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# 2019

# BERMUDA

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## **LAW AND PRACTICE:**

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

# Law and Practice

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# BERMUDA LAW AND PRACTICE

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Conyers Dill & Pearman's team of 16 lawyers provide top-tier advice to ultra high net-worth clients with family trust structures, both in original design of the structure or re-structuring in adjustment to changing tax or family circumstances, as well as in ongoing administration, particularly private trust companies and those owning businesses. Specialising in both structuring advice and contentious work, the firm advises clients and onshore attorneys on the laws of Bermuda, the British Virgin Islands, the Cayman Islands and Mauritius. Conyers regularly advises on the creation of

offshore trusts for international clients for private wealth succession and long-term management.

Conyers Corporate Services Group of companies – an international network of licensed trust companies that undertakes a broad range of trust and company administration services for private clients, corporations and charitable entities – was established by Conyers Dill & Pearman in 1985 in order to provide professional trustee services to Conyers clients, thereby augmenting the quality of the trustee services provided.

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## 1. Tax

### 1.1 Tax Regimes

In Bermuda there is no income or profits tax, withholding tax, capital gains tax, capital transfer tax or inheritance tax. There is no exit or similar such tax based on a resident's wealth when ceasing to be resident and there are no other consequences of leaving the jurisdiction. Customs duties and stamp duty are major government revenue earners, with stamp duties charged at different rates and in different manners on a variety of legal documents, excluding wills.

### 1.2 Stability of the Estate and Transfer Tax Laws

There is no inheritance or capital transfer tax in Bermuda. Estate tax is payable on death where the property passing is Bermudian property.

### 1.3 Recent Developments or Forthcoming Regulatory Changes

Bermuda has enacted several key pieces of legislation in the trusts arena, consisting of:

- legislation concerning the retention of powers over trusts by settlors and the grant of powers over trusts to third parties (the Trusts (Special Provisions) Amendment Act 2014);

- legislation reintroducing into Bermudian law provisions similar to those contained in the rule in Hastings-Bass as that rule was understood in England and Wales, and other common law jurisdictions prior to 2011 (the Trustee Amendment Act 2014); and
- legislation making it easier to vary the perpetuity periods of trusts that were settled prior to the abolition of the rule against perpetuities for new Bermudian trusts (the Perpetuities and Accumulations Amendment Act 2015).

Bermuda has an active trust law reform programme and is continually looking to modernise and improve its trust laws. At the moment, it is considering improving its firewall laws (ie, those laws that protect trusts from attack on the basis of foreign laws).

#### **1.4 Income Tax Planning**

There is no income tax in Bermuda.

#### **1.5 Efforts to Address Real or Perceived Abuses/ Loopholes**

The Stamp Duties Act 1976 contains provisions to deal with evasion of stamp duty (which are specific to Bermuda property); Section 19 states that any person who, with intent to evade the payment of duty, executes any instrument in which all the facts and circumstances affecting the liability of an instrument to duty, or the amount of the duty with which an instrument is chargeable, are not truly and fully set forth, or neglects or omits to set forth fully and truly all the facts and circumstances, commits an offence. In addition, Section 70 states any person who practises or is concerned in any fraudulent act, contrivance or device with intent to defraud the government of any stamp duty commits an offence.

## **2. Succession**

### **2.1 The Role of Notable Cultural Factors in Succession Planning**

Bermuda's estate planning structures are suitable for all forms of family from all cultures, including large and small families.

### **2.2 International Planning**

Various strategies have been used in this context; for example, provisions that allow the exclusion of beneficiaries (automatically or at the discretion of the trustees) upon becoming a tax resident in a certain jurisdiction, provisions that aim to protect against civil law issues such as forced heirship laws, provisions permitting beneficiaries to disclaim their interests under the trust and provisions permitting the trust assets to be decanted so that, eg, assets intended for one child who becomes a US resident could be decanted into a suitable vehicle for that child without affecting the remaining beneficiaries. At a basic level, the simple discretionary trust model

can provide effective protection against some onshore laws simply because no beneficiary has a definite entitlement to the assets held in such a trust (only a potential entitlement), although this depends on the onshore jurisdiction in question and the terms of the trust, and it is of vital importance for offshore advisers to work closely with onshore lawyers when designing offshore wealth planning structures.

### **2.3 Forced Heirship Laws**

Bermuda does not have forced heirship laws; it is a jurisdiction that allows individuals complete freedom of testamentary disposition.

### **2.4 Prenuptial and Postnuptial Agreements**

Bermuda has not made legislative provision for the recognition of pre or post-marital contracts. However, the common law position is set out in the UK Supreme Court case *Radmacher v Granatino* [2010] UKSC 42. While Supreme Court decisions, unlike those of the Privy Council, are not strictly binding on Bermuda, decisions of Supreme Court, in the absence of cogent reasons, are almost always applied and followed by Bermuda courts. Following *Radmacher* it is likely that Bermuda courts will uphold a pre-nuptial agreement that is freely entered into by both parties with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to uphold the agreement.

### **2.5 Marital Property**

There is no marital property regime, as such, in Bermuda. Ownership of property acquired both prior to and during marriage is determined on ordinary principles (including the principles that determine whether property is jointly owned and, if so, whether on a joint tenancy or tenancy in common basis) as they apply to unmarried individuals, subject to the court's jurisdiction in respect of such property upon divorce.

The principles that govern financial provision on divorce are contained in the Matrimonial Causes Act, 1974, which is almost identical to the United Kingdom Matrimonial Causes Act, 1973. Orders validly made in another jurisdiction are recognised under comity of law principles. The court has very wide statutory powers on granting a decree of divorce, nullity or judicial separation to order maintenance and property transfers to or for the benefit of a party to, or the child of, a marriage. The decisions of the English courts on the exercise of this jurisdiction will be of persuasive rather than binding authority in Bermuda.

### **2.6 Effect of Transfer of Property on the Cost Basis of Property Being Transferred**

In Bermuda a transfer of property either during life or at death does not affect the cost basis of the property.

### 2.7 Vehicles or Planning Mechanisms to Transfer Assets to Younger Generations Tax-Free

Bermudian discretionary trusts are most commonly used to transfer assets to younger generations.

## 3. Trusts, Foundations and Similar Entities

### 3.1 Types of Trusts, Foundations, or Similar Entities

Bermudian private trusts and purpose trusts are the primary legal vehicles of choice used to provide wealth-preservation structures to the high net worth international client. Bermudian trusts can be employed to achieve a variety of estate, personal, financial, tax or other business planning objectives. Bermuda has no foundations law.

### 3.2 Possible Tax Consequences of Designation as a Fiduciary or a Beneficiary of a Foreign Trust, Foundation or Similar Entity

Bermuda is a common law jurisdiction and as such recognises trusts. In Bermuda the common law position regarding trusts has been codified by the Trusts (Special Provisions) Act 1989, which states that the term "trust" refers to the legal relationship created, either inter vivos or on death, by a person, the settlor, when assets have been placed under the control of the trustee for the benefit of a beneficiary or for a specified purpose.

### 3.3 Structure of Irrevocable Trusts, Foundations or Similar Entities

There have been no changes in Bermuda that have decreased or eliminated the legitimate use of trusts for estate planning purposes. Bermudian law does not recognise foundations at this time.

### 3.4 Possible Tax Consequences of a Beneficiary or the Donor of a Trust, Foundation or Similar Entity also Serving as a Fiduciary

There are no specific Bermudian tax provisions applicable to citizens of Bermuda who serve as a fiduciary or are beneficiaries of foreign trusts, foundations or similar entities.

### 3.5 Structures That Permit Future Changes and Allow Settlers to Retain Extensive Powers

Bermuda's legislature works closely with private sector associations to ensure that Bermuda's trust legislation is regularly reformed. Successive Bermudian governments over the past 20 years have been committed to making innovative reforms and as a result Bermuda's trust legislation is both modern and facilitative of succession planning. In particular the legislature collaborates with private sector associations such as the Bermuda Association of Licensed Trustees, the Bermuda International Business Association and the Society

of Trusts and Estate Practitioners as well as the Bermuda Business Development Agency, an organisation created to support international business.

Recent legislative initiatives in the trusts arena include the introduction of a statutory Hastings-Bass rule and amendments to make it easier for historic trusts to extend their perpetuity period (the rule was abolished for most new trusts in 2009), and new legislation on settlors' reserved powers. The reservation or grant of certain powers for settlors has always been possible under Bermuda's trust legislation but historically, there has been some uncertainty about exactly how far settlors could go without calling the validity of the trust structure into question. The Trusts (Special Provisions) Amendment Act 2014 now provides statutory clarity and certainty in this area. Helpfully, the amending legislation expressly lists certain interests and powers that can be retained by a settlor or granted to a third party — for example, a protector or beneficiary — without prejudicing the validity of a trust. It also clarifies that the retention or grant of these powers and interests will not cause the property in the trust to become part of the settlor's estate; introducing certainty in this area distinguishes Bermuda from some of the other major offshore jurisdictions.

### 3.6 Tax Consequences of a Beneficiary Serving as a Fiduciary

Since Bermuda does not have income or capital gains tax, there are no tax consequences under Bermudian law as a result of a beneficiary or donor acting as a fiduciary, although advice should always be taken from advisers in the jurisdiction of residence of any such person to ensure that there are no unintended consequences.

## 4. Family Business Planning

### 4.1 Most Popular Method for Asset Protection

There are a number of approaches here. Commonly, businesses are held by a holding company whose shares are held in trust. The trusteeship of the trust may be vested in a private trust company (PTC), which can ensure participation of various family members on the board of the PTC, with younger generations taking over PTC directorships over time.

No-contest clauses in trusts and family agreements can be helpful mechanisms to deter or avoid conflict in appropriate circumstances.

### 4.2 Most Popular Method for Asset Protection

Bermudian trusts can be used for asset protection planning. Bermuda has firewall legislation in place that will protect assets in a Bermudian trust from being attacked based on orders of a foreign court under foreign law. The relevant

provisions are found in Section 11 of the Trusts (Special Provisions) Act 1989. A Bermudian court will only set aside or vary a trust validly created under Bermudian law in accordance with Bermudian law. In particular, the firewall legislation can protect assets held in a Bermudian trust against claims based on divorce, forced heirship and general claims made by or on behalf of creditors.

## 5. Wealth Disputes

### 5.1 Trends Driving Wealth Disputes

One of the circumstances that causes a dispute amongst people of wealth can be imprecision in drafting of the relevant documentation but as with all disputes, resolution can be achieved if there is a willingness of the parties to work together. The driver of the matter then proceeding to a formal dispute process is usually the desire of one party to the dispute to take a greater share than the other party or parties think fair. These disputes then take the form of arbitrations or court actions.

### 5.2 Mechanism for Compensating Aggrieved Parties

Compensating an aggrieved party who is the winner in a dispute concerning a trust, foundation or similar entity is usually by way of a declaration of entitlement of the successful party and possibly an actual award of a defined sum of money or property.

In so far as damages are concerned, an award of damages in Bermudian courts is usually compensation-based. Bermuda, in comparison to the United States, does not have any punitive basis for an award, hence there is no separate heading of punitive damages simply to punish a party for their behaviour in the matter. Aggravated damages are a form of damages allowed but these are compensatory in nature for possible exceptional loss suffered by reason of the conduct of one of the parties.

## 6. Roles and Responsibilities of Fiduciaries

### 6.1 Prevalence of Corporate Fiduciaries

Corporate fiduciaries are frequently used in trust and other structures in Bermuda. A PTC can be incorporated to act as trustee of a trust. PTCs can be exempted from the licensing requirements that apply to other corporate service providers. A Bermudian private trust company owes the same fiduciary and statutory duties to act in the best interests of beneficiaries as any other trustee (subject to any exclusions in the trust instrument). The directors of the private trust company must act in the best interests of the company and are subject to

certain statutory duties as well as fiduciary duties and duties of skill and care at common law.

### 6.2 Piercing the Veil of a Trust or Legal Entity

Generally, it is not possible to pierce the veil of a trust, foundation or similar entity and hold the fiduciaries liable for the liabilities of such entity, where relevant contracts have been properly drafted. However, in extreme cases it is conceivable that a fraudulent trustee could incur personal liability.

### 6.3 Regulation of a Fiduciary's Investment of Assets

In the context of trust assets, Section 55A(5) of the Trustee Act 1975 provides that when determining whether a trustee has acted in accordance with the investment provisions under the Act, any decision to invest or otherwise apply trust property shall be evaluated in the context of the trust property as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust. Although as a "prudent investor" it is clear a trustee needs to have regard to diversification as a way to protect and preserve the trust fund, diversification is but one factor in an overall assessment of exercising reasonable care in the investment of the trust fund. It is common to include a provision in the trust instrument excluding the duty to diversify the trust fund and to allow the trustee to make speculative investments.

### 6.4 The Investment Theory or Standard Applied to the Fiduciary Investment of Assets

In the context of investment management of a trust, the trustee would be guided by the trust deed. If the trust deed calls for maximising profits for the pursuit of particular purposes then the trustees would (without contrary direction or abridgement of duties in the deed) follow the usual prudent investor rule and consider diversification and modern portfolio theory.

### 6.5 Authorisation to Hold Active Businesses

If the trust deed confers ownership of a particular business then, depending on the terms of the trust, the trustees may be entitled to keep on conducting that business. Of course, one would expect trustees to do what they can to keep liabilities and losses to a minimum in all circumstances. In the context of running a business, a trustee of a purpose trust is in a much better position as compared to the trustee of a private trust; he would not be directly liable to a beneficiary for loss to that trust fund.

### 6.6 Mechanisms to Protect Fiduciaries from Liability

Trustee exemption clauses are often included in Bermudian trust instruments to exempt trustees from liability for breaches of trust. Section 22(1) of the Trustee Act 1975 provides a statutory indemnification for certain losses but

excludes loss resulting from the trustee's own deliberate, reckless or negligent breach of an equitable duty.

Bermudian trust legislation provides for a mechanism whereby specific aspects of trust administration can be delegated to a “managing trustee”. The trust instrument can state certain trustee powers are to be exercised by a managing trustee. All other trustees will then be absolved from liability for any of the decisions, acts or transactions of the managing trustee in so far as they amount to exercise of powers reserved by the trust instrument to the managing trustee. It is also very common for specific aspects of administration — for example, investment — to be delegated to a third party professional.

## 7. Citizenship

### 7.1 Requirements for Domicile/Residency/Citizenship

In order to be a citizen of Bermuda and obtain Bermudian status you must satisfy the restrictive criteria set out in the Bermuda Immigration and Protection Act; for example, if you possess a qualifying Bermudian connection as defined in the legislation or if you are a spouse, widow or widower of a Bermudian.

A person who is at least 18 years of age and has substantial means or has a continuous source of annual income without the need to engage in gainful occupation pursuant to Section 57 of the Bermuda Immigration and Protection Act 1956 in Bermuda can apply for a Residence Certificate, which entitles the person to reside in Bermuda without the right to work.

There is also a category of residents known as Permanent Resident Certificate holders. If you have a Permanent Resident's Certificate, you have the right to live and work in Bermuda, and to purchase Bermudian property. The requirements for this category are more stringent than the Residence Certificate and will require the applicant to demonstrate they have been resident in Bermuda for over 20 years of continuous residence.

### 7.2 Expedient Means for an Individual to Obtain Citizenship

Bermuda does not have any special tax/immigration/citizenship programmes designed to attract foreigners to become citizens of Bermuda.

## 8. Planning for Minors/Adults with Disabilities

### 8.1 Special Planning Mechanisms for Minors or for Adults with Disabilities

Bermuda does not have special planning mechanisms for minors or for adults with disabilities. Both of these groups could be beneficiaries of a Bermudian trust and a guardian could be appointed for the purposes of receiving property or any other activity the beneficiary in question is not capable of undertaking.

### 8.2 Appointing a Guardian

Specifically with regard to minors, the Minors Act 1950 provides the court with various powers, including the power to appoint and remove a guardian in accordance with the welfare of the child. The Mental Health Act 1968 includes provision for the court to appoint a receiver to deal with the property on behalf of a person suffering a mental disorder. The receiver can later be discharged by an order of the court when the judge is satisfied the person has become capable of administering their property and affairs.

## 9. Planning for Nontraditional Families

### 9.1 Children Born Out of Wedlock and Adopted Children

According to Section 18A of the Bermuda Children's Act, there is no distinction as a matter of Bermudian law between children born inside and outside marriage. In other words, the concept of legitimate or illegitimate children does not exist under Bermudian law; there is only one class of children. Thus, a beneficial class in a Bermudian law trust that seeks to define the beneficial class on the basis of legitimacy is likely to be ineffective. Similarly, pursuant to the Children Amendment Act 2002, an adopted child is treated as if it was the natural child of its adopted parents.

### 9.2 Recognition of Same-Sex Marriage

Domestic partnerships are legal in Bermuda for both heterosexual and same-sex couples under the Domestic Partnership Act 2018.

### 9.3 Recognition of Domestic Partners

Under the Domestic Partnership Act 2018, domestic partners' rights include the right to inherit in the case of no will, the right to a partner's pension, access to property rights, the right to be considered next of kin, the right to make medical decisions on behalf of a partner and the right to live and work in Bermuda as the partner of a Bermudian.

## 10. Charitable Planning

### 10.1 Laws on Charitable Giving

As there are no income taxes or taxes on earnings or capital gains levied in Bermuda — whether on a corporate, trust or individual level — there is very little framework for obtaining tax deductions through charitable giving under Bermudian law.

### 10.2 Structures Most Commonly Used for Charitable Planning

Trusts (charitable or purpose) and companies limited by guarantee are most commonly used for charitable planning (less commonly, unincorporated associations and entities incorporated by private act of parliament may be used).

They may also be faster to establish than companies. Further, there are no annual government or licence fees payable for trusts, although registered charities pay a small annual fee. Finally, there is no trust register in Bermuda, so parties to a trust can remain private.

By contrast, companies limited by guarantee must meet the requirements of the Bermuda Companies Act 1981. They must pay annual government fees and submit certain information to the Registrar of Companies, including a register of members, so there is somewhat less privacy. However, the corporate structure and corporate governance may be more familiar to many, especially civil law clients. Companies may also act in their own name, unlike trusts, which do not have legal personality.

## 11. Elder Law

Bermuda currently does not have any legislation specific to issues of elder law.

## 12. Digital Assets

At the time of writing, Bermuda does not have specific legislation in force to deal with succession of digital assets and as such they would devolve according to the rules applicable to personalty. The Bermudian government is moving forward on virtual currency legislation and plans to introduce Initial Coin Offering legislation soon.

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