

# Guernsey Private Trust Foundations

Last reviewed: January 2018

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## Introduction

For many years now, clients have used private trust companies (a **PTC**) to act as trustee of one or more related trusts. Following the introduction of foundations into Guernsey law pursuant to the Foundations (Guernsey) Law, 2012 (the **Foundations Law**), an alternative to PTCs has developed in the form of private trust foundations (a **PTF**).

This guide provides a brief summary on Guernsey foundations and their use as trustee of Guernsey law trusts. For a guide on foundations, please see here. This guide makes comparisons to PTCs which are separately dealt with in our guide on PTCs in Guernsey, for which see here.

## Guernsey foundations – a summary

The Foundations Law provides for the establishment of foundations in Guernsey. A foundation is a legal person which comes into existence when registered with the Guernsey Registry. A foundation therefore can sue and be sued in its own name.

## Constitution

The constitution of a foundation is made up of a charter and rules (the **Constitution**) (similar to the memorandum and articles of incorporation of a company).

## Purpose

A foundation must have a purpose but need not have beneficiaries. A foundation may be established for any purpose, save that it cannot carry out any commercial activities except those necessary for, and ancillary or incidental to, its purpose.

## Foundation officials

A foundation must have a founder who provides the initial endowment to the foundation and must (either personally or through an agent) sign the charter and rules. The founder may be a councillor or the guardian (but not both) and may also be a beneficiary.

A Guernsey foundation acts through a council, which is akin to the board of directors of a company.

Where a foundation is established for a purpose and not to benefit beneficiaries, a guardian must be appointed who is responsible for ensuring that the council acts in accordance with the foundation's purposes.

## Licensed fiduciary or resident agent

There is no requirement for a Guernsey licensed fiduciary to be appointed as a member of the council or a guardian. However, where no licensed fiduciary is either on the council or holding the office of guardian, a resident agent in Guernsey must be appointed to retain certain records within the jurisdiction. The resident agent must be a licensed fiduciary in Guernsey.

## Ownership

A foundation is similar to a company in that it has separate legal personality but, unlike a company, it has no shareholders. The advantage to a foundation is that, unlike with a company, there is no need for anyone to own the foundation as it is an orphan entity.

## PTFs

### Purpose

The purpose of a PTF is to act as trustee of one or a number of related trusts (ie one family trust or a group with a shared common interest).

### Regulation

Whether or not a Guernsey foundation will require a full fiduciary licence under the Regulation of Fiduciaries Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000 (the **Fiduciaries Law**) is a highly fact specific question and appropriate advice would need to be taken for each case. Broadly speaking, a licence is required where the PTF acts as trustee *by way of business* – and the Fiduciaries Law stipulates that where any fee is received for acting as trustee, those trustee services are being performed by way of business. In such circumstances, it may be possible to apply to the Guernsey Financial Services Commission (**GFSC**) for an exemption from the requirement to have a full fiduciary licence, provided that the criteria set out by the GFSC are met.

If the PTF does not act as trustee *by way of business*, then it would not be required to hold a fiduciary licence nor to apply for an exemption from the Fiduciaries Law.

### Ownership

Unlike a PTC which will most often be a company limited by shares and which must of necessity have a shareholder, a foundation does not require an owner. A PTF can therefore be a useful alternative to a PTC as it does not require an additional holding structure, thus reducing costs and complexity.

### Founder involvement

One of the main reasons for the use of a PTF is that the council can be made up of persons chosen by the founder and settlor of the trusts, such as family, friends and advisers.

PTFs can therefore allow the settlor to retain a greater degree of involvement and control when compared to appointing a third party trustee.

A founder can also be involved himself in the foundation, acting as either councillor or guardian and/or reserving to himself certain powers. These include the power to:

- amend the charter and rules
- revoke the charter and rules
- terminate the foundation.

In addition, there is no restriction in the Foundations Law preventing the reservation of powers to the guardian. A guardian can either be granted veto powers in relation to certain actions of the PTF or can be given power to give directions. Those powers would of course relate to the operation of the PTF itself, rather than the underlying trusts of which it acts as trustee.

### Public information

In setting up a PTF, the foundation officials (and others) should be aware that certain limited information will be publicly available in Part A of the foundations register. This information is limited to:

- the name and registered number of the foundation
- the name and address of the councillors
- the name and address of any guardian
- the details of the registered office.

### Trustee obligations

A Guernsey trustee has a number of core duties, both under the Trusts (Guernsey) Law, 2007 (the **Trusts Law**) and under common law (although a significant number of these duties were codified into the Trusts Law).

A trustee has an overriding duty to observe the utmost good faith and to act *en bon père de famille* – as a prudent man of business. A trustee must act in the best interests of the beneficiaries at all times and must exercise the discretion conferred on him reasonably.

The duty to act in good faith and the duty to act *en bon pere de famille* apply to the trustees regardless of what the trust instrument says.

A trustee has other duties which relate more to the custody and investment of the trust fund, such as to preserve and enhance the trust fund. These duties in relation to investment, however, are to be read subject to the terms of the trust instrument.

The council will therefore need to ensure they manage the PTF in its role as trustee in accordance with the statutory and common law obligations of the trustee. It will be for the guardian to ensure that the purpose of the PTF is being fulfilled.

However, it will remain for the beneficiaries of a trust to hold accountable the PTF in its role as trustee, as is the case for any other trustee whether an individual or body corporate or otherwise.

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## Contacts



**Matthew Guthrie**  
**Partner, Guernsey**  
+44 1481 731 424  
matthew.guthrie@mourantozannes.com



**Catherine Moore**  
**Associate, Guernsey**  
+44 1481 731 551  
catherine.moore@mourantozannes.com



**Sophie Denman**  
**Associate, Guernsey**  
+44 1481 731 440  
sophie.denman@mourantozannes.com

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