



Trusts & Foundations

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Trusts



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Malta's Legal System

- Today, trusts play a significant role in all common law systems
- Civil law jurisdictions are following suit
- Malta has the advantage of a “mixed” legal system
- We have the Civil Code, which creates certainty in many areas of law with strong influences of the English common and statutory law in other areas
- This dual influence of law has made it easier to introduce trusts in our legal system

What is a Trust?



- A private legal agreement made between two parties i.e. the Settlor and the Trustee
- **Settlor** transfers the legal ownership of assets to the **Trustee**
- For the benefit of third parties called the **Beneficiaries**
- The Beneficiaries could include the Settlor himself
- Extremely flexible relationship - can be designed to do whatever the person settling the property with the Trustee wishes it to do....

Settlor

Transfer of trust property to ...

Trustee/s

Holds on trust for ...

Beneficiaries

Fiduciary Obligations

- When a Trust is formed, a fiduciary relationship is created giving rise to obligations owed by the Trustees to the Beneficiaries

- Fiduciary obligations impose on a person **duties** of:
 - Care
 - Honesty
 - Accountability and
 - Loyalty

in the handling of the property of another person

What is a Trustee?

- Trust Me??
- obtains **full ownership** of the trust property
- holds the trust property in his name and for the benefit of the beneficiaries
- is under a duty to keep the trust property **segregated** from his own assets and assets of other trusts



What is a Trustee? *cont.*

- Can sue and be sued since the Trust has no legal personality
- Is bound to administer the property with reasonable care and skill
- Must file tax returns for the Trust and pay the required taxes
- Must keep accounts and proper records



What is a Trustee? cont.

- Is subject to fiduciary duties of **honesty and good faith**, and is prohibited from making undisclosed and unauthorised profit
- **Cannot** exclude liability arising from:
 - Fraud
 - Wilful misconduct
 - Gross negligence
- May be held personally **liable** for breaches of duty



What is a Settlor?

- The person who **creates** a trust
- Who passes on the ownership of the assets which he settles on trust as trust property to the Trustee
- Must **relinquish** his title to the trust property as title passes on to the Trustee
- Appoints the Trustees

What is a Settlor? cont.

- Must specify the beneficiaries in the Trust Deed
- Must agree to all the clauses in the Trust Deed
- Has little or no place in the administration of the Trust
- Should not be involved in the decision making carried out by the Trustees
- **But**

Letter of Wishes

- Guide by the Settlor to the Trustee to deal with the trust assets
- **Not legally binding** on the Trustee, but generally followed
- Can be amended or replaced at any time by a new one

Protector

- Must be specifically catered for in the Trust Deed
- Usually a **trusted friend** or an advisor of the Settlor
- Appointed under the Trust Deed or in the Letter of Wishes
- Role - to **protect** the interests of the Settlor

Protector *cont.*

- Should ideally have no direct or indirect interest in the Trust
- Typically provided for in the Trust Deed the requirement for the Protector to **pre-approve** certain transactions of the Trustee
- By default the Protector has the following powers:
 - Appointing a new or additional trustee
 - Remove a trustee
 - Require a trustee to obtain his consent before exercising certain powers or discretions

Beneficiaries

- Except in a Charitable trust, a Trust shall fail if it has no beneficiaries
- A Trust requires beneficiaries who must be:
 - Identifiable or
 - Ascertainable
- Identification of beneficiaries must be in writing by the Settlor – in the Letter of Wishes or Trust Deed

Beneficiaries cont.

- A beneficiary has an entitlement, called a **beneficial interest**, in the trust property, to enjoy the benefits arising from the trust property
- Benefit could also be subject to discretion of the Trustee
- Beneficiaries are entitled to information about the Trust
- This provides a control mechanism over the actions of the Trustee



Beneficiaries *cont.*

- A beneficiary can require the trustee to manage the trust property correctly
- In terms of Maltese law, beneficiaries can **terminate** the trust when:
 - they are all in existence, and
 - have been ascertained, and
 - are not interdicted or minors
- The trust deed may provide for the addition or exclusion of a beneficiary or the imposition of an obligation as a condition to benefit from the Trust

The Trust Deed

- The first step in establishing a Trust
- Drawn up specifically to meet the Settlor's wishes
- **Not registered**

The Trust Deed *cont.*

- **Should contain at least the following five elements:**
 - a brief description of the Settlor
 - a definition of the Trustee
 - a description of the Trustee's powers and restrictions thereon
 - a description of the assets of the Trust Fund & how to be added and managed, and
 - a definition of the beneficiaries

Trust Fund

- The Trust Fund consists of the assets of the Trust – on settlement and as a result of its administration
- May contain **any property** ranging from cash, personal effects, real estate, securities and other tangible and intangible assets
- Trust Deed may permit **addition** of assets to the Trust Fund
- Common to establish a trust with a nominal amount with more substantial assets added at later stages

Forms of Trusts

- Most **common types** - Discretionary Trusts and Fixed Income Trusts
- The **Discretionary Trust** provides maximum flexibility - gives Trustees wide discretionary powers as to how much and to which beneficiaries income and capital of the Trust may be distributed
- The **Fixed Interest Trust** - Trustees have no power of discretion in the distribution of the trust property to the beneficiaries as the entitlement of the beneficiaries is fixed by the Settlor

Charitable Purpose Trust

- Purpose trust - set up for a **specified purpose** and not for the benefit of beneficiaries
- Maltese law defines a “charitable purpose” as any **charitable and philanthropic** purpose which includes in particular the advancement in:

Charitable Purpose Trust *cont.*

- education, including physical education and sports
- Religion
- Health
- social and community advancement
- culture, arts and national heritage
- environmental protection and improvement
- promotion of human rights, conflict resolution and reconciliation

Would a Trust work for me....?

An effective means of estate planning

- Can help you preserve and build your estate during your life and pass it on as you desire when you die
- Effective estate planning supports your **financial and retirement planning**

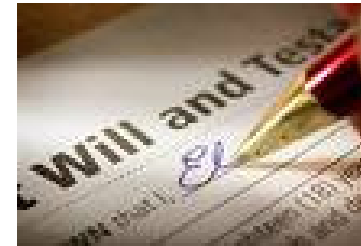


Would a Trust work for me....? cont.

- Estate planning gives you **peace of mind**
- By taking the time and effort necessary to plan your estate, you will be able to:
 - provide for your immediate family;
 - plan for your own incapacity (both mental and physical) and care in old age;
 - minimise expenses for transferring property to your beneficiaries upon death;
 - provide for people who need help and guidance

Typical Uses of Trust

Trust relationships are formed for many reasons and purposes.



A. Life Interest Trust

- The Settlor institutes as a beneficiary one person for his whole life and orders that the remainder of the trust assets shall pass, on the death of the beneficiary, to another beneficiary
- This ensures an income to for example the Settlor, until death with the **capital safeguarded** for the children



B. Protection of Family Wealth

- Business people may use family trusts to **protect** their **personal assets**
- Personal assets must be segregated from the business assets at the outset
- May be a better alternative to incorporating a limited liability holding company – more flexible, more confidential, less bureaucratic and cost efficient

C. Spendthrift Trust

- Used to protect beneficiaries against their own inability to handle money responsibly
- **Minimising risks** of an irresponsible child recklessly spending a lump sum received upon inheritance
- The Trustee would have exclusive authority to manage the funds
- Money normally distributed at a regular rate but no large lump sums
- The Beneficiary's creditors cannot attack the trust assets

D. Surviving Spouse

- A Trust can be set up with the surviving spouse as the beneficiary
- Trustee must ensure that the Trust would pay for **his/her needs**, residential care, etc....

provided that

- the trust property does not exceed that property which is allowed to be bequeathed or donated to such surviving spouse in terms of the Civil Code

E. Co-ownership

- Ownership of property by more than one person is **facilitated** by a trust
- On separation the spouses may wish to keep a part of their assets undivided, **e.g.** A plot of land, which does not yet enjoy development permits, but whose value would increase dramatically once permit is issued
- Trust **preserves** the value accretion potential of the property, without the spouses having to interact together
- Same applies in case of multiple heirs inheriting one property

F. Special Needs Trust

- Ensures that beneficiaries who are disabled or mentally ill can enjoy the use of property which is intended to be held for their benefit
- Parents' peace of mind that:
 - the responsibility for the well-being of their disabled children is not left solely in the hands of the other siblings, if any
 - an impartial and reliable trustee is providing for the beneficiaries' **ultimate protection**

G. Asset Protection Trust

- Settlor divests himself of the assets he owns with the intention that **future** creditors will not be able to attack that money
- Settlor may benefit – as beneficiary - from the trust assets, without owning them, and therefore without them being available to his creditors
- The Trust will usually preserve anonymity
- May be interesting to many professionals in case of personal liability claims
- No fraud must be involved and the Settlor acts in **good faith**

H. Unborn Child Trust

- Set up for the benefit of any children that might be born in the future
- This could be useful for grandparents who might want their money to benefit also the offspring of their, as yet unmarried, children
- In wills one can make dispositions to persons as yet unborn at the time of making the will BUT
- They have to be conceived at the time of death of the testator, or be unborn children of a determinate person who is alive when the testator dies (art.600(2) Civil Code)

I. Accumulation and Maintenance Trust

- Parents and Grandparents may wish to set aside money for a specific purpose e.g. their children's or grandchildren's education
- The **Maintenance Trust** – e.g. the Trustee distributes the income at periodical intervals for the specific maintenance, education or advancement of the minor
- The **Accumulation Trust** – e.g. the Trustee accumulates the income for a number of years with the beneficiaries receiving income after attaining majority

J. Testamentary Trust

- Is created in a will and comes into existence upon the **death** of the testator
- To be distinguished from inter vivos trusts which are created during the settlor's lifetime
- Appoints a Trustee to use the trust assets for the benefit of a beneficiary as specified in the will
- Throughout the settlor's lifetime, one can revoke or amend such testamentary trust, but on his death, it becomes irrevocable

Commercial Uses of Trusts

- **Substantial growth** in the use of trust structures in international commercial transactions
- **Flexibility**
- Operated on a **confidential basis**
- **Less formalities** for setting up the trust

Asset Holding (and Protection) Trust

- Where a business requires a **vehicle** to hold assets, a trust may be preferred to a company because the latter is subject to a number of statutory rules
- A Trust would be set up for the sole purpose of holding shares in a private company
- The company will then hold a particular asset
- Alternatively, the Trust can own the asset directly and not through the underlying company

Pension Trusts – for Pension Funds & Employment Benefit Schemes

- Pension fund is set up by the employer as a Trust
- **Contributions** are made by the employer alone or together with the employees
- Class of Beneficiaries – employees and possibly also the employer
- Pension fund kept entirely separate from assets of employer to safeguard employees against employer's creditors
- Trustee must administer the scheme properly and endeavour to make sure that benefits can be paid when due and in full

Why Trust

FLEXIBILITY

CONFIDENTIALITY

Why Malta

**WELL REGULATED
TRANSPARENT ENVIRONMENT
PROFESSIONAL PEOPLE**



Thank You