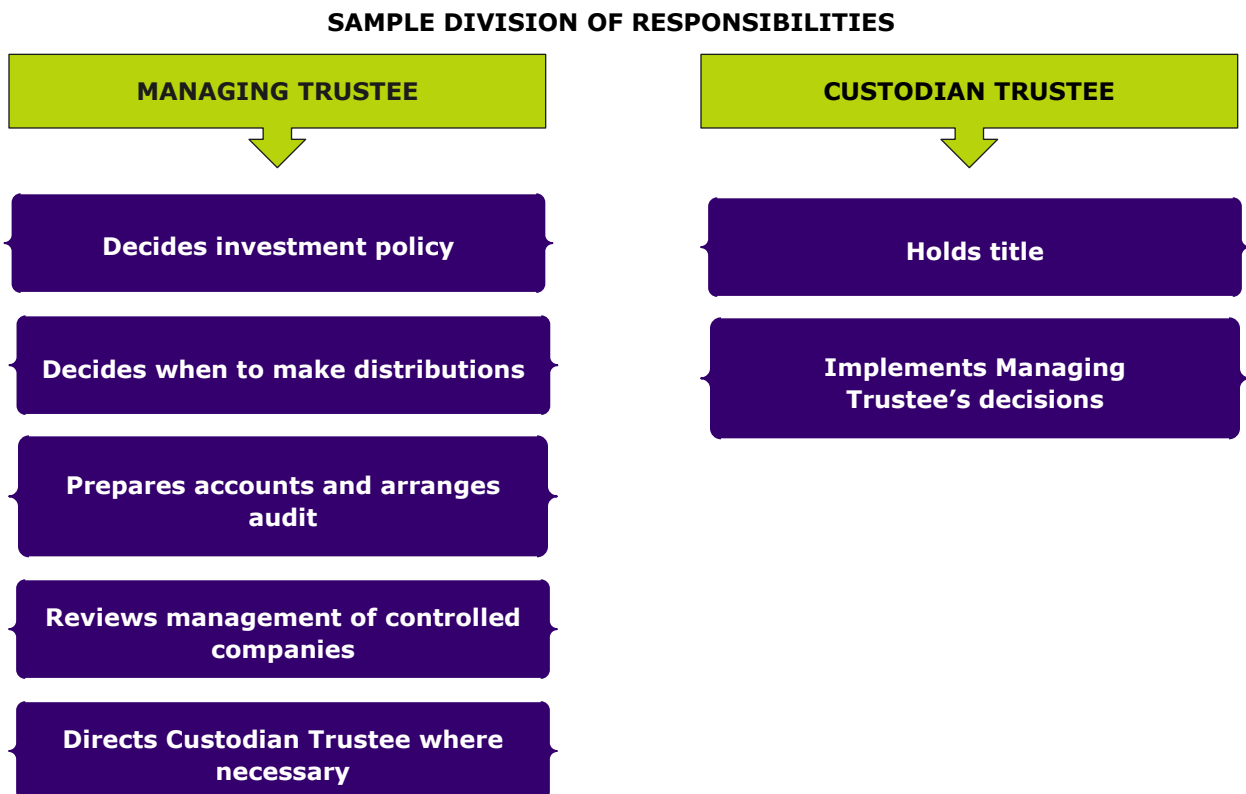
14. CAN THERE BE A MANAGING OR CUSTODIAN TRUSTEE?

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, the following functions, among others, must not be delegated: 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 number.

Under Bermuda law, the trust deed may allocate responsibilities amongst the trustees and may reserve certain powers to a managing trustee. This means that the other trustees will not be liable for any decisions, acts or transactions within the sphere of the powers reserved to the 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. This division of responsibilities is illustrated below:



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 been an international forerunner 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 proceed.

For more specific advice on trusts in Bermuda, we invite you to contact:

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).