

## BOOK REVIEW

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### **Drafting Trusts and Will Trusts in the Channel Islands and Drafting Cayman Islands Trusts<sup>2</sup>**

By James Kessler QC

Two new volumes in the trust drafting series have recently appeared on the scene:

Drafting Trusts and Will Trusts in the Channel Islands by James Kessler and Paul Matthams and Drafting Cayman Islands Trusts by James Kessler and Tony Pursall. As we would expect from these authors, both books are well written, easy to read and accessible to both lawyers and non-lawyers.

The Channel Islands volume begins with a brief explanation of the emergence of trust law in Jersey and Guernsey, its evolution from Norman law and the extent to which it is influenced by English judgments. Surprisingly, it was not until 1984 that trusts were recognised by statute in Jersey and in 1989 by Guernsey statute.

The Cayman Islands volume gives an introduction dealing with the practical difficulties of obtaining instructions when it is frequently not convenient to deal directly with the settlor and gives useful advice, particularly regarding the client care letter. Only an attorney-at-law admitted to practise in the Cayman Islands is normally able to draft any instrument relating to movable and immovable property, with specific exceptions.

Both books have a chapter dealing with style, in which the case for plain English is clearly and persuasively argued. Each book deals with beneficiaries, including valuable suggestions for dealing with the potential situation where a beneficiary makes an unfortunate marriage. It is interesting that, while illegitimate children are excluded as 'children' in the Channel Islands in the absence of provision to the contrary, since 2004 they have been included in Cayman. Protective or spendthrift trusts are permitted in the Channel Islands, although neither is defined in Jersey or

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<sup>2</sup> For details on how to order either volume, visit  
[http://www.kessler.co.uk/How\\_to\\_buy\\_books\\_by\\_James\\_Kessler.html](http://www.kessler.co.uk/How_to_buy_books_by_James_Kessler.html)

Guernsey statute. The Cayman Islands volume also acknowledges protective trusts, both books suggesting that a better form might be terminable 'at the trustees' discretion'.

Civil partners are not included in Channel Islands law and would therefore have to be specifically included if it were the intention to benefit them. They are not mentioned in the Cayman Islands work, so presumably the same would apply.

Appointment, liability, dismissal or retirement and control of trustees are discussed and the Channel Islands volume outlines the appointment of a protector and his powers and duties. The Cayman Islands version also discusses the protector and explains his role in a chapter devoted to protector and reserved powers trusts.

Assets most commonly settled on Cayman Island trust are shares and debt and the situations where Caymans law applies are outlined. Jersey law trusts are invalid to the extent that they purport to apply direct to land or 'immovable property in Jersey, so it is usual for land to be transferred to a company, the shares of which are held in trust.

Cayman law has a rule against perpetuities, where the maximum period is 150 years, considerably greater than in the UK. This does not apply to charitable trusts, pension funds or STAR trusts.

STAR trusts are unique to the Cayman Islands. They were introduced by the Special Trusts (Alternative Regime) Law 1997; this is now contained in Part VIII of the Trusts Law (2001 Revision). These flexible trusts, operating outside the normal trust regime, are fully explained in a chapter devoted to them.

Guernsey law has a trust period of 100 years, which applies only to private trusts, not charitable trusts. Jersey permits a trust of unlimited duration, following a change to its law in 2006.

Next come useful chapters on general provisions of a trust, drafting and understanding overriding powers, with emphasis on the use of modern English and exercising these powers, with plenty of examples for illustration. The necessity for settlor exclusion clauses is also discussed.

The chapter on administrative provisions adopts a no-nonsense approach in both books; the first few pages quickly discard unnecessary provisions and powers or void powers. The examination of the administrative provisions is slightly less detailed in the Channel Islands book, perhaps because this was the later of the two to be written.

The Channel Islands volume contains a short chapter on will trusts; both discuss charitable trusts. The use of trusts in commercial transactions and the advent of non-charitable purpose trusts in Jersey are also explained, as is the role of the enforcer.

The law and place of administration of trusts is the next topic addressed, followed by a chapter on restricting the rights of beneficiaries. Proposed solutions are a secret trust in the case of a Channel Islands will trust, or a STAR trust in the Cayman Islands.

Execution of wills and trust instruments (Channel Islands) and execution of trust instruments (Cayman Islands) follow, with timely warnings about failure to check drafts, reliance on word processors, natural decay and fraudulent alteration, along with good advice about checking that wills are still current.

Appointment and retirement of trustees is next. Surprisingly, ‘unlike the position in England and Wales, an instrument of appointment or retirement of trustees does not operate to convey to the new trustees any unregistered land in England and Wales, subject to the trust, and the right to any debt or other chose in action.’ Conversely, in the Cayman Islands, such deed of appointment does operate to convey the land or debt, but does not apply to mortgages, most leases or shares. It is also subject to stamp duty.

All this is in Part I!

Part II contains useful precedents and the accompanying CD contains even more.

These books are clearly and economically written in plain English, accessible not only to legal draftsmen, but also to those of us that content ourselves with instructing them.