



Heart foundation

WHILE CHARITABLE AND NON-CHARITABLE PURPOSE TRUSTS IN JERSEY HAVE BEEN USED FOR PHILANTHROPY, THERE'S A GROWING INTEREST IN FOUNDATIONS, SAYS ZILLAH HOWARD

Following the introduction of the *Foundations (Jersey) Law 2009* (the *Foundations Law*), the Jersey foundation has proved to be a popular choice for giving. Its appealing flexibility means it can allow an individual to pursue a particular cause of their choosing, concentrating on narrowly defined goals or on broad objectives as they choose, without being constrained by concerns as to whether or not the technical definitions of charity are satisfied. It is also possible to combine objects for benevolent purposes with objects for the benefit of individuals within the framework of one foundation.

As well as this flexibility in relation to the choice of objects, there are other features that combine to make the Jersey foundation an attractive choice for philanthropy, such as:

Incorporated vehicle. A foundation is an incorporated vehicle that is brought into existence following the completion of a registration process.

Name. A foundation's name can be chosen freely, save that it must not be misleading or otherwise undesirable, and must end with the word 'foundation' or the foreign language equivalent.

Legal personality. A foundation is a separate legal entity that holds assets, and enters into contracts, in its own name.

Public record. A foundation's existence can be determined as a matter of public record by conducting a search of the register of foundations. The entry of a foundation's name in the register is evidence that the foundation has been incorporated and that the requirements of the *Foundations Law* in that regard have been complied with.

The *Foundations Law* prescribes information that must be included in a foundation's two constitutional documents: its charter and regulations. The charter is registered and open to public inspection, whereas the regulations are not registered and are therefore private. However, anything required to appear in the regulations can instead be included in the charter (and so be open to public inspection if that is desired) and material can be added to both documents to accommodate particular structuring objectives.

No ultra vires. The doctrine of *ultra vires* does not apply and a foundation can exercise all the functions of a corporate body, save only that it cannot directly (a) acquire, hold or dispose of immovable property in Jersey, or (b) engage in commercial trading that is

not incidental to the attainment of its objects. However, both of these restrictions can be overcome by interposing an underlying company, so that the relevant activity is not undertaken directly by the foundation.

Orphan vehicle. A foundation does not have shareholders or any other form of owner.

Indefinite existence. A foundation can continue to exist for an indefinite period.

ONGOING INVOLVEMENT

For those keen to have an ongoing role in relation to their giving initiative, the Jersey foundation offers several options:

Retention of powers. The Foundations Law allows the founder (the person on whose instructions a foundation is incorporated) to have such rights in respect of the foundation and its assets as the foundation's constitutional documents provide. One option could therefore be for a philanthropist to have an ongoing role in their personal capacity as the founder. They may, for example, have rights in relation to future amendments to the constitutional documents, or the right to apply for the foundation to be wound up.

Council membership. A foundation has a council, which is similar to a company's board of directors. The council's function is to administer the foundation's assets and to carry out its objects. The council can have one or more members, with one member being a 'qualified person' with the appropriate regulatory licence: this member is known as the qualified member.

Council members owe duties to the foundation (similar to the statutory duties of a Jersey company's directors) and are required to act honestly and in good faith, with a view to the foundation's best interests, and to exercise the care, due diligence and skill that reasonably prudent persons would exercise in comparable circumstances. So, rather than having a personal role, another option is for a philanthropist to become a council member. This may, for example, allow them to participate as a member of a giving committee, distributing the foundation's assets.

'BECOMING A COUNCIL MEMBER MAY ALLOW A PHILANTHROPIST TO PARTICIPATE AS A MEMBER OF A GIVING COMMITTEE'



PUT TO GOOD USE

The fictional case of Ms Jones illustrates how a Jersey foundation may be used for philanthropy. Ms Jones is a successful entrepreneur who has created substantial wealth during her career. She would like to devote some of her wealth to a particular cause that she feels very strongly about: the encouragement of young people from underprivileged backgrounds to succeed in business and to become entrepreneurs themselves.

As well as providing funds for this cause, Ms Jones would like to have an ongoing role, so she can use the skills that have enabled her to succeed in business in this new venture and thereby help to ensure that it achieves its objectives to the fullest extent possible.

Having taken legal and tax advice, Ms Jones has decided to incorporate a Jersey foundation, to be called the Motivation Foundation. The charter will state, as the foundation's objects, the particular purposes that Ms Jones is keen to pursue.

Following the incorporation of the foundation, Ms Jones will endow it with initial funds. The foundation will be capable

of having an indefinite existence and she is hoping that, in time, those who are helped by the foundation may themselves endow the foundation so that it can continue long into the future. A provision to allow for future endowments will therefore be included in the charter.

Ms Jones has considered her options for ongoing involvement and has decided that, in conjunction with her advisors, a role as a council member would allow her to use her business skills and experience in relation to the investment of the foundation's assets and their use in the pursuit of her chosen cause. A trusted advisor is to be appointed to act as the guardian.

While Ms Jones is very happy that the foundation will be a matter of public record, she nevertheless wishes to preserve her anonymity in relation to this giving initiative as far as possible. It is therefore helpful to know that her involvement as a council member will not be filed with the registrar of foundations, albeit the name of the professional services provider, which will act as the qualified member, will be publicly available.

Guardian. Yet another possibility is for a philanthropist to become the guardian. Every Jersey foundation must have a guardian to take such steps as are reasonable in all the circumstances to ensure that the council carries out its functions. The founder and the qualified member (but not others) can be both a council member and the guardian. In addition to this general monitoring role, the guardian can be empowered to approve or disapprove any specified actions of the council, or (in certain circumstances) to sanction or authorise any action taken or to be taken by the council that would not otherwise be permitted by the constitutional documents.

So, as the third anniversary of the Foundations Law approaches, it is clear

the Jersey foundation is proving to be an attractive structure for those interested in philanthropy. The law's flexibility means a foundation can be tailored to meet individual requirements, with objects reflecting the philanthropist's particular giving initiative, and with opportunities for ongoing involvement as the individual philanthropist desires.

Zillah Howard TEP is a Partner at Bedell Cristin Jersey Partnership in St Helier, Jersey

