

Jersey and Guernsey foundations: what they are and how they are used

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A foundation is a body corporate, traditionally viewed as being somewhere between a trust and a company. The Foundations (Jersey) Law 2009 (the **Jersey Law**) and the Foundations (Guernsey) Law, 2012 (the **Guernsey Law**) permit foundations to be created under the laws of Jersey and Guernsey respectively.

A foundation can be created for beneficiaries or purposes or both. Where created for purposes, the purposes can be charitable, non-charitable or a mixture of both. A foundation might be created, for example, for benefiting a particular person or class of persons, for carrying out a specific purpose or holding a particular asset.

Foundations can be used as an alternative to a trust in many situations and can also be used in combination with trusts. The uses of foundations are discussed in more detail below.

A foundation has separate legal personality. This means that the foundation itself exists in the same way that a person or company exists. Therefore a foundation can hold assets and take Court proceedings in its own name in the same way that a company may. This will have obvious benefits for any third parties wishing to contract with a foundation since that third party will easily be able to ascertain the existence and status of the foundation and be comfortable that it has full power to deal with its own assets. In this respect a foundation differs from a trust where it is the trustees of the trust who own assets and enter into contracts.

A foundation's powers will be exercised by its council, which is similar to a company's board of directors.

| How do Jersey and Guernsey foundations compare?

There are some key differences between Jersey and Guernsey foundations, and a comparison table is provided in the Appendix.

Both Jersey and Guernsey foundations are run by a 'council'. Under the Jersey Law there must be at least one council member although often there will be more. The Guernsey Law specifies that there must be two council members unless otherwise stated in the foundation's constitutional documents. The founder of the foundation (the person who usually provides the assets) may remain actively involved in the management of the foundation by becoming a member of the council.

The founder could also ensure that trusted family advisers, family members or friends are also council members and therefore have control. Council members do not have a fiduciary duty to people who may benefit from the foundation, but they do have duties towards the foundation itself, similar to those directors have towards companies.

However, the Jersey Law does require that at least one council member is registered under the Financial Services (Jersey) Law 1998 to carry on financial services business of this type. This person is referred to as the 'Qualified Member'. The Guernsey Law does not require this, but if no foundation official (councillor or guardian) is a regulated entity under Guernsey Law, a resident agent must be appointed who must be regulated.

Unlike a company, there are no shareholders to hold the council to account – in effect a foundation is ownerless. Instead in Jersey this role will be carried out by the holder of another post known as the 'guardian'. The main job of the guardian is to ensure that the council carries out its functions in order to achieve the objects/purposes of the foundation. Generally, the Jersey Law prohibits a person from being both a council member and guardian, but it expressly permits the founder to be the guardian, even if he is also a council member, and the Qualified Member is also permitted to be guardian.

Under the Jersey Law, unless the foundation's constitutional documents provide otherwise, beneficiaries do not have a direct role in enforcing the terms of the foundation and they do not have rights to information. However, a beneficiary may make an application to court for the terms of the foundation to be enforced. Additionally many founders include provision in the constitutional documents for beneficiaries to have the right to information.

By contrast, the Guernsey Law permits a foundation to be created with 'enfranchised beneficiaries', 'disenfranchised beneficiaries' or both or neither (for example, if it is created for purposes only). An enfranchised beneficiary is entitled to certain information in respect of the foundation, but a disenfranchised beneficiary is not entitled to any information about the foundation, unless the foundation's constitution requires otherwise.

Under the Guernsey Law, where there are no enfranchised beneficiaries, a guardian must be appointed to hold the council to account. Under that law, a person cannot be both a council member and a guardian.

Further, the Guernsey Law states that a guardian owes a fiduciary duty to the beneficiaries and

founder of the Foundation by including the duty of care and duty to act en bon père de famille (like a good father to a family) analogous to Guernsey's trust legislation.

The requirement for a guardian distinguishes Jersey and Guernsey foundations from foundations in many other jurisdictions and is a mechanism to ensure the proper administration of foundations and protection for those who are to benefit from the foundation.

A foundation must have both a charter, as well as regulations (in Jersey) or rules (in Guernsey). In Jersey, the charter is a public document and must state a number of matters including the name of the foundation, the objects/purposes (although there is no need to identify any people who will benefit) and the initial endowment (if any). The majority of details, however, will be included in the regulations. Whilst the full set of regulations will remain private, abridged regulations must also be filed, following the introduction of the Financial Services (Disclosure and Provision of Information) (Jersey) Law 2020 in January 2021. These abridged regulations will be available to the public along with details of significant persons (council members), such as the name, date of birth (limited to the month and year), address for correspondence and nationality of the significant person. It should be noted that the address for correspondence may be different to the person's residential address. Details of the founder and guardian can remain private by deliberate exclusion from the abridged regulations and a nominated person can apply to the Jersey Financial Services Commission for information to be kept private on a number of grounds.

In Guernsey, the information contained on a public register is the name and registration number of the foundation, the name and address of the councillors and guardian, and details of the registered office. As with Jersey foundations, corporate entities can be used as councillors and guardian.

It is possible to restrict the information that is provided to people who may benefit from the foundation and therefore founders may prevent their children becoming aware of the existence of the foundation until they reach a certain age or even until the founder's death if the founder considers this to be appropriate. Under the Guernsey Law, as indicated above, disenfranchised beneficiaries can be entitled to no information at all regarding the foundation, and under the Jersey Law beneficiaries are not entitled to information unless the foundation's constitution specifies otherwise.

The Jersey and Guernsey Laws are drafted to ensure maximum flexibility and therefore may be a useful mechanism for holding assets if a trust is not considered appropriate or the founder wishes to maintain a level of control. Foundations may also be more familiar than trusts to prospective founders from civil law backgrounds. The tax implications of the use of a Foundation and the control of a founder will of course need to be considered for each individual case.

Uses of foundations

A flexible structure to hold assets to benefit family members

A foundation is often used as an alternative to a trust in structuring for succession planning and other purposes. As with a trust, beneficiaries can have a fixed entitlement (to, say, income from the assets, as they would in a life interest trust) or receive benefits at the discretion of the foundation (as they would in a discretionary trust).

Foundations may have a particular appeal to founders who wish to retain some control, as they or parties of their choice, can sit on the council of the foundation. Alternatively, the founder may have a supervisory role, overseeing the actions of the council. This could be achieved by requiring the council to obtain the guardian's consent before exercising a particular power. It is also possible to create a corporate guardian, with several family members on the board.

The fact that a foundation can be established where beneficiaries have no right to enforce and no rights to information may also appeal to some founders.

A foundation for charitable or philanthropic purposes

A Jersey or Guernsey foundation can be created for charitable purposes, and also for purposes which are philanthropic but do not meet the strict criteria to qualify as charitable.

Retaining and preserving certain assets

Foundations can be particularly useful where a structure is required to hold assets whose value is volatile or may diminish, or where a single asset is held, such as an aeroplane, artwork or a boat. Given a trustee's duty to diversify, act prudently, and in the best interests of the beneficiaries, trustees may be reluctant to hold such assets. There are a number of solutions which clients may consider in this situation, including establishing a Jersey or Guernsey foundation specifically to hold the asset to benefit certain beneficiaries or purposes. The council of the foundation will not be subject to the same duties as a trustee in a traditional trust – rather their duty will be to ensure the object of the foundation (namely the holding and preservation of the asset) is achieved.

Family businesses

Founders of family businesses often recognise the need to establish a long-term holding structure for that business, to help ensure the business is not fragmented on the passing of the founder. A traditional trust structure can be problematic in this context for the reasons set out above – namely the trustee's duty to diversify investments. A Jersey or Guernsey foundation is one potential solution such clients might consider – the foundation is established for the purpose of holding the company for the benefit of the family (and perhaps other beneficiaries or purposes). The council's duty will be to retain the company for the benefit of family (and other beneficiaries or purposes, if relevant).

Holding an asset to carry out a specific transaction

In commercial situations, it is not uncommon for a special purpose vehicle company to be established where its ownership needs to be separate from the rest of the structure. A foundation is an 'ownerless' incorporated vehicle which can be established for a specific business purpose, and is ideally suited to this type of planning.

In combination with trusts

Where individuals or families establish trusts, but wish to retain a high level of control, they often establish a private trust company (PTC) to be trustee. Family members can sit on the board of the PTC and therefore have direct involvement in trustee decisions.

Traditionally the shares of a PTC have been held by a professional trustee on the terms of a non-charitable purpose trust. An alternative holding vehicle is a Guernsey or Jersey foundation. This may be more appealing than a non-charitable purpose trust for some settlors, as the settlor or named family members can sit on the council, and therefore be involved directly in running the structure at this level.

An alternative may be for a foundation itself to act as trustee, rather than a PTC. This enables the founder, family members and advisers to be involved directly as trustee, as with a PTC structure, but without the additional layer being required to hold the PTC shares.

Foundations can also be used to own shares of any corporate protector or enforcer involved in a trust structure.

Overview of the differences between Jersey and Guernsey foundations

	Jersey	Guernsey
Law	Foundations (Jersey) Law 2009	The Foundations (Guernsey) Law 2012
Documents	Charter and Regulations	Charter and Rules
Established for	Beneficiaries and/or purposes	Beneficiaries and/or purposes
	Founder	

Roles	Founder Council Guardian	Council Guardian (if purposes or disenfranchised beneficiaries) Guernsey resident agent (in some cases – see below)
Need for local representation	Qualified Member must be on council	If neither a council member nor the guardian is a Guernsey licensed fiduciary then the foundation must have a Guernsey licensed fiduciary as resident agent
Can founder be council member or guardian or both?	Yes, founder can be council member and guardian	Founder can be either council member or guardian but not both
Can corporates be used?	Corporates may act as founder, council member and guardian.	Corporates may act as founder, councillor or guardian.
Is registration required?	Yes	Yes
Publicly	Charter (including name objects/purposes, initial endowment), abridged regulations and	Name and registration number of foundation, name and address of councillors and

available information	information on significant persons i.e. council members. No requirement to make names of beneficiaries public.	guardian, details of reg office. (Note corporates can be used) Charter must be filed but is not public.
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Beneficiaries' rights to information	No, unless the charter or regulations provide otherwise. NB a 'person of standing' such as a beneficiary may make an application to court for the terms of the foundation to be enforced.	It is possible to ensure beneficiaries do not have rights to information. 'Enfranchised' beneficiaries have a right to information but disenfranchised beneficiaries do not.
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Time limit (perpetuity period)?	None	None
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