

## Non-Charitable Purpose Trusts in Guernsey

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Traditionally, a valid trust requires at least one beneficiary capable of benefitting. The reason for this restriction lies in the enforceability of the trust - if there is no beneficiary to enforce the trust, who will ensure that the trustees are doing as they should?

However, while many elements of trusts law are as they always were, one of the attractions of trusts is that they are a flexible, evolving concept, developed to cater for changing times and capable of adapting to modern life.

This evolution has paved the way for purpose trusts, which under English law are permitted only in certain circumstances (for instance charitable trusts and trusts for certain kinds of limited purpose) but which under Guernsey law are permitted both in relation to charitable and non-charitable purposes pursuant to the Trusts (Guernsey) Law, 2007 (the Law).

### What is a "purpose"?

The definition of the term "purpose" under the Law is wide and allows non-charitable purpose trusts to encapsulate modern social and commercial realities. The Law specifically uses the phrase "for any purpose whatsoever" while clarifying that the holding of property and performing of functions are valid purposes, without limitation.

However, it should go without saying that the purpose/s cannot be immoral, illegal or contrary to public policy.

### Features of a non-charitable purpose trust

A comparison of non-charitable purpose trusts against a number of more traditional forms of trust may assist in demonstrating its unique features:

In writing

Unlike, for example, a discretionary trust, a non-charitable purpose trust can only be created by instrument in writing with certain provisions included. In light of the differences in certainty between a traditional trust and a non-charitable purpose trust, the fact that the latter must be in writing provides added certainty as to the purpose of the trust and how such purpose can be achieved.

## Enforcement

Trusts must generally have some person capable of enforcing the trust. For a discretionary trust this will be the beneficiaries. For a charitable trust this will be HM Procureur. However, as neither of these apply in respect of non-charitable purposes, the Law introduced the concept of an "enforcer", who has a fiduciary duty to enforce the trust in relation to its non-charitable purposes. The Law requires certain provisions to be included in the trust instrument regarding the enforcer (such as the power to appoint and remove an enforcer and provisions to ensure any successor enforcer is appointed). The settlor or a corporation may act as enforcer (but not a trustee).

## Information

Like beneficiaries, an enforcer may request and at all reasonable times must be provided with full and accurate information as to the state and amount of the trust property.

## Certainty of beneficiaries or purpose/s

One element which is often overlooked by practitioners is the need to have a very well drafted, conceptually clear and ascertainable purpose. In the same way that the beneficiaries of a traditional trust must be conceptually clear and certain, the purpose or purposes of a non-charitable purpose trust must also be. While this has not been considered judicially, practitioners and settlors alike should err on the side of caution.

Like beneficiaries, purposes can be added or excluded, subject to the terms of the trust instrument. This is useful as it can allow the trust to adapt as needs arise.

## Cy-près

Like charitable purpose trusts, in the event that the purpose/s can no longer be met for whatever reason, the property, or the remainder of the property, shall be held for such other non-charitable purpose/s as the Royal Court may order. The enforcer or the trustees, among others, may apply for such an order.

## **General Uses of a non-charitable purpose trust**

Not unlike other forms of trust, a non-charitable purpose trust can be used for, amongst other reasons, the preservation of wealth, addressing forced heirship rules, succession planning and asset

protection.

## Common uses

The particular circumstance in which the desire for a non-charitable purpose trust may arise will differ and we point out below just some of the situations in which we see non-charitable purpose trusts used:

### Asset holding vehicle

A common use of a non-charitable purpose trust will be to hold assets of a particular kind, such as to hold shares in a company given the Law is permissive as to what can be held in such a trust.

### Private Trust Companies

Non-charitable purpose trusts are often established to hold shares in private trust companies (PTCs). Using this structure ensures privacy, bespoke settlor or related party involvement and allows for rapid commercial decisions to be made. The annual costs can also be lower than if a professional trust company acted depending on the complexity of the structure. Ogier has seen a growing number of purpose trusts used for just this purpose.

### Commercial transactions

Non-charitable purpose trusts are popular for use in commercial transactions, including off balance sheet transactions, securitisation and security arrangements, financing and escrow agreements. In particular, non-charitable purpose trusts can be used to hold shares in an 'orphan' special purpose vehicle in finance transactions. The benefit is that once the transaction has gone through, the shares in the orphan can be quickly and easily transferred.

### Family businesses and succession planning

Using a non-charitable purpose trust to hold shares in the family business is often used for succession planning purposes. Upon the death of the older generation, the trust allows the shares to continue to be held for purposes relating to the family business, ensuring that shares are not split up amongst multiple beneficiaries and sold. This is useful in ensuring continuity in the business in years to come.

### Philanthropy

What one person considers charitable may not be what another person (or the law) considers charitable, particularly in cross-jurisdictional situations. Non-charitable purpose trusts can therefore be used to cater for whatever purpose the settlor considers appropriate - providing of course it is not contrary to public policy or the law generally.

## Mixed or hybrid trusts

While clients may wish to provide for a non-charitable purpose alone, it is possible under Guernsey law to create one trust for a "combination" of non-charitable purposes, charitable purposes and beneficiaries (or any two of the aforementioned). Whilst these are not specifically referred to in the Law, they are in practice often referred to as "mixed" or "hybrid" trusts. Such trusts can be drafted so as that the purposes and beneficial interests run concurrently or consecutively or both.

## Alternatives to the non-charitable purpose trust

Where a non-charitable purpose trust is not desirable or preferable for any reason, Guernsey law provides the option for a foundation to be created under The Foundations (Guernsey) Law, 2012 (as amended).

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