

# **JERSEY LAW**

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## **AN INTRODUCTION TO JERSEY LAW TRUSTS**

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## What is a trust?

A trust is a legal arrangement which is achieved in most cases when one person (the "**settlor**") transfers legal ownership of his assets to one or more other persons (the "**trustee(s)**") who are required to hold those assets (the "**trust fund**") for the benefit of other persons (the "**beneficiaries**"). As a result, the legal ownership of the assets (which is with the trustee) is separated from the beneficial ownership of the assets (which is with the beneficiaries). There are many other scenarios which may give rise to a trust but these are less common in the context of commercial trust business.

Although no particular formalities are required to create a Jersey trust (with the exception of a unit trust), there is usually a written document (the "**trust instrument**") which sets out the respective rights, duties and powers of the trustee, the beneficiaries and (if any) the settlor and protector. A trust instrument may be signed by both the settlor and the trustee (known as a "**settlement**") or may be signed by the trustee only (known as a "**declaration of trust**").

Trusts may be created during the lifetime of the settlor by him transferring assets to the trustee ("**inter vivos trusts**") or created on the death of the settlor by him making the appropriate provision in his will ("**will trusts**").

## Jersey trusts

Jersey trusts, being trusts whose proper law is that of Jersey, are administered in accordance with the laws of Jersey. This means that the duties and powers of trustee and the rights of settlors (if any) and beneficiaries will therefore be determined in accordance with Jersey law.

The Trusts (Jersey) Law 1984 (the "**Law**") sets out much of Jersey's trust law. It is regularly updated and enhanced and was amended in 1989, 1991, 1996 and 2006.

Certain articles of the Law apply to trusts which are administered in Jersey even though the proper law of the trust may be the law of another jurisdiction.

The Law is, however, not exhaustive and the Jersey courts often look to the decisions of the English courts and the courts of other Commonwealth jurisdictions, which are considered to be of persuasive authority.

## The basic features of a Jersey trust

### The settlor

The settlor is the person who provides the trust fund and may or may not be a beneficiary of the trust. Although the settlor transfers legal ownership of his/her assets to the trustee he/she may, if he/she wishes, also retain a degree of control over the trust fund. For example, the trust instrument may state that the trustee must seek the consent of the settlor before the trustee can make a distribution of trust assets to a beneficiary. However, it is essential that the settlor does not retain total control or the trust may be considered to be a sham. The Law provides extensive provisions in relation to the reservation of powers by a settlor and therefore the settlor of a trust governed by Jersey law is able to retain significant control over the trust without risk of it being considered to be a sham.

### The trustee

The trustee is responsible for the administration of the trust and must administer it in accordance with the provisions of the trust instrument and Jersey law. A trustee's fundamental duty is to act in the best interests of the beneficiaries and the Law states that a trustee must act with due diligence as would a prudent person, to the best of its/his/her ability and skill and with the utmost good faith. The trustee is also required to preserve and enhance the value of the trust fund as far as is reasonable and must keep accurate accounts and records of its/his/her trusteeship. A trustee may be one or more individuals or companies.

## **The beneficiaries**

The rights of the beneficiaries are set out in the trust instrument. The Law also gives beneficiaries rights, for example, a right subject to the provisions of the trust instrument to see a limited class of trust documents and a right to apply to the Jersey courts to decide questions about the administration of the trust. The beneficiaries have the power to enforce the trust and the trustee must account to the beneficiaries for his administration of the trust.

## **The trust fund**

The trust fund can be comprised of any assets (although special consideration needs to be given to immovable property situated in Jersey) and additional assets may be added to the trust fund at any time after the trust has been established. The trust instrument may also give the trustee the power to accumulate income accruing on the trust fund and add it to the capital of the trust fund.

## **The protector**

A trust may or may not have a protector. This is often the settlor's trusted advisor who is given, by virtue of the trust instrument, a degree of influence or control over the exercise by the trustee of his powers by obliging the trustee to seek the protector's consent to the exercise of certain dispositive or administrative powers. For example, a protector's prior written consent may be required before the trustee can exercise certain dispositive powers such as making a distribution of trust assets to a beneficiary. It is also possible that certain powers may be vested in the protector rather than the trustee, for example, the power to appoint or remove the trustees.

## **Other features of a Jersey trust**

### **The trust fund is separate from the trustee's personal assets**

Although a trust does not have a separate legal identity, Jersey law provides that the trust fund is separate to, and does not form part of, the trustee's personal assets. In the event of a trustee becoming personally bankrupt, his creditors will not have any right to the trust fund to satisfy the trustee's personal debts and it is therefore protected from their claims.

### **A trustee is personally liable for loss to the trust fund caused by his breach of trust**

A trustee who commits a breach of trust (ie a breach of any of the duties imposed on him by the trust instrument and Jersey law) may be liable for the loss in value of the trust fund or the loss of profit caused by his breach. The terms of a trust may, to some extent, relieve a trustee of liability for breach of trust but under Jersey law a trustee cannot be relieved of liability if the breach of trust was caused by his fraud, wilful default or gross negligence.

### **A beneficiary may apply to the Jersey courts to ensure that a trustee complies with the terms of the trust**

Beneficiaries and others can apply to the Royal Court to direct the trustee to act in accordance with the trust instrument and the Law.

### **Professional trustees based in Jersey are licensed and regulated**

Although there is no requirement that a trustee of a Jersey trust must be resident in Jersey and indeed a Jersey based trustee may be the trustee of trusts other than Jersey trusts, anyone based in Jersey who conducts trust company business must be licensed and regulated by the Jersey Financial Services Commission.

## Some types of Jersey trust

### Fixed interest

Under a fixed interest trust each beneficiary has a fixed entitlement to the income and/or capital of the trust fund, which is clearly set out in the trust instrument. For example, a beneficiary may be entitled to a fixed amount of the trust fund or may be entitled to benefit for a fixed period of time. The trustee administers the trust but has no discretion to decide who will benefit and in what way.

### Discretionary

In contrast to a fixed interest trust, the trustee of a discretionary trust is usually given very wide discretionary powers to decide which of the beneficiaries will benefit, how they will benefit and how much they will receive. Discretionary trusts provide a great deal of flexibility and enable the trustee to take into account the changing circumstances of the beneficiaries.

A settlor will often provide the trustee with what is known as a "letter of wishes", which although not legally binding, provides the trustee with guidance as to how the settlor would like the trust fund to be administered and how the trustee should exercise its/his/her powers. Settlers who are concerned about the extensive discretionary powers given to a trustee of a discretionary trust may appoint a protector to consent to the exercise of such powers.

### Accumulation and maintenance

These trusts are usually used to provide for the settlor's children and grandchildren. During a certain period of the trust (for example, until the beneficiaries reach a certain age or a certain event takes place) none of the beneficiaries have a fixed entitlement and instead the trustee is required to accumulate any income accruing from the trust fund (which is added to the capital of the trust fund). However, during that time the trustee can use the income for the maintenance, education or other benefit of the beneficiaries should they need it. For example, the trustee may use it to pay a beneficiary's school or tuition fees. Such trusts have become less common in recent years as the tax advantages which they provided in certain jurisdictions have been removed.

### Charitable trusts

These are trusts which are established for charitable purposes to benefit society generally or part of it. Some charitable trusts are governed by the Law but others are governed by the Loi (1862) sur les teneures en fidéicomis et l'incorporation d'associations.

### Non-charitable purpose trusts

These are trusts where the assets are held by the trustee in order for the trustee to carry out specific purposes which are set out in the trust instrument which do not qualify as charitable. A purpose trust must have an enforcer. The role of the enforcer is to enforce the terms of the trust in the absence of any beneficiaries. Such trusts are usually used in financial structures.

This memorandum is intended as a general introduction to trusts in Jersey. It is not intended to be comprehensive in its scope and we recommend that clients seek legal advice on any particular matters.

Memoranda on other aspects of trust and foundations law have been prepared by Fiduciary Legal and are available on request or on our website at [www.fiduciarylegal.com](http://www.fiduciarylegal.com)

