

No. 11 of 2003

VIRGIN ISLANDS
TRUSTEE (AMENDMENT) ACT, 2003
ARRANGEMENT OF SECTIONS

Section

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12. Section 84A inserted.
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14. Section 92 repealed and substituted.
15. Section 93 amended.
16. Parts X and XI and First Schedule inserted.
17. Schedule amended.

I Assent

THOMAS MACAN,
Governor.
17th October, 2003

VIRGIN ISLANDS

No. 11 of 2003

An Act to amend the Trustee Ordinance (Cap. 303).

[Gazetted 6th November, 2003]

ENACTED by the Legislature of the Virgin Islands as follows:

Short title and
commencement.

1. (1) This Act may be cited as the Trustee (Amendment) Act, 2003.

(2) The provisions of this Act shall come into force on such date or dates as the Governor may, by Proclamation published in the *Gazette*, appoint, and the Governor may appoint different dates for the coming into force of different provisions of this Act.

Interpretation.
Cap. 303

2. In this Act, “principal Act” means the Trustee Ordinance.

Section 16
amended.

3. Section 16 of the principal Act is amended by inserting after the words “acting together,”, the words “(or in the case of a trust created on or after the date on which section 3 of the Trustee (Amendment) Act, 2003 comes into force, a personal representative or a trustee)”.

4. (1) Section 18 of the principal Act is repealed and the following section is substituted:

Section 18 repealed and substituted.

“Validation of appointment where objects are excluded or take illusory shares.

18. (1) No appointment made in exercise of any power to appoint any property among two or more objects shall be invalid on the ground that

- (a) an unsubstantial, illusory or nominal share only is appointed to or left unappointed to devolve upon any one or more of the objects of the power; or
- (b) any object of the power is thereby altogether excluded,

but every such appointment shall be valid notwithstanding that any one or more of the objects is not thereby, or in default of appointment, to take any share in the property.

(2) No selection made in exercise of any power to select among two or more beneficiaries shall be invalid on the ground that any beneficiary is thereby altogether excluded.

(3) This section does not affect any provision in the instrument creating the power which declares the amount or the share or shares, or any selection, from which any object of the power is not to be excluded.

(4) In this section, “share” shall include a contingent or limited interest in capital or income.

(5) This section applies to appointments made before, on or after the date on which this section comes into force.”.

(2) Subsection (1) shall not affect the application of the section repealed by that subsection in relation to any payment or advancement made before the coming into force of this section.

5. Section 58 of the principal Act is amended

Section 58 amended.

- (a) in subsection (1),
 - (i) in paragraph (b), by inserting after the words “shall not include any”, the word “ascertained”;

(ii) by deleting from the words “varying or revoking all or any of the trusts” to the end and substituting the words “varying, adding to, revoking or replacing all or any of the trusts, enlarging, restricting or removing all or any of the powers of the trustees of managing or administering any of the property subject to the trusts or all or any other powers of the trustees, or varying, adding to, removing or replacing any or all of the other provisions of the trusts: Provided that except by virtue of paragraph (d) the Court shall not approve an arrangement on behalf of any person if carrying it out would be detrimental to that person.”; and

(b) by inserting after subsection (4), the following subsections:

“ (5) The references to an interest in subsections (1)(a) and (1)(b) shall be construed to include references to a discretionary interest.

(6) This section applies to any trust, whether created before, on or after the date on which this subsection comes into force.”.

Section 58A
inserted.

6. The principal Act is amended by inserting after section 58, the following section:

“Power to
appoint
persons to
consent to
variations on
behalf of
those
incapable.

58A. (1) Where a trust instrument provides for the appointment of any person (including the holder of any office under the trust) to approve any arrangement described in section 58(1) on behalf of any of the persons referred to in paragraphs (a) to (d) thereof (whether specified by name or by description and whether or not the identity of such persons is ascertained or ascertainable), and where such approval is subsequently given pursuant thereto, such approval shall have the same effect as if the Court had approved such arrangement on behalf of such persons pursuant to the powers vested in it by section 58(1):

Provided that no such approval shall be given on behalf of any persons referred to in paragraphs (a) to (c) of section 58(1) unless, in the opinion formed in good faith of the person giving the approval, carrying out and giving effect to such arrangement would

not be detrimental to the person or persons on whose behalf it is given.

Cap. 80 (2) Nothing in subsection (1), nor in any such provision in a trust instrument as is referred to in that subsection, shall be taken to limit the powers conferred by section 58 or 59 or by section 6 of the West Indies Associated States Supreme Court (Virgin Islands) Act.

(3) References to the holder of any office under the trust in subsection (1) include references to a trustee or any protector or protective committee of the trust.

(4) This section applies only to trusts created on or after the date on which this section comes into force.”.

7. Section 81 of the principal Act is amended

Section 81 amended.

(a) in subsection (3), by deleting the words “an event” and substituting the words “any event, other than any of the events described in subsection (4), which is”;

(b) by inserting after subsection (3), the following subsection:

“ (4) The events referred to in subsection (3) are

(a) an order of the Court;

(b) the institution of criminal proceedings against the settlor, the trustees or any of the beneficiaries; and

(c) an investigation in relation to the settlor, the trustees, any of the beneficiaries of the trust or any part of the trust property by the Financial Services Commission pursuant to any enactment.”.

8. Section 82 of the principal Act is amended

Section 82 amended.

(a) in paragraph (e), by deleting the word “or”;

(b) by deleting paragraph (f) and substituting the following paragraph:

“(f) the Court is otherwise the natural forum for the litigation;”;

(c) by inserting after paragraph (f), the following paragraphs:

“(g) the parties submit to the jurisdiction of the Court; or

(h) the trust instrument contains a provision referring disputes to the jurisdiction of the Court.”.

Section 83 amended.

9. Section 83 of the principal Act is amended by inserting after subsection (2), the following subsection:

“(3) This section shall only apply to trusts created before the date on which section 83A comes into force.”.

Section 83A inserted.

10. The principal Act is amended by inserting after section 83, the following section:

“Conflict of laws rules for certain trusts and dispositions. First Schedule

83A. (1) In this section and the First Schedule, unless the context otherwise requires

“disposition”, in relation to any property, includes every form of conveyance, transfer, assignment, lease, licence, mortgage, charge, pledge, encumbrance or other transaction of that property or by which any interest in it is created or extinguished;

“foreign law” means the law of any part of the world outside the Territory, other than a provision in an Act of the Parliament of the United Kingdom, or an enactment made under such Act, which extends to the Territory as part of the law of the Territory;

“Hague Trusts Convention” means the Convention on the Law Applicable to Trusts and on their Recognition, as applicable to the Territory by virtue of the Recognition of Trusts Act 1987 (Overseas Territories) Order 1989;

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“heirship rights” means any right, claim or interest in, against or to property of a person arising, accruing or existing in consequence of, or in anticipation of, that person’s death, other than any such right, claim or interest created by will or other voluntary disposition by such person or resulting

from an express limitation in the disposition of the property to such person;

“judgment” means any judgment or award of arbitration given by a court, tribunal or arbitrator in any part of the world, whatever the judgment or award may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court or by a tribunal or arbitrator;

“personal relationship” includes every form of relationship by blood or marriage, including former marriage, and, in particular, a personal relationship between two persons exists if

- (a) one is the child of the other, natural or adopted (whether or not the adoption is recognised by law), legitimate or illegitimate;
- (b) one is married to the other (whether or not the marriage is recognised by law);
- (c) one cohabits with the other or so conducts himself in relation to the other as to give rise in any jurisdiction to any rights, obligations or responsibilities analogous to those of a parent and child or husband and wife; or
- (d) personal relationships exist between each of them and a third person;

“settlor”, in relation to a trust, includes every person who, directly or indirectly, on behalf of himself or on behalf of any other, as owner or as holder of a power in that behalf, makes a disposition of property to be held in that trust or declares or otherwise creates such trust;

“terms” includes express and implied terms;

“Virgin Islands trust” means a trust the essential validity of which is, for the time being, governed by the law of the Territory and which is

- (a) created on or after the date on which this section comes into force; or

(b) created before the date on which this section comes into force, but the proper law of which has been changed to the law of the Territory after that date in accordance with section 81;

First Schedule (2) For the purposes of this section and the First Schedule, no change in circumstances causes a personal relationship, once established, to terminate.

First Schedule (3) In the definition of “Virgin Islands trust” in subsection (1), subsections (9) and (12) and items 2, 3, 4(A) and 7 of the First Schedule, “law” excludes choice of law rules, but otherwise in this section and the First Schedule, where the context so admits, “law” includes choice of law rules.

(4) In subsection (11), “internal law” excludes choice of law rules.

(5) For the purposes of identifying the law applicable under this section and the First Schedule, the Territory shall be treated as a State and where a State comprises more than one territorial unit, each of which has its own rules of law, each territorial unit shall be treated as a State.

First Schedule (6) Without prejudice to subsections (13) to (18), in ascertaining whether a trust has been completely constituted, the preliminary issues referred to in Article 4 of the Hague Trusts Convention shall be determined, to the extent so provided, in accordance with subsections (7) to (11) and the First Schedule.

(7) The formal and essential validity of a disposition, not being a testamentary disposition, of immovable property or tangible movable property, and the capacity to make the disposition, shall be determined according to the law of the State in which the property is situated at the time of the disposition.

(8) The formal and essential validity of a disposition, not being a testamentary disposition, of intangible movable property, and the capacity to make the disposition, shall be determined in accordance with the First Schedule, or, in the case of intangible movable property not provided for in the First Schedule, in accordance with the law under which the property came into existence.

(9) The capacity to subject property to a trust, not being a testamentary trust, as distinct from the capacity to dispose of that

property, shall be determined in accordance with the law governing the essential validity of the trust.

(10) Where a person declares a trust of his own property, there shall be no requirement for compliance with the rules on formal or essential validity or capacity applicable to a disposition of that property or of any interest in it.

First Schedule (11) Where, under subsections (6) to (10) and the First Schedule, an issue falls to be determined by the law of the Territory, the choice of law rules of the Territory shall designate the internal law of the Territory to determine the issue.

First Schedule (12) Subject to subsections (6) to (11) and the First Schedule, all questions arising in regard to the validity, construction, effect or administration, whether the administration is conducted in the Territory or elsewhere, of a trust including

- (a) questions relating to any of the following matters, being matters specified in Article 8 of the Hague Trusts Convention
 - (i) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee;
 - (ii) the rights and duties of trustees among themselves;
 - (iii) the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers;
 - (iv) the powers of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets;
 - (v) the powers of investment of trustees;
 - (vi) restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust;

- (vii) the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries;
 - (viii) the variation or termination of the trust;
 - (ix) the distribution of trust assets;
 - (x) the duty of trustees to account for their administration; and
- (b) to the extent that they do not fall under paragraph (a), questions as to
- (i) the fiduciary or non-fiduciary powers, obligations or duties of the trustees or to the liabilities or rights of the trustees;
 - (ii) the existence and extent of powers conferred or retained, including powers to vary or revoke the trust and powers of appointment, and questions as to the validity of any exercise of any such power,

are to be determined by the proper law of the trust or, where there are different proper laws for different aspects of the trust, the proper law applicable to the area in which the question falls.

(13) Subject to any express provision to the contrary in the trust or disposition, no Virgin Islands trust, and no disposition of property to be held upon the trusts of such a trust, is void, voidable, liable to be set aside or defective in any fashion, nor is the capacity of any settlor in relation to the trust or disposition to be questioned, nor is the trustee or any beneficiary or other person to be subjected to any liability or deprived of any right, by reason that

- (a) the law of any foreign jurisdiction prohibits or does not recognise the concept of a trust, or
- (b) the Virgin Islands trust or the disposition
 - (i) avoids or defeats any right, claim or interest conferred by foreign law upon any person by reason of a personal relationship to the settlor or by way of heirship rights; or

- (ii) contravenes any rule of foreign law or any foreign judicial or administrative order or arbitration order or action intended to recognise, protect, enforce or give effect to such a right, claim or interest.

(14) Heirship rights conferred by foreign law in relation to the property of a living person shall be disregarded when determining rights of ownership of property subject to, or claimed to be subject to, a Virgin Islands trust.

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(15) Heirship rights conferred on persons by foreign law shall not be taken to constitute those persons creditors for the purposes of section 81 of the Conveyancing and Law of Property Ordinance, nor to constitute those persons “creditors or others” for the purposes of the Act against Fraudulent Deeds, Gifts, Alienations, etc. to the extent, if any, that that Act has any application in the Territory.

(16) Subject to subsection (17), the law designated as applicable to succession by virtue of the Territory’s choice of law rules shall apply to a Virgin Islands trust, not being a testamentary trust, only to the extent that it does not contain rules conferring any right, claim or interest upon any person by reason of a personal relationship to the settlor or by way of heirship rights.

(17) Subsection (16) shall not apply where the law so designated is that of the Territory.

(18) In the case of a conflict between any of the provisions of subsections (13) to (17) and any of the provisions of subsections (6) to (11) and the First Schedule, the provisions of subsections (13) to (17) shall prevail.

(19) To the extent that it is inconsistent with subsections (13) to (18), a foreign judgment shall not be recognised or enforced or give rise to any estoppel, and both its recognition and its enforcement shall be regarded as contrary to the public policy of the Territory,

(20) Subsections (6) to (12) apply only to trusts created on or after the date on which this section comes into force.”.

11. Section 84 of the principal Act is amended

- (a) in subsection (3) by inserting after the word “applies”, the words “and, for the avoidance of doubt, the rule against perpetuities and remoteness of vesting includes the rule against inalienability, the rule against perpetual trusts, any rule prohibiting a trust under which trust property would, apart from that rule, be inalienable beyond a permissible period, and any rule prohibiting a trust or power under which trust property would, apart from that rule, be capable of application for a purpose beyond a permissible period”;
- (b) by inserting after subsection (11), the following subsections:

“(12) Where any of the persons specified in subsection (13) has reason to believe that no trustee of a trust to which subsection (2) applies is a designated person or that no designated person is likely in the immediate future to be appointed as a trustee pursuant to the terms of the trust instrument, that person shall use all reasonable endeavours to secure the appointment of a designated person as a trustee of the trust and if such endeavours fail to result in such an appointment he shall make an application to the Court for the appointment of a designated person pursuant to the provisions of subsection (14).

(13) The persons referred to in subsection (12) are

- (a) any trustee of the trust who is not a designated person; and
- (b) any person who has been appointed to enforce the trust.

(14) If, at any time following its creation, a trust to which subsection (2) applies does not have at least one trustee who is a designated person, on the application in relation to the trust by

- (a) any existing trustee of the trust,
- (b) a person who has been appointed to enforce the trust, or

- (c) the Attorney General,

the Court shall make an order appointing a designated person as a trustee of the trust.

(15) On an application in relation to a purpose trust by

- (a) a trustee of the trust; or
- (b) a person who has been appointed to enforce the trust,

the Court may in such manner as it thinks fit vary any of the purposes of the trust, or enlarge or otherwise vary any of the powers of the trustees or other provisions of the trust.

(16) In exercising the powers conferred upon it by subsection (15), the Court shall have regard to such factors as the Court thinks material, which may include

- (a) such changes in circumstances since the trust was created as are in the opinion of the Court relevant; and
- (b) such factors and proposals as are set out in the application.

(17) The changes in circumstances referred to in subsection (16)(a) may include the fact that the execution of the trust in accordance with its terms has become in whole or in part

- (a) impossible or impracticable;
- (b) unlawful or contrary to public policy; or
- (c) obsolete in that, by reason of changed circumstances, it fails to achieve the intention of the settlor and the spirit of the gift.

(18) Where any costs are incurred in connection with an application under subsection (15), the Court may

make such order as it considers just as to payment of those costs, including payment out of the property of the trust.

(19) Where any costs are incurred by the person who has been appointed to enforce the trust in connection with enforcement, the Court may make such order as it considers just as to payment of those costs, including payment out of the property of the trust.

No. 1 of 1997 (20) For the purposes of section 203 of the Criminal Code, 1997 property held upon the trusts of a trust to which subsection (2) applies shall be regarded, as against the trustee and as against the person who has been appointed to enforce the trust, as belonging to others, and an intention on the part of any such person to defeat the trust shall be regarded as an intention to deprive others of their property.

(21) The trustee of a trust to which subsection (2) applies who is a designated person shall keep in the Territory a documentary record of

- (a) the terms of the trust;
- (b) the identity of any other trustees and the person who has been appointed to enforce the trust;
- (c) all settlements of the property upon the trust and the identity of settlors;
- (d) the accounts of the trust; and
- (e) all distributions or applications of the trust property.

(22) This section shall only apply to trusts created before the date on which section 84A comes into force.”.

Section 84A inserted.

12. The principal Act is amended by inserting after section 84, the following section:

“Purpose trusts created on or after the commencement of this section.

84A. (1) For the purposes of this section, “charitable trust” means a trust for exclusively charitable purposes;

“designated person” means

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- (a) a barrister or solicitor practising in the Territory;
- (b) an accountant practising in the Territory who qualifies as an “auditor” for the purposes of the Banks and Trust Companies Act, 1990;
- (c) a licensee under the Banks and Trust Companies Act, 1990, or
- (d) such other person as the Minister of Finance may, by Order, designate; and

“rule against trusts or powers of excessive duration” includes, but without limitation,

- (a) the rule known as the rule against inalienability, sometimes referred to as the rule against perpetual trusts; and
- (b) so far as not embraced within paragraph (a),
 - (i) any rule prohibiting a trust under which trust property would, apart from the rule, be inalienable beyond a permissible period, and
 - (ii) any rule prohibiting a trust or power under which trust property would, apart from the rule, be capable of application for a purpose beyond a permissible period.

(2) A person may create a valid trust for any purpose or purposes if the conditions set out in subsection (3) are satisfied.

(3) The conditions referred to in subsection (2) are

- (a) the purpose or purposes are specific, reasonable and possible;
- (b) the purpose or purposes are not immoral, contrary to public policy or unlawful;
- (c) at least one trustee of the trust is a designated person;

- (d) the trust instrument appoints a person as enforcer of the trust, and provides for the appointment of another enforcer on any occasion on which there is no enforcer, or no enforcer able and willing to act;
- (e) the enforcer appointed by the trust instrument is a party to the trust instrument or gives his consent in writing, addressed to the trustee who is a designated person, to act as enforcer of the trust.

(4) In this section a trust for a purpose or purposes that satisfies the conditions in subsection (3), not being a charitable trust, is referred to as a “purpose trust”.

(5) No rule against trusts or powers of excessive duration shall apply to a purpose trust.

(6) Nothing in this section shall operate to invalidate a trust which, apart from this section, would be a valid trust.

(7) Nothing in this section affects the law with respect to charitable trusts and, in particular, nothing in this section shall affect the ability of the Attorney General to enforce a charitable trust.

(8) Without prejudice to subsections (6) and (7), any purported appointment of an enforcer of a charitable trust shall be of no effect.

(9) The Court may, whenever it is expedient to appoint an enforcer of a purpose trust and it is found inexpedient so to do without the assistance of the Court, make an order appointing an enforcer either to fill a vacancy or in substitution for the existing enforcer.

(10) Where a trustee of a purpose trust who is a designated person has reason to believe that there is no enforcer of the trust, or no enforcer able and willing to act, and that no enforcer is likely in the immediate future to be appointed, that trustee shall as soon as practicable inform the Attorney General in writing of the fact and send him a copy of the instrument creating the trust.

(11) On being informed under subsection (10), the Attorney General shall, with all reasonable speed but in any event within ninety days, apply to the Court for the appointment of an enforcer under subsection (9).

(12) Where any costs are incurred by the Attorney General in connection with any application under subsection (11), the Court may make such order as it considers just as to the payment of those costs out of the assets of the trust.

(13) Where a designated person fails to comply with subsection (10), then, subject to subsection (14), the designated person commits an offence and is liable on summary conviction to a fine not exceeding five thousand dollars.

(14) It shall be a defence to a charge of committing an offence under subsection (13) to prove that the designated person took all reasonable steps and exercised all due diligence to avoid committing the offence.

(15) A trustee of a purpose trust shall provide the enforcer of the trust with

- (a) the accounts of the trust;
- (b) copies of the trust instrument and of deeds and other written instruments executed pursuant to the trust instrument;
- (c) legal and other professional advice received by the trustees; and
- (d) such, if any, other documents and information as the trust instrument requires to be provided.

(16) The instrument declaring or evidencing a purpose trust may, but need not, do any of the following:

- (a) specify an event or date upon the happening or occurrence of which the trust ceases to be a purpose trust;
- (b) provide for the disposition of assets of the trust when the trust ceases to be a purpose trust; or

- (c) provide that, for so long as the trust is a purpose trust, the trustees owe no duty
 - (i) to any persons entitled to such assets when the trust ceases to be a purpose trust; or
 - (ii) in relation to any purposes for which such assets are then to be applied.

(17) An enforcer of a trust appointed in accordance with the provisions of this section shall have both the power and the duty of enforcing it.

(18) A person may not be or become a trustee of a purpose trust while he is the enforcer of that trust.

(19) Where any of the persons specified in subsection (20) has reason to believe that no trustee of a purpose trust is a designated person or that no designated person is likely in the immediate future to be appointed as a trustee pursuant to the terms of the trust instrument, that person shall use all reasonable endeavours to secure the appointment of a designated person as a trustee of the trust and if such endeavours fail to result in such an appointment he shall make an application to the Court for the appointment of a designated person pursuant to the provisions of subsection (21).

(20) The persons referred to in subsection (19) are

- (a) any trustee of the trust who is not a designated person;
- (b) the enforcer of the trust.

(21) If, at any time following its creation, a purpose trust does not have at least one trustee who is a designated person, on the application in relation to the trust by any of the following persons:

- (a) the settlor, unless the trust instrument provides otherwise,
- (b) any existing trustee of the trust,

- (c) the enforcer of the trust, or
- (d) the Attorney General,

the Court shall make an order appointing a designated person as a trustee of the trust.

(22) On an application in relation to a purpose trust by

- (a) any person appointed by the instrument declaring or evidencing the trust for the purposes of this subsection,
- (b) the settlor, unless the trust instrument provides otherwise,
- (c) a trustee of the trust, or
- (d) the enforcer of the trust,

the Court may in such manner as it thinks fit vary any of the purposes of the trust, or enlarge or otherwise vary any of the powers of the trustees or other provisions of the trust.

(23) In exercising the powers conferred upon it by subsection (22), the Court shall have regard to such factors as the Court thinks material which may include

- (a) such changes in circumstances since the trust was created as are in the opinion of the Court relevant; and
- (b) such factors and proposals as are set out in the application.

(24) The changes in circumstances referred to in subsection (23)(a) may include the fact that the execution of the trust in accordance with its terms has become in whole or in part

- (a) impossible or impracticable;
- (b) unlawful or contrary to public policy; or

- (c) obsolete in that, by reason of changed circumstances, it fails to achieve the intention of the settlor and the spirit of the gift.

(25) Where any costs are incurred in connection with an application under subsection (22), the Court may make such order as it considers just as to payment of those costs, including payment out of the property of the trust.

(26) Where any costs are incurred by the enforcer of a trust in connection with enforcement, the Court may make such order as it considers just as to payment of those costs, including payment out of the property of the trust.

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(27) For the purposes of section 203 of the Criminal Code, 1997 property held upon the trusts of a purpose trust shall be regarded, as against the trustee and as against the enforcer of the trust, as belonging to others, and an intention on the part of any such person to defeat the trust shall be regarded as an intention to deprive others of their property.

(28) The trustee of a purpose trust who is a designated person shall keep in the Territory a documentary record of

- (a) the terms of the trust;
- (b) the identity of any other trustees and the enforcer of the trust;
- (c) all settlements of the property upon the trust and the identity of settlors;
- (d) the accounts of the trust; and
- (e) all distributions or applications of the trust property.

(29) This section shall only apply to trusts created on or after the date on which this section comes into force.”.

13. Section 89 of the principal Act is repealed and the following section is substituted:

Section 89 repealed and substituted.

“Construction of power to amend trust.

89. (1) In the absence of any contrary provisions in the trust instrument, an express power to amend in a trust instrument shall be construed as a power to vary all or any of its terms, including terms implied by law.

(2) In this section,

“vary” includes enlarge, add to, replace, remove, and restrict;

“terms” means terms of any description whatsoever, and in particular, but without limitation, terms declaring trusts and terms conferring powers whether dispositive or administrative; and

“power to amend” includes any express provision, howsoever worded, contained in the trust instrument indicating that the trust or the trust instrument may be varied, amended or modified by the trustees or any other person.

(3) This section applies to any trust, whether created before, on or after the date on which this section comes into force.”.

14. Section 92 of the principal Act is repealed and the following section is substituted:

Section 92 repealed and substituted.

“Trust duty.

92. (1) In this section,

“authorised person”, for the purposes of a trust to which a chargeable instrument relates, means

- (a) the settlor of the trust;
- (b) a trustee of the trust;
- (c) any person who has executed the chargeable instrument on behalf of a corporate trustee of the trust;
- (d) any person duly authorised to execute documents on behalf of a corporate trustee of the trust;

- (e) any beneficiary or person capable of benefiting from the trust;
- (f) any person authorised or appointed by any of the persons described in paragraphs (a) to (e) to cancel the revenue or postage stamp referred to in subsection (3)(a);
- (g) a barrister, solicitor, attorney, advocate or lawyer acting for any of the persons described in paragraphs (a) to (f) who is admitted to practise in any jurisdiction other than the Territory; or
- (h) a barrister or solicitor who is admitted to practise in the Territory;

“chargeable instrument” means an instrument in writing executed on or after the date on which this section comes into force, which is either

- (a) an instrument declaring or evidencing a trust of which the proper law is, immediately following the creation of the trust, the law of the Territory, or
- (b) an instrument changing the proper law of a trust to the law of the Territory,

but which is not

- (i) a will or codicil;
- (ii) an instrument creating or recording a bare trust;
- (iii) an instrument creating or recording a trust which is exclusively for charitable purposes;
- (iv) an instrument executed in exercise of a power vested in a trustee or any other person conferred or reserved by the terms of a trust; or
- (v) an instrument directing or declaring that further property is to be held upon the trusts of an existing trust;

“trust duty” means the duty referred to in subsection (2).

(2) Every chargeable instrument shall be liable to trust duty in the sum of one hundred dollars.

(3) Subject to subsection (4), trust duty shall be deemed to have been duly paid on a chargeable instrument only when within three months of the date of the instrument

- (a) a revenue or postage stamp of the Territory for one hundred dollars is affixed to the chargeable instrument; and
- (b) an authorised person has cancelled the revenue or postage stamp referred to in paragraph (a) by writing on or across it his name and the date on which his name has been so written on or across it.

(4) Where, in relation to a trust, two or more instruments are chargeable instruments, trust duty shall be deemed to have been paid on each of those instruments if it is deemed to have been duly paid, by virtue of a stamp affixed and cancelled in accordance with subsection (3), on any one of them.

(5) Where trust duty is not deemed to have been duly paid on a chargeable instrument in accordance with the provisions of this section, that instrument (and, in the case of a chargeable instrument changing the proper law of a trust to the law of the Territory, any instrument declaring or evidencing the trust to which such chargeable instrument relates) may not be pleaded or given in evidence or admitted to be good, useful or available in law or equity in civil proceedings unless, following the payment in the manner described in subsection (7), of

- (a) a penalty in the sum of two hundred dollars for each calendar year or part thereof that shall have elapsed from the creation of the trust to which the instrument relates or the date upon which its proper law became the law of the Territory, as the case may be, and
- (b) the sum of one hundred dollars (hereinafter in this section called “late duty”),

the Court by order at its discretion so directs.

(6) The provisions of subsection (5) shall not affect any rights to plead or give in evidence or admit to be good, useful or available in criminal proceedings any chargeable instrument or other document.

(7) The penalty referred to in subsection (5)(a) and the late duty shall be paid by affixing to the chargeable instrument a revenue or postage stamp of the Territory for the amount of the penalty and the late duty on or across which shall be written by any person, the date upon which the stamp is affixed to the instrument.

(8) No chargeable instrument or other document which is liable to trust duty, the penalty referred to in subsection (5)(a) or the late duty shall be produced to the Treasury, Post Office or other public body for the purposes of payment of such trust duty, penalty or late duty.”.

Section 93 amended.

15. Section 93 of the principal Act is amended by inserting before the word “Schedule” occurring in the marginal note and in subsection (1), the word “Second”.

Parts X and XI and First Schedule inserted.

16. The principal Act is amended by inserting after section 93, the following Parts and Schedule:

**“PART X
TRUSTEES AND DEALINGS
WITH THIRD PARTIES**

“Definitions.

94. (1) In this Part

“contract” includes a warranty, undertaking, covenant and any other legal commitment;

“transaction” includes a contract;

“trust fund”, in relation to a trust, means the property for the time being subject to the trust.

(2) In this Part, references, in relation to a power, to requirements for its exercise are references solely to requirements for the exercise of the power, including, in particular, requirements for consent, expressly laid down by the terms of the power.

Transactions deemed to be properly entered into with trustees.

95. (1) For the purposes of this Part, where a person (“the third party”) enters into a transaction with a trustee, the transaction shall be deemed to be properly entered into by the trustee if the condition stated in subsection (2) is satisfied.

(2) The condition referred to in subsection (1) is that when entering into the transaction it appears to the third party after reasonable enquiry that

- (a) the trustee has power, conferred by the terms of the trust or by law, to enter into a transaction of the kind in question; and
- (b) if there are any requirements for exercise of that power, the trustee has complied with them.

(3) Satisfaction of the condition in subsection (2) shall not require the third party to make enquiry as to whether, in the particular case, the exercise of the power referred to in subsection 2(a) would be in breach of any duty of the trustee, apart from any duty to comply with any requirements for its exercise.

(4) Subsection (1) shall not apply in construing the provisions of sections 97(3) and (4) and 98(2).

(5) Subsection (1) shall not apply otherwise than for the purposes of this Part, and in particular shall not affect a trustee’s obligation to make restitution or pay compensation if he has acted improperly.

Protection of persons dealing with trustees.

96. (1) Where a person (“the third party”) enters into a transaction with a trustee of a trust and that transaction has been properly entered into by the trustee, the provisions of subsections (2) and (3) shall apply, except to the extent that the transaction otherwise provides.

(2) Property acquired by the third party in or by virtue of the transaction shall be taken free and discharged from the trust.

(3) The third party shall not be concerned to see that property acquired by the trustee from the third party in or by virtue of the transaction is properly applied.

(4) Subsections (1) to (3) shall not prejudice any other right or claim of the third party in relation to the transaction.

Optional provision concerning liability of trustees.

97. (1) This section applies to a trust where the terms of the trust expressly so provide.

(2) Where this section applies to a trust, the provisions of subsections (3) and (4) shall have effect.

(3) Except as otherwise provided in the contract, a trustee of the trust shall not be personally liable under or by virtue of a contract with any party properly entered into by the trustee in the trustee's fiduciary capacity in the course of administering the trust if the trustee disclosed in the contract the fiduciary capacity, or if the party was otherwise aware of that capacity.

(4) A claim based on

- (a) a contract entered into by a trustee of the trust,
- (b) an obligation arising from ownership or control of trust property, or
- (c) a tort committed in the course of administering the trust,

may be asserted by a party in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim, and so that the claimant shall be entitled to satisfaction out of the trust fund directly rather than by way of subrogation to any right of indemnity of the trustee.

Limitation of trustee's personal contractual liability.

98. (1) Where section 97 does not apply to a trust, this section shall apply to it.

(2) Subject to subsection (3), where, in a contract properly entered into by a trustee, the trustee discloses his fiduciary capacity, or the other party was otherwise aware of that capacity, the trustee is personally liable for any sum payable under the contract only to the extent of the value of the trust fund when the payment falls due.

(3) When computing the value of the trust fund for the purposes of subsection (2), the fund shall be treated as still including any property which, since the contract was entered into, has been distributed.

(4) Subsections (2) and (3) shall have effect subject to any contrary provision in the contract.

(5) For the purposes of subsection (3), property shall be taken to have been distributed if it has ceased to be subject to the trust otherwise than on a disposal in good faith for valuable consideration in the management or administration of trust property.

Protection from tortious liability.

99. A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of any law relating to protection of the environment, only if the trustee is personally at fault.

Provisions relating to the right of subrogation.

100. (1) Subject to the terms of the trust and without prejudice to section 97 where applicable,

- (a) where a trustee of a trust has incurred a liability in favour of another party (“the third party”) under or by virtue of a contract properly entered into by the trustee, the trustee shall have a right of indemnity in relation to that liability against the trust fund and against distributed property or its traceable product, to which right the third party shall be subrogated; and
- (b) in computing the amount of the indemnity any indebtedness of the trustee shall be disregarded.

(2) If the contract is deemed, by virtue of section 95, to be properly entered into when in fact it was entered into without the requisite power or without compliance with any requirements for its exercise or otherwise in breach of duty, the trustee shall be liable to compensate the trust fund for any amount to which the right of subrogation applies by virtue of subsection (1).

(3) The disregarding of any indebtedness of the trustee under subsection (1)(b) shall be solely for the purpose of establishing the extent of the third party’s right of subrogation, and shall not eliminate or otherwise affect that indebtedness.

(4) For the purposes of this section, indebtedness of a trustee includes all liability, quantified or not, of the trustee to make restitution or pay compensation to the trust fund, including the liability specified in subsection (2).

(5) Rights of indemnity conferred by this section,

(a) shall not prejudice any rights of indemnity or reimbursement to which, apart from this section, a trustee would be entitled,

(b) shall subsist notwithstanding any purported waiver or exclusion, in whole or in part, by the trustee.

(6) For the purposes of subsection (1), property shall be taken to have been distributed if, since the contract was entered into, it has ceased to be subject to the trust otherwise than on a disposal in good faith for valuable consideration in the management or administration of trust property.

Optional power to vary trust for protection of creditors.

101. (1) This section applies to a trust where the terms of the trust expressly so provide.

(2) Where this section applies to a trust, subsections (3) to (6) shall have effect.

(3) Where a person (“the lender”) has lent money to a trustee of the trust, whether on security or not, that trustee or any trustee for the time being in office may, where so requested by the lender for the lender’s protection, by declaration in writing, to such extent and in such manner as the trustee thinks fit, restrict, or impose conditions on the exercise of, any of the following:

(a) powers of investment and other powers in the management and administration of trust property;

(b) rights of beneficiaries, including objects of powers, to actual receipt of trust property to which they have or may become entitled;

(c) powers relating to the appointment, retirement or removal of trustees.

(4) A declaration pursuant to subsection (3)

(a) shall not be made by a trustee unless he considers it to be compatible with his equitable duties under the trust in relation to its beneficiaries;

(b) shall not affect any power of the Court.

(5) A restriction or condition made or imposed under a declaration pursuant to subsection (3) may subsist only during such time or times as there is a liability for money lent under or by virtue of a contract properly entered into by a trustee of the trust.

(6) If, and to the extent that, a trust is for purposes, the reference in subsection (4)(a) to a trust's beneficiaries shall be taken to include a reference to those purposes.

Optional
power to
create charges.

102. (1) This section applies to a trust where the terms of the trust expressly so provide.

(2) Where this section applies to a trust, subsections (3) to (12) shall have effect.

(3) A trustee of the trust may grant security in accordance with this section in favour of a person (referred to in this section as a "third party") acting in good faith and for value in relation to liabilities to that third party incurred by the trustee under or by virtue of a contract properly entered into by the trustee.

(4) The grant of security may take the form of a fixed legal or equitable mortgage or charge over all or any of the property subject to the trust, or of a right in equity in accordance with subsection (5).

(5) A trustee may by writing grant a third party the right in equity, which shall be enforceable as such, to require the trustee to discharge liabilities to that third party out of the trust fund, or some part of it, and a right so granted is referred to in this section as a "trustee statutory charge".

(6) A trustee statutory charge shall, except to the extent otherwise agreed by the parties concerned, have priority over

(a) rights of persons under the terms of the trust,

- (b) obligations under the trust to apply property for any purpose,
- (c) trustees' rights of indemnity against the trust fund,
- (d) creditors' claims against the trust fund not secured by any fixed charge or right in the nature of a fixed security over any trust property, and
- (e) any trustee statutory charge entered into at a later time,

but shall be subject to any fixed charge or right in the nature of a fixed security over any trust property, and subject to any trustee statutory charge entered into at an earlier time.

(7) Nothing in subsection (6) shall affect the rights of a person claiming under a floating security created over property subject to a trust prior to its becoming so subject.

(8) A person receiving any trust property, otherwise than on a disposal by a trustee for value in course of management or administration of the trust fund, shall take it subject to any subsisting trustee statutory charge, but without prejudice to any claim of a third party against a trustee for distributing property before the charge has been satisfied.

(9) A security granted pursuant to subsection (3) may be on such terms and conditions as the trustee thinks fit.

(10) Subject to the terms of the charge, the trustee for the time being of a trust shall pay due regard, in the execution, management and administration of the trust, to the interest of any person entitled to the benefit of a trustee statutory charge.

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(11) The Bills of Sale Act shall have no application to a trustee statutory charge.

(12) The powers conferred by this section shall be in addition to any powers to grant security conferred by the trust instrument or by any other provision of law.

Prohibition of amendment of applied sections.

103. This Part does not permit the application of section 97, 101 or 102 to a trust other than in the terms of the relevant section.

Application of Part.

104. This Part shall apply to trusts created on or after the date on which this Part comes into force.

PART XI CHARITIES

Definitions.

105. (1) In this Part,

“charitable company” means a charity which is a company or other body corporate;

“charity trustees” means the persons having the general control and management of the administration of charity;

“gross income”, in relation to a charity, means its gross recorded income from all sources including property which is held and administered by or on behalf of a charity for any special purposes of the charity, and is so held and administered on separate trusts relating only to that property; and

“trusts”, in relation to a charity, means the provisions establishing it as a charity and regulating its purposes and administration, whether those provisions take effect by way of a trust or not.

(2) In this Part, the expression “charity” does not include any ecclesiastical corporation or any trust of property for purposes for which the property has been consecrated.

Occasions for applying property cy-pres.

106. (1) Subject to subsection (2), the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-près shall be as follows:

- (a) where the original purposes, in whole or in part,
 - (i) have been as far as may be fulfilled;
or

- (ii) cannot be carried out generally or according to the directions given and to the spirit of the gift; or
- (b) where the original purposes provide a use for part only of the property available by virtue of the gift; or
- (c) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the gift, be made applicable to common purposes; or
- (d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the spirit of the gift, or to be practical in administering the gift; or
- (e) where the original purposes, in whole or in part, have, since they were laid down,
 - (i) been adequately provided for by other means; or
 - (ii) ceased, in law, to be charitable on the grounds that they have become useless or harmful to the community or for other reasons; or
 - (iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift.

(2) Subsection (1) shall not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied cy-près except insofar as those conditions required a failure of the original purposes.

(3) References in subsections (1) and (2) to the original purposes of a gift shall be construed, where the application of the property given has been altered or regulated by a scheme or otherwise, as referring to the purposes for which the property is for the time being applicable.

(4) It is hereby declared that a trust for charitable purposes places a trustee under a duty, where the case permits and requires the property or some part of it to be applied cy-près, to secure its effective use for charity by taking steps to enable it to be so applied.

Power for
the Court to
authorise
dealings with
charity
property, etc.

107. (1) Subject to the provisions of this section, where it appears to the Court that any action proposed or contemplated in the administration of a charity is expedient in the interests of the charity, it may by order authorise that action, whether or not it would otherwise be within the powers exercisable by the charity trustees in the administration of the charity to do so, and anything done under the authority of such an order shall be deemed to be properly done in the exercise of those powers.

(2) An order under this section may be made so as to authorise a particular transaction, compromise or the like, or a particular application of property, or so as to give more general authority, and without prejudice to the generality of subsection (1), may authorise a charity to use common premises, or employ a common staff, or otherwise combine for any purpose of administration, with any other charity.

(3) An order under this section may give directions as to the manner in which any expenditure is to be borne and as to other matters connected with or arising out of the action thereby authorised, and where anything is done in pursuance of an authority given by any such order, any directions given in connection therewith shall be binding on the charity trustees for the time being as if contained in the trusts of charity, but any such directions may on the application of the charity be modified or superseded by a further order.

(4) Without prejudice to the generality of subsection (3), the directions which may be given by an order under this section may in particular include directions for

- (a) meeting any expenditure out of a specified fund;

- (b) charging any expenditure to capital or to income;
- (c) requiring expenditure charged to capital to be recouped out of income within a specified period;
- (d) restricting the costs to be incurred at the expense of the charity; or
- (e) the investment of moneys arising from any transaction.

(5) No order under this section shall authorise the doing of any act expressly prohibited by any enactment or by the trusts of the charity, nor shall it extend or alter the purposes of the charity.

Power to spend capital.

108. (1) This section applies to a charity if

- (a) it has a permanent endowment which does not consist of, or comprise, any land;
- (b) its gross income in the twelve months period ending on the date on which the resolution referred to in subsection (2) is passed did not exceed two thousand, five hundred dollars or such greater sum as the Governor in Council may, by Order, specify;
- (c) there is no express provision in the trust instrument to the effect that this section does not apply to the charity; and
- (d) it is not a charitable company.

(2) Where the charity trustees of a charity to which this section applies are of the opinion that the property of the charity is too small, in relation to its purposes, for any useful purpose to be achieved by the expenditure of income alone or that its purposes can be more effectively served by the expenditure of all or any part of its capital, they may resolve for the purposes of this section that the charity ought to be freed from the restrictions with respect to expenditure of capital to which its permanent endowment is subject.

(3) Any resolution passed under subsection (2) shall be passed by a majority of not less than two-thirds of such charity trustees as vote on the resolution.

(4) Where charity trustees pass a resolution under subsection (2), they shall

- (a) give public notice of the resolution in such manner as they think reasonable in the circumstances; and
- (b) send a copy of the resolution to the Attorney General, together with a statement of their reasons for passing it.

(5) The Attorney General may, when considering the resolution, require the charity trustees to provide additional information or explanation

- (a) as to the circumstances in and by reference to which they have determined to act under this section, or
- (b) relating to their compliance with this section in connection with the resolution,

and the Attorney General shall take into account any representations made to him by persons appearing to him to be interested in the charity where those representations are made within the period of six weeks beginning with the date when the Attorney General receives a copy of the resolution by virtue of subsection (4)(b).

(6) Where the Attorney General has so received a copy of a resolution from any charity trustees and it appears to him that the trustees have complied with this section in connection with the resolution, the Attorney General shall, within the period of three months beginning with the date when he receives the copy of the resolution, notify the trustees, in writing, that he either

- (a) concurs with the resolution; or
- (b) does not concur with the resolution.

(7) Where the Attorney General notifies the trustees of his concurrence with the resolution under subsection (6)(a), the charity trustees shall have, as from such date as may be specified in the notification, power by virtue of this section to expend any property of the charity without regard to any such restrictions as are mentioned in subsection (2).

(8) An Order under subsection (1)(b) may apply either generally in relation to all charities or in relation to charities specified in the Order.

(9) A charity shall be deemed for the purposes of this section to have a permanent endowment unless all property held for the purposes of the charity may be expended for those purposes without distinction between capital and income, and in this section “permanent endowment” means, in relation to any charity, property held subject to a restriction on its being expended for the purposes of the charity.

Application
of Part.

109. This Part applies in relation to trusts whether created before, on or after the date on which this Part comes into force.

FIRST SCHEDULE

(Section 83A)

Type of Intangible property	Law to determine questions of essential and formal validity and capacity
1. Shares in a body corporate.	The law of the State of incorporation (and in the case of a corporate body whose place of incorporation has changed, the law of the State of incorporation at the time of the disposition)

Type of Intangible property	Law to determine questions of essential and formal validity and capacity
<p>2. Rights of all descriptions arising from a contract (not being rights attaching to shares in a body corporate).</p> <p>This category includes, in particular</p> <ul style="list-style-type: none"> (a) rights to subsisting contractual debts; (b) rights to payments under a contract that might fall due in the future; (c) rights, subsisting or future, under policies of insurance or assurance. 	<p>The law governing the essential validity of the contract</p>
<p>3. Rights to non-contractual debts.</p>	<p>The law under which the debt was created.</p>
<p>4. Interests in trusts and other equitable interests.</p>	<p>(A) As regards disposability, the law governing the essential validity of the trust or interest.</p> <p>(B) As regards the disposition itself, the law of the State in which the equitable interest is situated.</p>

Type of Intangible property	Law to determine questions of essential and formal validity and capacity
5. Patents, trademarks, designs, and similar rights, required to be deposited or registered.	The law of the State in which the deposit or registration has been applied for, or has taken place or is under the terms of an international convention deemed to have taken place.
6. Intellectual property not falling within item 5.	The law under which the property came into existence.
7. Claims in tort.	The law of the State in which the tort occurred.”.

Schedule amended.

17. The Schedule to the principal Act is amended
- (a) by deleting the heading “SCHEDULE” and substituting the heading “SECOND SCHEDULE”;
 - (b) in paragraph 4(d), by deleting the words “as if beneficially entitled thereto and without being restricted in any way by the office of trustee” and substituting the words “as if the Trustees were the absolute beneficial owners thereof”;
 - (c) in paragraph 4(n), by deleting the words “or arbitration” and substituting the words “for arbitration”;
 - (d) in paragraph 4(s), by deleting the word “convenient” and substituting the word “covenant”; and
 - (e) in paragraph 8, by deleting the words “to beneficiary” and substituting the words “no beneficiary”.

Passed by the Legislative Council this 30th day of September, 2003.

V. INEZ ARCHIBALD,
Speaker.

DENNISTON FRASER,
Clerk of the Legislative Council.