

MEMORANDUM

Samoan Reserved Power Trusts

1. Reserved powers to a Settlor:

1.1 Samoan Trust Law says that a reservation of powers and rights to a Settlor (someone who creates a Trust) in a Trust does not invalidate that Trust provided that:-

- “(a) the trust is not a sham” (which it would only be in both the Settlor and Trustees do not intend it to be one but would like to deceive others into thinking that it is); or
- (b) “there is such an excessive reserve of powers to the settlor that the role of the trustee and the nature of the trust is compromised.”

1.2 Subject to paragraph 1.1, the Settlor can by Samoan Trust Law reserve to himself any interest in or rights over property which he will transfer to the Trust.

1.3 Subject to paragraph 1.1, Samoan Trust Law permits a settlor to reserve to himself or herself all or any of the following powers:-

- “(a) to revoke, vary or amend the trust or powers arising wholly or partly under it;
- (b) to advance, appoint, pay or apply income or capital of the trust property or to give directions for the making of any advancement, appointment, payment or application;
- (c) to act as, or give binding directions as to the appointment or removal of, a director or officer of any corporation wholly or partly owned by the trust;
- (d) to give binding directions to the trustee in connection with the purchase, retention, sale, management, lending, pledging or charging of the trust property or the exercise of any powers or rights arising from such property;
- (e) to appoint or remove any trustee, enforcer, protector or beneficiary;
- (f) to appoint or remove an investment manager or investment adviser;
- (g) to change the proper law of the trust;
- (h) to restrict the exercise of any powers or discretions of a trustee by requiring that the powers or discretions be exercisable only with the consent of the settlor or any other person specified in the trust.”

2. Reserved powers to a Protector:

2.1 A Protector is a “watchdog” for the Beneficiaries and Samoan Trust Law sets out clearly the role and duties of a Protector.

2.2 In particular, Samoan Trust Law provides that a Protector may be given any proactive power (a power exercisable by the Protector) or reactive power (a power exercisable by the trustee but only with the prior written consent of the Protector).

2.3 If the Trust does not provide otherwise, the Protector will have the following proactive default powers:-

- “(a) to remove and to appoint new or additional trustees;
- (b) to add any person as a beneficiary of the trust;
- (c) to remove any person as beneficiary of the trust;
- (d) to create any excluded person;
- (e) to change the proper law of the trust; and
- (f) to change the forum of administration of the trust.

3. Prescribed directions:

3.1 Many Trusts now need to provide any person with the power to give directions. Samoan Trust Law enables the power to give “prescribed directions” to be reserved in a Trust and that such power may be exercisable by all or any of the following persons:-

3.1.1 the Settlor; or

3.1.2 the Protector; or

3.1.3 “any person or persons (including the settlor and the protector) whether exercisable alone, personally, jointly by majority of persons or by reference to a casting vote or to persons in order of priority.”

As a result of what is set out in paragraphs 1 to 3 of this Memorandum, there is wide ability to create ongoing reserved power Trusts under Samoan Trust Law.

4. Protection:

4.1 Subject to paragraph 1.1 above, Samoan Trust Law provides that, if any of the powers mentioned in paragraph 1.3 above have been reserved to the Settlor, then a Trustee who exercises such a power is not acting in breach of trust and is not liable for the consequences of

so acting. This covers any delegation by the Settlor of the exercise of such a power to the Trustee.

4.2 Samoan Trust Law provides that the exercise of a power granted to a Protector under a Trust does not make that Protector a Trustee.

4.3 Samoan Trust Law provides that, if

4.3.1 either the consent of the Protector is required by the Trustee to the exercise of a power and that consent is properly given, or

4.3.2 the Trustee acts under a direction of the Settlor or Protector provided for and properly given under the Trust or a separate deed, and

4.3.3 in either case the Trustee acts in good faith

the Trustee is not liable for any loss directly or indirectly arising from any resulting act or omission.

4.4 If a Trust provides for prescribed directions, Samoan Trust Law provides that a Trustee is not

“(a) under a duty to preserve or enhance the value of the trust property; or

(b) under a duty to diversify the investments of the Trust, if prescribed directions provide otherwise; or

(c) liable for any loss in value to the trust property arising directly or indirectly as a result of the giving of prescribed directions.

4.5 Samoan Trust Law prevents the Trust from protecting a Trustee in the following circumstances:

4.5.1 A Trustee cannot be protected from liability for breach of trust arising from his own fraud, willful misconduct or gross negligence;

4.5.2 A term of a Trust which seeks to relieve a Trustee from breach of trust is unenforceable to the extent that it

“(a) relieves a trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(b) was inserted as a result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.”

4.6 There is provision for the Court to relieve a Trustee from liability if he has acted honestly and ought fairly to be excused.

4.7 If a Beneficiary instigates, requests or concurs in a breach of trust by the Trustee, then the Court can order that Beneficiary’s interest to be impounded to provide an indemnity to the Trustee.

4.8 A Beneficiary can consent to a breach of trust or release a Trustee from liability for a breach of trust or ratify of a breach of trust.

4.9 Samoan Trust Law seeks to extend the protection given to Trustees to Protectors and to Enforcers.

5. Conclusions:

Samoan Trust Law provides that:

5.1 subject to the proviso contained in paragraph 1.1 above, the widest possible powers can be reserved;

5.2 such powers can be reserved not only to a Settlor but also to a Protector and by “prescribed directions” to anyone in the widest of methods available; and

5.3 there is considerable protection available to a Trustee and Protector so acting.

6. Diagram:

There is a diagram of a Reserved Power Trust attached to this Memorandum.

NOTE: This Memorandum is provided for your assistance but you should always take professional advice before acting. Circumstances and needs differ considerably from one person or family to another.

This Memorandum was last updated on 30th July 2015