

# Foundations v Trusts (now the dust has settled)

Edward Bennett from Bedell looks at the pros and cons when using a trust or foundation to protect assets



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**B**efore the Foundations (Jersey) Law 2009 came into force in July 2009, several market commentators were predicting that the introduction of the Jersey foundation would result in the “death” of trusts. In part, these predictions arose from the thinking in some quarters that the foundation was intended to replace the trust notwithstanding that trusts have provided the back bone for Jersey’s modern finance industry.

Five years on, the dust has settled and it is clear that the anticipated tensions between foundations and trusts have simply not arisen - trusts are very much alive and kicking with foundations providing a complimentary wealth management

and planning vehicle. The two are very often found within the same overall wealth structure, meeting the specific objectives and requirements of the family for whom the structure was created.

The interplay between trusts and foundations has been brought into sharp focus by the evolving needs of wealthy families. As a consequence, it is becoming increasingly rare for families to place a substantial part of their wealth into just one type of wealth management vehicle out of which the professional administrator is required to take account of the potentially competing interests of the current and future generations when deciding what benefits if any can be provided to the family.

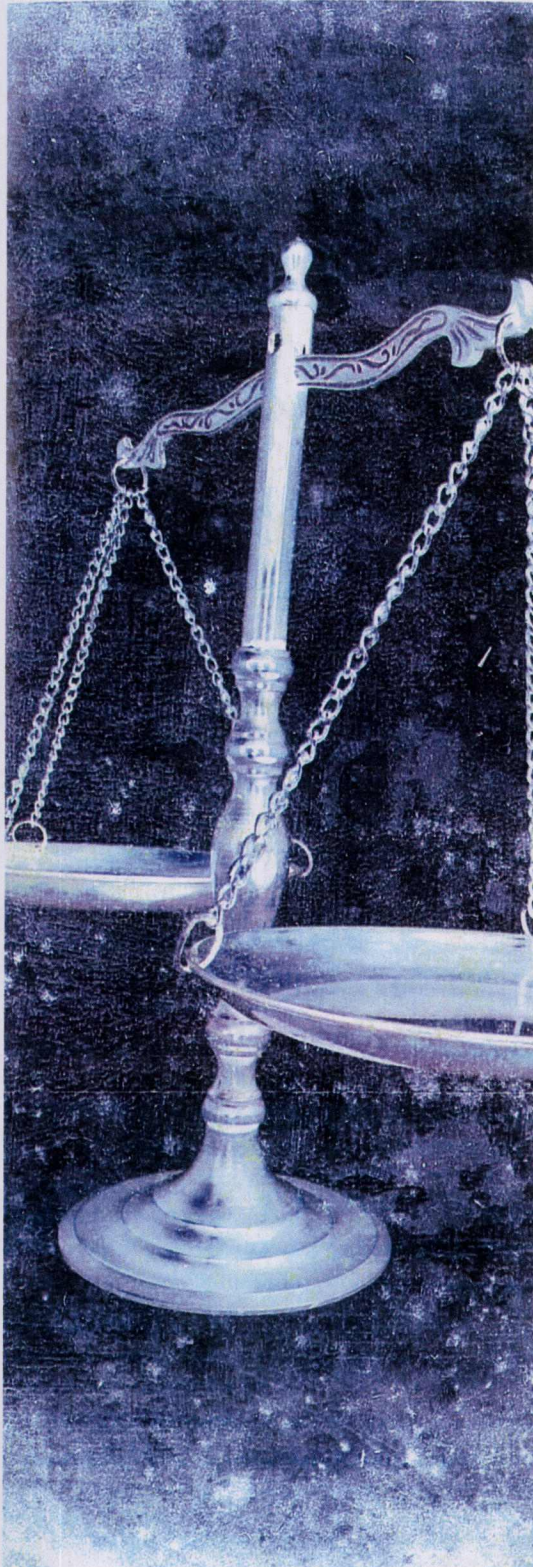
With the world shrinking as families increase their mobility, the wealth management industry has had to adapt from a “one size fits all” to a much more “pick and mix” approach with the emphasis on bespoke products being the order of the day. Today, wealth advisers need to take account of where family members are likely to be living or educated, the nature

of the assets, pre-nuptial agreements, philanthropic wishes and so on. These issues are real issues which need to be properly addressed and very often adopting a flexible approach holds the key which is when having trusts and foundations in your “toolkit” is of huge benefit.

Let’s look at some of these real issues in a little more detail.

## Education.

Many trusts contain express provisions enabling trustees to fund the education of beneficiaries. However, what happens if a beneficiary is educated in a jurisdiction where the payment of school fees by trustees could trigger foreign disclosure requirements concerning details of the funds out of which the fees are paid? It is unlikely that trustees would feel comfortable in disclosing details of the entire trust assets to foreign authorities especially if the school fees paid represent only a small portion of the trust assets and/or the beneficiary in question is only one of several beneficiaries whose interests could be prejudiced by such disclosure. Rather than putting in place a discretionary trust to hold the bulk of the family’s wealth out of which the trustees may pay school fees, a neater proposal could be to put in place a structure with the principal objective of paying for beneficiaries’ schooling and further education. The value of the funds of such structure could be limited to the annual anticipated fees but subject to a top up mechanism enabling additional funds to be added as fees and/or the number of participating beneficiaries increase. Accordingly, if a disclosure requirement were triggered then the disclosure would be limited to only the specific educational fund rather than the bulk of the family wealth. Either a trust or a foundation could



be put in place with each specifying the educational objectives – a trust could be formed fairly quickly and may be more suitable if the trust is intended to benefit a small closed class of beneficiaries over a relatively short period of time whereas a foundation could be better suited if the class of beneficiaries is open ended and intended to continue indefinitely.

### High risk assets.

A trust may be drafted with appropriate provisions enabling the holding of high risk assets, for example the holding of shares in a single company or the ownership of aircraft and yachts. Such provisions could specifically direct the trustees to hold such assets and exonerate the trustees from liability arising from such holdings but trustees may still need to consider their fiduciary responsibilities and whether or not diversification is required. A foundation can be incorporated without beneficiaries but with the sole object of holding such high risk assets and in so doing remove the fiduciary responsibility of those administering the foundation.

### Pre-nuptial agreements.

Although pre-nuptial agreements have now achieved a greater understanding and acceptance, practical difficulties may still arise if the assets which are subject to the agreement need to be extracted and shared between a divorcing couple. However, such extraction may have a material impact on the valuation especially if the asset in question is an investment designed to be held long term and its redistribution results in a termination penalty. A possible solution could be to place such asset in two parallel structures – one for the benefit of each spouse and each holding the relevant assets (in accordance with the pre-

nuptial agreement) for the principal benefit of the relevant spouse. Upon divorce, each couple will receive “their” structure in accordance with the pre-nuptial agreement but without requiring the potentially expensive unravelling and redistribution of existing investments. In such situation either a trust or a foundation could be used – the type of asset and anticipated value is likely to influence which structure is chosen.

### Philanthropy.

This is a topic of increasing importance for wealthy families. In Jersey, the two principal structures used for philanthropy are trusts and foundations. So far as trusts are concerned, there is a choice of either a charitable trust, which must be exclusively charitable, or a non-charitable purpose trust which can be used in circumstances where particular purposes, whilst philanthropic, may nevertheless not be capable of being categorised as strictly charitable for example trusts for humanitarian, ecological or research purposes. A foundation can be drafted to accommodate extremely flexible philanthropic objects which could be charitable or non-charitable or both charitable and non-charitable. The Jersey foundation can therefore be an ideal vehicle to use in circumstances where a family is keen to pursue particular philanthropic initiatives, some or all of which may not be strictly charitable.

The above examples illustrate that when deciding on whether or not to use a trust or a foundation all relevant circumstances will need to be taken into consideration and given appropriate weight. However, it is certainly clear that there is plenty of room for trusts and foundations to exist alongside each other. ■