

GUIDE TO OFFSHORE TRUSTS

The use of offshore trusts has increased dramatically in recent years with the growing internationalization of the affairs of both individuals and businesses. Professional advisers today regard offshore trusts as providing a practical solution to many issues involving estate and tax planning, political and creditor protection, and the structuring of international and trading company activities.

Growth in the use of offshore trusts has been matched by a corresponding expansion of jurisdictions throughout the world – commonly known as "tax havens" – which provide suitable tax and other incentives to attract such trusts and those providing offshore trustee services.

Tax havens understandably have a strong appeal because of the advantages they offer for legitimate deferment of taxation on certain profits earned overseas and as a center for administration of patent and trademark agreements internationally.

Additional key benefits of tax havens having leading edge offshore trust laws include:

- ★ privacy accorded to financial dealings and holdings;
- ★ availability of flexible provisions for inheritances;
- ★ ability to shift investments without being taxed;
- ★ in some instances, higher rates of return on investments made in an international investment environment;
- ★ adaptability to needs of individuals and investment syndicates; and
- ★ absence of or minimum government controls.

Robertson & Williams has been active for several years in advising its clients and their financial advisors on offshore trusts and providing them with information and legal services to determine which offshore jurisdiction is appropriate for use by the client, structuring an appropriate plan and establishing the trust and any related entities or required instruments to effect the plan. We have also worked closely with the government of Nevis in structuring its trust laws to meet the objectives of key clients in their planning needs.

While every effort has been made to make this paper accurate, readers should note that it contains only general statements and is not intended to cover all possible situations that might arise in an individual plan. Readers should also be aware that this a dynamic and changing area of the law in many jurisdictions and they should not attempt to proceed with any such planning without seeking the advise of a qualified advisor, familiar with the laws of the jurisdiction in question.

Family and Individual Trusts

Family and individual trusts have been in use under English common law since the mid 1700's to protect wealth, reputations, land from taxes and inheritance laws and to limit the rights of spendthrift beneficiaries, minors and widows.

A trust is an equitable obligation binding a trustee to deal with property over which it has control for the benefit of designated persons (beneficiaries). The powers and duties of the trustee and each beneficiary's rights with regard to the trust property are clearly defined in what is called a trust deed, trust agreement or declaration of trust. Each trust contains three clearly defined areas: (1) whether it is revocable or irrevocable; (2) the powers and duties of the trustee; and (3) how and when the trust funds and any accumulated income is to be distributed to the various beneficiaries.

Under many jurisdictions, a trust may be established by either a grantor ("settlor") or may be settled by the trustee through a declaration of trust. Some jurisdictions also provide for an appointment of a "protector" to assist the trustee in the exercise of its discretion or to perform other functions in relation to the administration of the trust. Discretionary trusts (where only the names and addresses of the beneficiaries are listed and all matters concerning payment is in the discretion of the trustee) the settlor may express his or her wishes to the trustee under a "memorandum of wishes." Such a memorandum has no legal validity or effect and may be disregarded by the trustee (although it seldom will be) but it may be amended or canceled by the maker at any time.

The protection initially afforded domestic trusts in both the United States and Great Britain has been gradually eroded away through statutes and judicial interpretation to permit more and more incursions into the trust to satisfy third parties such as excluded heirs or creditors of the grantor or beneficiaries. Through such doctrines as enjoyment of benefits, retention of control or creditor fraud or intent -- many family or individual trusts in the United States can no longer serve to protect assets. These doctrines have been applied to not only family and individual trusts but in some circumstances to pension plans and other retirement benefits.

Trusts Used for Asset Protection

Jurisdictions such as the Cayman Islands, the Cook Islands, Belize and the Island of Nevis in the British West Indies, have enacted legislation which permits the establishment of trusts which may protect assets from creditors in foreign jurisdictions (the United States and elsewhere). These jurisdictions offer commercially oriented legislation designed to protect trusts in the event of grantor or beneficiary bankruptcy, alleged fraudulent conveyancing and matters relating to the establishment of the trust.

Such laws and their construction in the jurisdiction's courts have particular relevance to individuals who may have exposure to long term contingent liabilities such as developers, manufacturers, medical and dental practitioners and other professionals. This protection is particularly relevant in light of the dramatic increases in vexatious lawsuits, the size of damage awards and the cost of liability insurance.

Many of the provisions of the trust laws under these jurisdictions are precisely what a proper plan requires for asset protection. The confidentiality of the trust being established by declaration can preserve the anonymity of the trust beneficiaries. A settlor can be his or her own beneficiary (not permitted in virtually all states in the United States) and in some instances, his own trustee and beneficiary. The complete relinquishment of control of the trust assets by the settlor can be tempered with a trusted friend or advisor (or even the settlor or beneficiary) being named a protector in the trust instrument with total veto power and/or by a memorandum of wishes being provided to the trustee.

The confidentiality of the banking regulations in these jurisdictions also adds a level of protection and confidentiality. Income earned on the trust is not taxed in the jurisdiction where the trust is established (hence a "tax haven") and may not be taxed in the United States until the funds are repatriated by distribution to beneficiaries who are United States citizens.

Attacking the validity of the trust or attempting to levy on its assets by creditors of the settlor or a beneficiary are very restricted and subject to complete adjudication in the trust jurisdiction and

under its laws. Hence, in instances such as Belize, Nevis and the Cook Islands (and to some degree the Cayman Islands) where legislation has been passed specifically to block such actions by creditors absent a clear showing of actual fraud, it is virtually impossible for creditors to pierce the trust and get the assets. The judicial system in Belize, Nevis, the Cook Islands and Cayman are all based on the British system where the losing party pays all the costs and attorney fees of the prevailing party. Coupled with a substantial bonding requirement for plaintiff's to cover such potential costs, these jurisdictions are in the forefront of protecting trusts from "contingent fee" lawsuits.

While the Cook Islands, Belize, Nevis and the Cayman Islands have many of the same asset protection provisions in their trust laws, Belize, the Cook Islands and Nevis have little judicial precedent supporting its legislation to date since most of their trust laws were recently enacted. The Cook Islands are in a remote region of the South Pacific and difficult to get to. Many United States individuals prefer use of either the Cayman Islands due to its stability, judicial precedent and closer proximity to the United States or Nevis or Belize due to their extremely favorable laws and also their close proximity to the United States.

Cayman Islands, Nevis, B.W.I. and Belize

Robertson & Williams has had experience in establishing trusts in Belize, Nevis and the Cayman Islands – two with new aggressive trust legislation and one with a longer established law. All are considered politically and economically as some of the most stable tax havens in the world.

Realizing the great need for a convenient vehicle for the accumulation and redistribution of income with a minimum loss through taxation, the both the government of the Cayman Islands (in 1966) and the government of Nevis (in 1994) enacted banking and trust legislation that makes it especially attractive for Americans to have offshore trusts in the Caribbean. Coupled with their favorable trust laws, each jurisdiction has a series of sound business practices which facilitate the creation, security, implementation and maintenance of trusts and corporations.

The Cayman Islands are located in the western Caribbean approximately 470 miles south of Miami and 180 miles northwest of Jamaica. The islands occupy an area of approximately 100 square miles. The capital is George Town, on the largest island, Grand Cayman. Regular airline services to and from Grand Cayman are available from Atlanta, Houston, Miami and New York. There are excellent postal services as well as excellent telecommunications services with international direct dialing.

The islands were formerly administered by Jamaica, and when Jamaica became independent from the UK in 1959, the Cayman Islands subsequently elected to become a British Crown Colony. The Governor is appointed by the Crown and the 1972 Constitution provides for a legislative assembly of 12 elected members. There is a 7-man executive council (cabinet), four of whom are appointed from and by the elected assembly, the other three by the Governor. The islands are cosmopolitan, with a high level of racial harmony, and politically stable.

Cayman Islands' stability has led to it being a leading offshore banking, insurance and financial center for North American, European and Asian companies and individuals for many years. George Town boasts the presence of over 500 international banks and trust companies. All of the "big five" accountancy firms have a presence in the islands. The language spoken is English.

The island of Nevis is located in the Leeward Islands in the eastern Caribbean, approximately 1,500 miles southeast of Miami. The island is approximately 36 square miles and inhabited by 9,500 full time residents. International flights from New York, Miami, Toronto and San Juan arrive daily at St. Kitts, 20 minutes by boat or 5 minutes by commuter air across the Narrows from Nevis. Nevis has a strong banking system with a number of international banks with branch offices on the Island. Nevis has the highest literacy rates in the western hemisphere and a stable work force. English is the official and commercial language.

Nevis was a British colony until 1983 when it and its sister island of St. Kitts (St. Christopher) formed the Federation of St. Kitts and Nevis. Nevis has a democratic form of government based upon the British Parliamentary system with a local elected assembly. Nevis is a member of the British Commonwealth and the United Nations.

Belize (formerly British Honduras until the name was changed in 1973) is a former British colony. In 1990, Belize passed an International Business Companies Act and has since added and amended legislation to maintain a modern, safe and clean financial services industry. This sector has matured over the years and today has some of the most modern instruments for asset protection, investment banking, Trusts, insurance and mutual funds. A professional Central Bank staff, a Financial Services Commission and a pro-active Government combine efforts for efficiency, service and the necessary secrecy and diligence. There is air service from most major cities in the United States.

The laws of all three jurisdictions are common law (similar to English common law) as supplemented by statutory enactments and judicial precedent. Nevis has adopted the Nevis Business Corporation Ordinance which is based upon the Delaware Corporate Act.

The person who creates a trust in any of these jurisdictions is not required to be physically present in the jurisdiction. The deed or declaration covering a trust may be signed any place in the world and need not be recorded in the jurisdiction, but an exempt trust must be registered with the Registrar (in Nevis and Belize, only the name or number of the trust is registered). The Registrar in all these jurisdictions is forbidden by law to disclose a trust's existence. Assets stated in the trust instrument need only be nominal. Other funds or assets may be transferred to the trust at any time and there are no statutory restrictions on the accumulation of income.

Costs to Establish a Trust

The costs to establish a trust are surprisingly reasonable considering the advantages offered to qualified individuals. The costs can be broken down into three areas: (1) trustee's acceptance and administration; (2) legal; and (3) government fees and duties.

Trustee's Acceptance and Administration Fees. The amounts charged by a corporate trustee (a bank or a trust company) are negotiable, depending on the trustee selected. Typically a trustee will charge an acceptance fee ranging from \$1,500 to \$4,000 which is charged to the trust when it is established. Annual administration fees are charged based upon a sliding scale percentage of the gross assets managed (typically $\frac{3}{4}\%$ down to $\frac{1}{4}\%$) with minimum fees ranging from \$2,500 to \$4,000 annually. Trust companies and banks will also charge a termination or withdrawal fee which is based on the time it takes to terminate the trust (typically around \$1,500).

Legal Fees and Expenses. The legal fees charged by Robertson & Williams for preparing or working with the trust company to prepare the trust instrument, working with the trustee and the appropriate transfer and related documentation is between \$3,000 and \$5,000, depending upon who prepares the trust instrument and what additional time is required for significant changes or hire local counsel to address unusual matters that might arise. Our expenses are billed on an actual cost basis and will normally run about \$250. Our annual agent's fee is \$300, plus our standard hourly rate for additional work that might be required.

Government Fees and Duties. Trust deed stamp duty taxes, notarial fees and other government fees will typically run \$100 to \$300 when the trust is established in the Cayman Islands and are usually included in the trustee's acceptance fee in Nevis and Belize. There are no additional fees or taxes on the trust or the income it earns in either jurisdiction.

Summary

An offshore trust can be a valuable tool for higher income individuals, professionals, directors of high risk corporations, entrepreneurs, and other individuals and businesses needing both estate and asset protection planning. A substantial portion of an individual's net worth and pension funds can be protected from vexatious litigation and passed to the next generation with significant savings.

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