

2018-12-11

OBJECTS AND REASONS

This Bill would repeal the *International Trusts Act*, Cap. 245, make provision for the creation of certain miscellaneous trusts and for related matters.

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BARBADOS

A Bill entitled

An Act to provide for the creation and regulation of certain trusts and for related matters.

ENACTED by the Parliament of Barbados as follows:

Short title

1. This Act may be cited as the *Trusts (Miscellaneous Provisions) Act, 2018*.

PART I

INTERPRETATION

Definitions

2.(1) In this Act,

“beneficiary” includes

- (a) a bank licensed to carry on a financial service under the *Financial Institutions Act*, Cap. 324A; and
- (b) a charity within the meaning of section 2 of the *Charities Act*, Cap. 243.

“court” means the High Court;

“Director” means the Director of International Business;

“Minister” means the Minister responsible for International Business;

“trustee” means a person who holds a valid licence under the *Financial Institutions Act*, Cap. 324A, or the *Corporate and Trust Service Providers Act* (Act 2015-12).

(2) For the purposes of this Act, the following are residents of Barbados, namely:

- (a) an individual resident in Barbados for the purposes of the *Income Tax Act*, Cap. 73; and

- (b) any Company or Society whose central management and control are exercised in Barbados.

Trust described

3.(1) In this Act the expression "trust" means the legal relationship created when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

(2) A trust has the following characteristics

- (a) the assets of the trust constitute a separate fund and are not part of the trustee's own estate;
- (b) title to the assets of the trust is held in the name of the trustee or in the name of another person on behalf of the trustee;
- (c) the trustee has the power and the duty to manage, employ or dispose of the assets of the trust in accordance with the terms thereof and the special duties imposed upon him by law;
- (d) the trustee is accountable to the beneficiary for the management and administration of the assets of the trust.

PART II*Creation of Trusts***Creation of trusts**

4. A trust shall only be created by instrument in writing.

Presumption against avoidance of trust

5. A trust that does not contain a power of revocation is irrevocable by the settlor or his legal personal representative notwithstanding that the trust is voluntary.

Duration of trust and accumulation of income

6.(1) Subject to subsection (2), a trust terminates on the one hundredth anniversary after the date of its creation, if not sooner terminated in accordance with the terms of the trust instrument.

(2) Subsection (1) does not apply to a purpose trust or a trust established exclusively for charitable purposes, such a trust may continue in force without any limit as to time.

(3) The rule of law known as the "rule against perpetuities" does not apply to a trust.

(4) The terms of a trust may direct or authorise the accumulation of all or part of the income of the trust for a period not exceeding 100 years from the date of the creation of the trust.

Proper law of trust

7.(1) Subject to subsections (2) and (3), the proper law of a trust is the law of

- (a) the jurisdiction expressed by the terms of the trust as the proper law, or if not so expressed;
- (b) the jurisdiction intended by the settlor to be the proper law, or if not so expressed or intended; or
- (c) the jurisdiction with which the trust at the time it was created had the closest connection.

(2) Where the proper law of a trust is changed from the law of another jurisdiction to the law of Barbados, the change is valid and effective if it is recognised by the law of the other jurisdiction.

(3) Where the terms of a trust provide for the proper law of the trust to be changed from the law of Barbados to the law of another jurisdiction the change

is valid and effective only if the new proper law recognises the validity of the trust and the respective interests of the beneficiaries.

(4) In ascertaining the law with which a trust has its closest connection, reference shall be had in particular to

- (a) the place of residence or business of the trustee;
- (b) the place of administration of the trust designated by the settlor;
- (c) the situs of the assets of the trust; and
- (d) the purposes of the trust and the places where they are to be fulfilled.

(5) The terms of a trust may provide

- (a) for the severable aspects of the trust, particularly the administration of the trust, to be governed by a different law from the proper law of the trust; and
- (b) for the law governing a severable aspect of the trust to be changed from the law of Barbados to the law of another jurisdiction and *vice versa*.

(6) A change in the proper law of a trust shall not affect the legality or validity of or render any person liable for anything done before the change.

(7) Subject to subsection (5)(a), the proper law of the trust shall govern the validity of the trust, its construction, its effects and its administration.

(8) When the proper law of a trust or the law governing the severable aspects of a trust is changed from the law of Barbados to the law of another jurisdiction (herein called the "new law") no provision of the new law of Barbados operates to render the trust void, invalid or unlawful or to render void, invalid or unlawful any function conferred on the trustee under the new law.

(9) Where the proper law of a trust or the law governing the severable aspects of a trust is changed from the law of another jurisdiction (herein called the "old law") to the law of Barbados no provision of the old law operates to render the trust void, invalid or unlawful or to render void, invalid or unlawful any function conferred on the trustee under the law of Barbados.

PART III

Purpose Trusts

Interpretation

- 8.** In this Part, "purpose trust" means
- (a) a trust, other than a trust that is for the benefit of particular persons, whether or not immediately ascertainable; or
 - (b) a trust that is for the benefit of some aggregate of persons ascertained by reference to some personal relationship.

Creation of purpose trusts

- 9.** Notwithstanding any law to the contrary but subject to this section, a valid trust may be created for a non-charitable purpose, if
- (a) the purpose is specific, reasonable and capable of fulfillment;
 - (b) the purpose is not immoral, unlawful or contrary to public policy;
 - (c) the terms of the trust provide for the appointment of a protector to enforce the trust and for the appointment of a successor to such a protector; and
 - (d) the terms of the trust specify the event upon the occurrence of which the trust terminates and provides for the disposition of surplus assets of the trust upon its termination.

Protector not to be trustee

- 10.** The protector of a non-charitable purpose trust may not be a trustee thereof.

Appointment of protector by court

- 11.(1)** Where a trustee of a trust has reason to believe that
- (a) the protector of that trust is dead, is unwilling, refuses or is unfit to act or is incapable of acting;
 - (b) there is no other protector of the trust;
 - (c) no one has been appointed as successor to the protector referred to in paragraph (a) in accordance with the terms of the trust,

the trustee shall as soon as practicable, apply to the court for the appointment of a protector of the trust.

(2) The order of the court under subsection (1) is conclusive of the appointment of the protector to enforce the trust and the appointment takes effect from the date of the order.

(3) A trustee who fails to comply with subsection (1) is guilty of an offence and liable on summary conviction to a fine of \$10 000.

(4) In addition to the fine specified in subsection (3) the court may order the trustee referred to in that subsection to cease to be a trustee of non-charitable purpose trusts for 2 years.

(5) It is a defence to a charge under subsection (3) to prove that the trustee took all reasonable steps and exercised due diligence to comply with subsection (1).

Custody of copy of instrument

- 12.(1)** A trustee of a trust created under section 9 shall keep in Barbados
- (a) a copy of the instrument creating the trust and copies of any other instrument amending or supplementing the instrument;
 - (b) a register in which the following information is set out:
 - (i) the name of the settlor;

- (ii) a summary of the purposes of the trust;
- (iii) the name of the protector of the trust; and
- (iv) such documents as are necessary to show the true financial position of the trust.

(2) Notwithstanding any other provision of this Act, a trustee of a trust shall file with the Director, upon payment of the prescribed fee, the information referred to in subsection (1)(b)(i), (ii) and (iii), and the Director shall issue to the trustee a certificate of registration in the prescribed form.

(3) The information referred to in subsection (2) is confidential and not available to the public.

(4) A trustee of a trust may, upon payment of the prescribed fee, apply to the Director for a certified copy of the certificate of registration issued in respect of the trust.

(5) The instrument, register and documents referred to in subsection (1) are confidential and not available to the public, but the trustee shall allow the protector or a person authorised by the protector to inspect the instrument, register and documents.

(6) Where a trustee of a trust created under section 9

- (a) fails to comply with subsection (1) or (5);
- (b) refuses to allow a person referred to in subsection (5) to inspect the instrument, register or documents referred to in that subsection; or
- (c) in any deed, register or document referred to in subsection (5) makes, or authorises the making of, any statement that he knows to be false or does not believe to be true,

he is guilty of an offence and liable on summary conviction to a fine of \$10 000, and in addition to such fine the court may order the trustee to cease to be a trustee of non-charitable purpose trusts for 2 years.

Extension of *cy-près*

13.(1) Where a trust is created for a non-charitable purpose, the terms of the trust may provide that the doctrine of *cy-près* is, *mutatis mutandis*, applicable thereto.

(2) For the purpose of subsection (1), where a purpose that is reasonably similar to the original purpose cannot be found, a purpose that is not contrary to the spirit and meaning of the settlement may be substituted for the original purpose.

PART IV

EFFECT OF FOREIGN LAW

Capacity of settlor

- 14.** A person may create
- (a) an *inter vivos* trust if the trust property is movable and the person has the capacity to create a trust of movable property under the law of Barbados;
 - (b) a testamentary trust, if the trust property is movable and the person has the capacity to create a trust of movable property under the law of his domicile;
 - (c) a trust of immovable property if he has the capacity to create a trust of immovable property under the law of the jurisdiction in which the immovable property is situate.

Law of Barbados

- 15.** Any question arising with regard to
- (a) a trust that is governed by the law of Barbados; or

(b) any disposition of property upon the trust thereof,
is to be determined according to the law of Barbados without reference to the law of any other jurisdiction with which the trust or disposition may be connected.

Effect of section 15

16.(1) Section 15

- (a) does not validate any disposition of property that is
 - (i) not owned by the settlor;
 - (ii) not the subject of a power in that behalf vested in the settlor;
 - (b) takes effect subject to any express contrary term of the trust or disposition;
 - (c) does not, with regard to the capacity of a corporation, affect the recognition of the laws of its place of incorporation;
 - (d) does not affect the recognition of foreign laws prescribing generally, without reference to the existence or terms of the trust, the formalities for the disposition of property;
 - (e) does not validate any trust or disposition of immovable property situate in a jurisdiction, other than Barbados, being a trust or disposition that is invalid under the law of that jurisdiction;
 - (f) does not validate any testamentary trust or disposition that is invalid under the law of the testator's domicile.
- (2) The recognition of any foreign law in determining whether the settlor is the owner of property referred to in this Part or the holder of a power so referred to before the time of disposition or at the time of disposition is not affected by this Part.

Varying or setting aside trust

17. Where a trust is validly created under the law of Barbados the court shall not vary it or set it aside pursuant to the law of another jurisdiction in respect of

- (a) the personal and proprietary effects of marriage;
- (b) succession rights, testate and intestate, especially the legal right of surviving spouses and the shares of relatives;
- (c) the protection of creditors in matters of bankruptcy,

unless there are corresponding laws in Barbados.

PART V

Fraudulent Disposition

Interpretation

18. In this Part

- (a) "creditor" means a person to whom an obligation is owed;
- (b) "intent to defraud" means an intention of a transferor wilfully to defeat an obligation owed to a creditor;
- (c) "obligation"
 - (i) means an obligation or liability that existed on or before the date of a relevant disposition and of which the transferor had notice; and
 - (ii) includes a liability contingent upon an obligation or liability referred to in sub-paragraph (i);
- (d) "relevant disposition" means a disposition to which section 19 applies;

- (e) "transferor" means the person who as owner of property or as the holder of a power in that behalf directly or indirectly makes a relevant disposition or causes it to be made; and
- (f) "transferee" means the person to whom a relevant disposition is made and includes any successor in title.

Fraudulent disposition voidable

- 19.(1)** Subject to this Act, every disposition of property made with an intent to defraud shall be voidable at the instance of a creditor thereby prejudiced.
- (2) The burden of establishing an intent to defraud for the purposes of this Act shall be upon the creditor seeking to set aside the disposition.
 - (3) No action or proceedings shall be commenced pursuant to this Act later than 3 years after the date of the relevant disposition.

Certain rights

- 20.** In the event that any disposition is set aside pursuant to this Act, then
- (a) if the court is satisfied that the transferee has not acted in bad faith
 - (i) the transferee shall have a first and paramount charge over the property, the subject of the disposition, of an amount equal to the entire costs properly incurred by the transferee in the defence of the action or proceedings to set aside (and not merely such costs as might otherwise be allowed by the court; and
 - (ii) the relevant disposition shall be set aside subject to the proper fees, costs, pre-existing rights, claims and interests of the transferee (and of any predecessor transferee who has not acted in bad faith); and
 - (b) if the court is satisfied that a beneficiary of a trust has not acted in bad faith the disposition shall only be set aside subject to the right of such beneficiary to retain any distribution made consequent upon the prior

exercise of a trust, power or discretion vested in the trustee of such trust, or any other person, and otherwise properly exercised.

Extent of avoidance of relevant dispositions

21. A disposition shall be set aside pursuant to this Act only to the extent necessary to satisfy the obligation to a creditor at whose instance the disposition has been set aside together with such costs as the court may allow.

Act not to validate certain dispositions

22. Nothing in this Act shall validate any disposition of property which is neither owned by the transferor nor the subject of a power in that behalf vested in the transferor, and this Act does not affect the recognition of foreign laws in determining whether the transferor is the owner of such property or the holder of such a power.

Property Act

23. Section 193 of the *Property Act*, Cap. 236 does not apply to trusts.

No interest to defraud

24. The fact that a settlor of a trust is a beneficiary under the trusts or a trustee thereof does not *per se* constitute an intent to defraud.

PART VI

Protector of Trust

Appointment of protector

25.(1) The terms of a trust may provide for the appointment of a protector of the trust whether called protector, guardian, advisor or by whatever name called.

- (2) The following or any of them may, *inter alia*, be conferred on the protector by the terms of the trust
- (a) the power to appoint and remove trustees;
 - (b) the power to change the proper law of the trust;
 - (c) the right to receive notice in advance of specified actions of the trustees;
 - (d) the right to receive information relating to or forming part of the accounts of the trust.
- (3) Nothing in subsection (2) shall be construed as conferring the status of trustee on a protector.
- (4) Subject to the terms of the trust, where there is more than one protector of a trust any function conferred on the protectors may be exercised by a majority of the protectors who agree thereto.
- (5) A protector who dissents from a decision of the majority may require his dissent to be recorded in writing.

PART VII

Miscellaneous

Language of trust

26. Where the deed creating a trust is in a language other than English the deed must be accompanied by a certified English translation.

Confidentiality

27.(1) Without affecting section 12(5) but subject to the terms of the trust and to the order of the court, no trustee or other person shall disclose to any other person not legally entitled to any information or documents respecting the trust

- (a) the name of the settlor or any beneficiary;

- (b) the trustees' deliberations as to the manner in which a power or discretion was exercised or a duty conferred by the terms of the trust or by law was performed;
 - (c) the reason for the exercise of the power or discretion or the performance of the duty or any evidence upon which such reason might have been based;
 - (d) any information relating to or forming part of the accounts of a trust;
 - (e) any other matter or thing respecting a trust.
- (2) Notwithstanding subsection (1) but subject to the terms of the trust, the trustee shall, at the written request of a beneficiary, disclose any document or information relating to or forming part of the accounts of the trust to that beneficiary.
- (3) Notwithstanding any other law but subject to subsection (4), the court may, in any civil or criminal proceedings, allow the disclosure of information or document referred to in subsection (1) on the application of a party to the proceedings in such circumstances as the court thinks fit.
- (4) For the purposes of subsection (3), in making an order under that subsection the court shall, *inter alia*, have regard to the importance of the information or document to the outcome of the proceedings.

Disclosure for purposes of Act

28. Notwithstanding sections 12 and 27, information in respect of a trust may be disclosed where the information is lawfully required to be disclosed pursuant to any other enactment.

Application of other law

29.(1) Except in so far as they are inconsistent with the express provisions of this Act, the following apply to trusts:

- (a) the rules of equity and of common law applicable to trusts; and

(b) the *Trustees Act*, Cap. 250, except section 3 thereof and the Schedule to that Act, and the *Charities Act*, Cap. 243.

(2) The Public Trustee is prohibited from being a trustee for the purposes of this Act.

Penalties

30.(1) A person who makes or assists in making a report, return, notice or other document

(a) that is required by this Act or the regulations to be sent to the Registrar of Companies or to any other person; and

(b) that

(i) contains an untrue statement of a material fact; or

(ii) omits to state a material fact required in the report, return, notice or other document or makes a statement containing information that is misleading in light of the circumstances in which it was made,

is guilty of an offence and is liable on summary conviction to a fine of \$25 000 or to imprisonment for a term of 12 months or to both.

(2) A person is not guilty of an offence under subsection (1) if the making of the untrue statement or the omission of the material fact was unknown to him and with the exercise of reasonable diligence could not have been known to him.

(3) Where an offence under subsection (1) is committed by a body corporate and a director or trustee of that body corporate knowingly authorised, permitted or acquiesced in the commission of the offence, that body corporate, director, or trustee is liable on summary conviction to a fine of \$25 000 or to imprisonment for a term of 12 months or to both.

Fees and forms

31. The Minister may by order prescribe

- (a) the fees to be paid; and
- (b) the forms to be used,

under this Act.

Regulations

32. The Minister may make regulations to give effect to this Act.

Repeal of Cap. 245

33. The *International Trusts Act*, Cap. 245 is hereby repealed and an international trust that was created under that Act on the day immediately preceding January 1, 2019 shall from that date, be deemed to have been created under this Act and the provisions of this Act shall apply thereto accordingly.

Read three times and passed the House of Assembly this
day of _____, 2018.

Speaker

Read three times and passed the Senate this _____ day of
_____, 2018.

President