COMPARATIVE ANALYSIS BETWEEN THE CANADIAN TRUST AND THE PANAMANIAN FOUNDATION OF PRIVATE INTEREST

by

Frank Tedman

A thesis submitted in conformity with the requirements for the degree of Masters in Law (LLM)

Graduate Department of Law

University of Toronto

© Copyright by Frank Tedman

2010

Supervisor:

Anthony Duggan
Abstract

Canadian Trusts and Panamanian Foundations of Private Interest are generally utilized as juridical vehicles through which a creator can designate a person to hold and administer property for the benefit and enjoyment of a beneficiary. Given the similarity of application of both vehicles, and taking into consideration that they emanate from separate juridical and judicial systems, it is pertinent to analytically compare them.

As can be expected, there is a significant number of aspects through which Foundations of Private Interest and a Trusts can be compared. The following comparative analysis will be centered around three aspects: Asset ownership, creation mechanisms and the requirement of properly identifying beneficiaries. Preceding the aforementioned comparative analysis, a presentation and description of both legal vehicles will be provided in order to make the comparative analysis comprehensible and hopefully useful.
Acknowledgments

To my parents, Frank and Gilda, inexhaustible sources of love, support and inspiration.

To my brother and sister, Alexander and Monica, my companions in the path of life.

To Charlene, Graham, Gabriel, Irma, Mercedes, Shane, Emily, Ben, Eva, Colette, Gunter, Kyla and Harry who have become my family while away from home.
# Table of Contents

CHAPTER I – INTRODUCTION .......................................................... 1

CHAPTER II – INTRODUCTION TO A GENERAL CONCEPT OF PANAMANIAN FOUNDATIONS OF PRIVATE INTEREST .................................... 2

CHAPTER III – FOUNDATIONS OF PRIVATE INTEREST ....................... 5
   A. Brief Historical Presentation .............................................. 5
   B. Concept ........................................................................... 7
   C. Characteristics of the Foundation of Private Interest ............ 9
   D. Juridical Nature ............................................................... 12
   E. Constitution of Foundations of Private Interest .................. 15

CHAPTER IV – TRUSTS .................................................................... 25
   A. Historical Presentation ..................................................... 25
   B. Concept ........................................................................... 28
   C. Three Certainties ............................................................ 29
   D. Inter Vivos and Testamentary Trusts ................................. 37

CHAPTER V – BRIEF DESCRIPTION OF BUSINESS TRUSTS ............... 42

CHAPTER VI – COMPARATIVE ANALYSIS ........................................ 44
   A. Asset Ownership ............................................................ 44
   B. Creation Mechanisms ...................................................... 49
   C. Certainty of Objects vs. Designation of Beneficiaries in the Foundation Act ......................................................... 51

CHAPTER VII – LESSONS AND CONCLUSION ..................................... 54
   A. Lessons ........................................................................... 54
   B. Conclusion ...................................................................... 54

BIBLIOGRAPHY ............................................................................ 56

ANNEX – Panama Law No. 25 of June 12, 1995 – Translation ............... 58

COPYRIGHT ACKNOWLEDGMENTS .................................................. 68
CHAPTER I

Introduction

The following thesis is comparative analysis. Such analysis will be made between a Panamanian juridical figure known as Foundation of Private Interest and the Canadian Trust. In the case of the Foundations of Private Interest I will begin by writing a brief historical presentation, followed by an attempt to conceptualize such Juridical Figure. I will then present foundational characteristics, foundational juridical nature and the aspects involving foundational constitution in order to make it as understandable as possible to those who have never been exposed to such juridical figures and to those who have been exposed to similar ones. In relationship to the Canadian Trust I will embark on a similar approach, mentioning relevant aspects of its origins and evolution, its concept, the three certainties that every trust must comply with in order to have validity and the formalities associated with the creation of inter vivos and testamentary trusts.

The aforementioned descriptions of both institutions will serve as stepping stones, as they will provide necessary information to effect a comparative analysis of the two institutions, based on the aspects of asset ownership, creation mechanisms and the necessity of properly identifying beneficiaries in both cases. These aspects of comparison have been selected because, in my opinion, they provide the reader with pertinent information about two institutions, which originate in two different legal cultures, that are widely utilized for similar purposes.
CHAPTER II

Introduction to a General Concept of Panamanian Foundations of Private Interest:

The purpose of this chapter is to provide a somewhat informal description of the Panamanian Foundations of Private Interest in order to have a general understanding of them. As Foundations of Private Interest have been developed in countries and Principalities whose judicial branches are conducted through and implement the civil law system, a general idea of their concept and uses would be expedient to understand an ensuing analysis that would inevitably be launched from a civil law platform.

I would say that a Foundation of Private Interest is a legal entity, created to administer, preserve and or dispose of a specific amount of assets according to the intentions and instructions of its founder. It is important to express that Foundations of Private Interest are considered to have separate legal identities or personalities from those of their founders, administrators and beneficiaries.

I have heard from different lawyers, when attempting to explain their concept, that Foundations of Private Interest could be perceived as a hybrid between a donation and the common law trust, clearly emphasizing the administration of goods for the benefit of third persons that takes place in the common law trust and the transference of assets that takes place in a donation.

To further familiarize ourselves with the concept of Foundations of Private Interest, I shall now mention a number of their different uses or applications:

a. For Family Support: A Foundation of Private Interest can be created with the purpose of supporting or maintaining a family. A determined amount of money can be destined to satisfy needs of clothing, food, transportation, etc. of certain or all members of a family. A foundation
b. can also be designed in such a way that its beneficiaries could receive determined periodic sums of money from particular bank accounts.

c. For asset protection and administration of goods: This goal can be achieved by transferring goods to the foundation. Once the transference has been made the goods become the property of the foundation, which is separate from that of its founder. The Panamanian Law of Foundations of Private Interest (Law No. 25 of 1995) establishes that the foundational goods may not be sequestered or embargoed as a result of personal legal obligations of the founder, the members of the foundational council (administrators), the beneficiaries or any other persons that transfer goods to the foundation.

d. To attract and administer capital: Foundations of Private Interest may be structured with the intention of receiving capital from diverse sources amongst which we can mention: security market investments, dividends generated after purchasing shares in companies and joint venture earnings amongst others. The best way to structure such a foundation would be to transfer ownership of all titles, contracts and stock certificates to the foundation.

e. For educational purposes: Through a Foundation of Private Interest, a parent can destine funds towards the education of his or her children, with all the limitations and controls that they may consider appropriate.

f. For testamentary purposes: A founder can design a foundation in such a way that at the moment of his or her death, the goods of the foundation shall be distributed in a way instructed by him or her.

g. As a private retirement fund: In this sense, the founder may designate herself as the beneficiary and transfer goods to the foundation, for their administration until retirement age, when she may enjoy the goods and earnings of the foundation.
h. For charity purposes: The founder may create a foundation and declare specific pecuniary contributions towards particular charitable institutions as one of its objectives or goals.

i. For management of insurance: Foundations of Private Interest can be named as beneficiaries in insurance policies. When conditions or occurrences result in payment to the beneficiaries of a policy, these payments can be made directly to the foundation, which will administer such payment in a way previously established in the foundational act of the foundation.

All of the above uses can be applied to Foundations of Private Interest since there are not restrictions concerning the uses of such foundations in the Panamanian Law No. 25 of 1995, except for the stipulation that Foundations of Private Interest are not to be used as instruments or structures that generate profits on a habitual basis.
CHAPTER III

FOUNDATIONS OF PRIVATE INTEREST

A. Brief Historical Presentation

The Foundation is born from the human social need of contributing and participating, in a selfless and spontaneous manner, in a social cause or from the desire to achieve a determined and lawful goal, through the utilization of a patrimonial fund extending its related benefits over a prolonged period of time, which tends to be longer than the natural life of the founder.

This institution initiates its juridical life as a legal and economic entity and is a direct consequence of the weakness of the State during the middle ages, particularly in countries that had been situated at the limits of the Roman Empire and were heavily influenced by Christianity. During this period, over which religious and familial foundations developed simultaneously, a struggle was apparent between the Nobility and the Clergy to achieve societal control.¹

During the epoch known as Renaissance and because of its corresponding philosophical, political and cultural societal transformations, the foundations suffered an enormous diminishment of prestige, due mainly to the fact that they were administered and controlled by the Church and privileged or aristocratic classes; and of course, this was a time period in which renowned thinkers and exponents championed principles of equality before the law, codification, individualism, among others. The individualism current espoused the eradication of anything that stood in between the Individual and the State, including juridical persons like foundations, because they were reputed to encumber social progress and to serve as instruments of wealth accumulation.²

¹ Boutin, Gilberto. La Fundacion de Interes Privado en el Derecho Panameno y Comparado. Editorial Mizrachi y Pujol, S.A. Panama. 2002. P.7
² Ibid. p.8
Evidence of the aforementioned prestige diminishment is the fact that codifications of the time regulated foundations of public interest and benefit; nevertheless, the familial foundations which would later give origin to the foundations of private interest, are not mentioned anywhere in the codifications. An explanation of this situation is the perception existent during the time period that conservation and perpetuation of patrimony through generations were considered as contrary to public order and common interest.\(^3\)

This current began to lose impetus and followers through time when members of society came to the realization that foundations, as well as other juridical persons, contrary to initial belief, constituted a vehicle towards social progress and common necessity satisfaction of all kinds. That is why, some countries of Germanic tradition and idiosyncrasy like Germany, Austria, Switzerland and Holland conserved foundations as a juridical instrument of patrimony preservation and perpetuation, maintaining the familial interest that originated the figure. Such is the case of the Principality of Liechtenstein, which introduces the foundations figure under the name “Stiftung” in its Law of Juridical Persons and Companies of January 20\(^{th}\) 1926. Its creators conceived of a new type of foundation endowed with great appeal for the management and control of goods and investments. This appeal consists on one side, with the liberty of the legal regime that regulates them, which permits its combination with a great deal of other legal structures; and on the other side, by the political and economic stability of the Principality and its services economic sector.\(^4\)

The “Privatstiftung” followed in Austria in 1993. They were based on the private foundations of Liechtenstein and were characterized by having greater density of regulation. These were a product of the Austrian government which finality was the facilitation of the continuous existence of personal

\(^3\) Ibid. p8
business after the death of the owner, the support of family members by means of professional services, as opposed to the self administration of goods by heirs.  

Aside from the stiftung and privatstiftung from Liechtenstein and Austria respectively, no other country or principality has produced juridical figures that have directly influenced the creation of the Panamanian Foundation of Private Interest. I understand that Switzerland has produced foundations of a somewhat similar nature, but yet, sufficiently different from the model of the Panamanian Foundations.

As a consequence of the popularity that the familial foundations of Liechtenstein acquired in the European continent, a group of Panamanian Jurists began pondering the idea of creating a Foundations of Private Interest Law in Panama. This group of Law Professionals, in their majority linked to the more prominent Law Firms in the country, were substantially familiarized with the familial foundations figure of Liechtenstein. Nevertheless, after performing a thorough analysis of the law that regulated them, they concluded that the law was insufficient in relation to what was intended to be achieved in Panama; that is why a number of new articles were incorporated to the format extracted from the Liechtenstein Legislation to create a Foundation of Private Interest more attractive than the already existent and utilized by Off shore products and services clients of the Republic of Panama.

As I understand, other countries or territories that have produced foundations of a similar nature to the Panamanian foundations of private interest in the new world are the Bahamas and Uruguay, although not overwhelmingly similar to the Panamanian model which was designed according to the economy of service that characterizes the country.

B. Concept

---

5 Ferrer M., Eduardo. La Fundacion de Interes Privado bajo la Legislacion de la Republica de Panama. Graphix Editoriales, S.A. Panama. 1995. P. 8
6 Ibid p. 9
Given the multiple variants that the Foundations have experimented, as a consequence of their
evolution through time and as a product of the different influences to which they have been exposed; I
have been able to collect a few definitions given by Panamanian Jurists that attempt to encompass the
content of this juridical figure.

Dr. Eduardo Ferrer M (a member of the writing commission of the Law no. 25 of 1995 – The Foundations
of Private Interest Law) defines Foundations of Private Interest as:

“The provision or the donation of a patrimony for some determined objectives or ends in a document
denominated foundational act. The achievement of the ends of a foundation is assigned to persons
whom are denominated Members of the Council of the Foundation who come to be as a board of
directors, whose names shall appear in the act of the constitution of the foundation”.

In this sense, Dr. Fernando Arias Campagnani (also a member of the writing commission of the
Foundations of Private Interest Law) manifests his opinion in the definition of these foundations as:

“A legal entity, with its own denomination and internal organization, created to maintain the property of
certain goods destined to the achievement of specific ends determined by the foundational act.
Entrusting the persecution of these ends to a foundational council, which has been previously
designated in the Act of Constitution of the Foundation”.

Eduardo E. Morgan Boyd also explains, with sufficient clarity, the concept of foundation of private
interest. He asserts that the foundation of private interest is:

“A juridical person, which is endowed by its founder of goods that belong to him and which are
consolidated in a separate patrimony, property of the foundation, after their transference, to be

---

7 Ibid P. 1 [translated by author]
author]
administered by the Council of the Foundation, named by the founder in the statutes of the foundation, with the purpose of complying with the finality and object of the foundation, which must be lawful, non lucrative, specified by the founder in the constitutive statutes and which will last until the persecuted end is achieved or mentioned foundation is extinguished by other means”.

C. Characteristics of the Foundation of Private Interest in Panamanian Legislation

1. It is a Juridical Person

The Foundation of Private Interest, constituted in conformity with Panamanian Legislation acquires its juridical personality only after the inscription of the foundational act at the Public Registry Offices takes place. Therefore, they are juridical persons independent of their founder, from their administrators and from their beneficiaries; they can acquire and possess goods of all types, as well as contract obligations and exercise civil and criminal actions, in conformance with their rules of constitution. From what has just been mentioned, we can conclude that foundations of private interest do not have an owner, as it happens in the case of corporations.

2. Private Character

Due to the finality or objectives of this type of foundation, which are eminently private and of civil nature, the Panamanian Legislators considered it pertinent that they would not be regulated by the legal provisions that regiment public foundations. These foundations (private) are regulated by their foundational or constitutional act, their statutes, their particular law and their ruling decree.

3. Non Lucrative

---

Foundations of Private Interest are prohibited by law to pursue commercial or lucrative ends in a habitual way. In other words, these foundations cannot be linked to the performance of commercial activities. Nevertheless, the law concedes the possibility of performing commercial activities which are not habitual as long as those do not constitute the principal or main activity of the foundation. They are also allowed to participate in mercantile societies (analogous to corporations) and to exercise the rights that such participation confers to them.

4. **Formal**

The law states that the foundations’ normative body must be written, by way of a public instrument or private document which must be signed by the founder. This document or instrument, after its due authentication and protocolization (approved in its form by a Public Notary), must be inscribed in the Foundations of Private Interest Section of the General Direction of Public Registry. The aforementioned normative body has been denominated by law as “foundational act” ad together with its statutes, they regiment the functioning of the foundation of private interest in the juridical world.

Additionally, it is important to mention that in order for the foundation to have juridical validity, the law states as indispensable requisites that it be included in the foundational act: the name of the foundation, its initial patrimony, its organization, its domicile, the objectives of the foundation, its duration and the general information of its resident agent, which would be encompassed by his/her name, gender, civil state (married or single), cedula number (cedula is a document that is given to every Panamanian after becoming an adult and is utilized to vote and many other activities), profession or trade and domicile.

5. **Patrimony as a requisite for its existence**
The Private Foundations are born into juridical life possessing funds for the realization of its activities, which are necessary for their recognition as juridical persons. These funds constitute a universality of goods which could be movable, not movable (land, buildings, etc), generic, specific, corporal, non corporal, present, future, etc.

In the case of goods which are located outside of commerce of men (in the legal sense this refers to goods like drugs, which are illicit, as well as slave labour, etc.) it is considered that these goods cannot be incorporated into the foundational patrimony.

6. Irrevocable

The Private Foundations cannot be annulled by any administrative act of their creator, unless the contrary is established in the foundational act or in the case in which it has not been inscribed in the Public Registry Office.

7. Constitute a patrimony independent from the founder’s

The Foundational goods constitute a separate and independent patrimony from that of the founder and the beneficiaries. For that reason the foundational goods cannot be seized, nor they can be the object of cautionary measures, unless in relation to damages caused by the foundation in the pursuance of its objectives.

The Private Foundation does not respond for obligations contracted by the founder or the beneficiaries, nor for the obligations of the members of the foundational council at a personal level. Nevertheless, it is possible to impugn the transference of goods to the foundation, if such a foundation has been created in creditor’s fraud.

8. It has a determined objective
The foundation of private interest is constituted as a consequence of a unilateral act by the founder, which will be further discussed later in the chapter, given his or her will to apply the finality or objective of the foundation to a patrimony; such finality should be expressly defined in the Foundational Act and may not be of lucrative nature. These guidelines are contained in articles 1 and 3 of the Law of Foundations of Private Interests.

9. Prolonged Duration or Existence

One of the advantages of creating a juridical person is the continuity and security that it provides. As is the case of other juridical persons, its duration in many cases exceeds the life of the natural persons that originally constituted it.

Given the nature of the foundational object, the foundation must necessarily operate for a period of time, generally indefinite; until its finality is accomplished, or until the moment in which its objectives become unreachable or impossible to attain, or until the moment in which the duration or existence period of the foundation is expired, provided that it was established in the foundational act.

D. Juridical Nature

Many theories have been formulated by jurists and scholars with the intention of encapsulating and explaining the juridical nature of foundations.

As Mantilla Molina states:

“Sometimes they are thought to be a person, others that it is a patrimony and others that it is a person and patrimony at the same time; another it is considered to be an organization, another as an organizing idea; some consider it a juridical business; others as a right; the more divulged idea is that of considering
it as a universality, even when are not scarce the ones that consider it lacking unity and as a mere name applied to a heterogeneous plurality of objects”.  

In a similar sense Clemente De Diego manifests:

“It is very general the belief that they are fictitious persons, placing them some the personality in the favoured ones, others (Heisse, Arndts) in the personified patrimony, others (Savigny) in the finality, and others (Zietelmann) in the will of the founder”.  

1. Personification of the Foundation

This theory, which is sustained by a group of jurists, consists in the conception of the foundation as a juridical personality different from the founder’s. The foundation, as other persons, as the proponents of this theory assert, has a name, a patrimony, a domicile and a nationality. It subsists even when its original founder ceases to exist, when it changes domicile or when beneficiaries are substituted.

2. The foundation as a patrimony

Without reaching the point of ascribing personality to a foundation, some authors consider it as an autonomous patrimony, of which the founder holds the title of property, whom also possesses other civil patrimony which is totally independent from the patrimony constituted by the foundation.

Nevertheless, this consideration or opinion openly clashes with the possibility that the foundation may be a subject that exercises rights and contracts obligations, as well as with the principle of juridical independence that characterizes it, which basically impedes the founder’s creditors from reaching foundational patrimony in relation to personal obligations or debts of the founder.

---

3. The foundation as a person and as a patrimony

Valery considers that in the foundation must be distinguished: a group of persons (the founder, beneficiaries and members of the foundational council) and a group of goods, rights and obligations. The first group becomes an autonomous entity, endowed with juridical personality and whose patrimony is formed by the second group, which in conjunction with the first group constitutes the foundation in strict sense.\(^\text{12}\)

4. The foundation as a juridical business

Carrara considers the foundation to be, in its essence, a combination of persons that pursue the same end, which cannot be accomplished without a juridical business; which consists in an agreement between the founder, the foundational council and the beneficiaries. The finality of such agreement is to attain by means of their coordinated efforts, the objectives for which the foundation was constituted. \(^\text{13}\)

5. The Foundation as a right

In an outward projection, the foundational activity, according to Carrara, is manifested as the right of the beneficiaries which is derived from the established relations with the foundation itself. \(^\text{14}\)

It seems obvious that such a right is basically to receive the economic benefit that results from the foundational creation.

6. Foundations as a universality

---

\(^\text{12}\) Valery, J. Cited by Mantilla Molina whom adopts his opinion in his book titled Tratado de Derecho Civil. P.122

\(^\text{13}\) Carrara, Giovanni. Appunti per una nuova impostazione del concetto de fundatio. RDC s.p.a. Roma. 1926. p.45

\(^\text{14}\) Ibid. P.45
Not only are the different elements of a foundation coordinated in a patrimonial and functional unity; not only is it considered as a unitary object of juridical businesses, its existence is also recognized by valid juridical dispositions which protect it from the segmentation and separation of its components.

E. Constitution of Foundations of Private Interest

The constitution of a foundation of private interest is considered to be simple and expeditious. In relation to this point of view Dr. Eduardo Ferrer M. affirms that:

“The private foundation, in similitude to the majority of societies, is constituted by means of a document denominated in the law as foundational act, which is equivalent to a constitution act of charitable or public interest foundations”.

In any way, to constitute one of these juridical institutions, the concurrence of a series of indispensable requisites for its creation is necessary.

1. Indispensable requisites for foundational constitution

I. The manifested will of the founder to create it (the foundation)

This constitutes the subjective element of the foundation. It consists in the exteriorization of the will of the founder, of his or her intention to compromise part of his or her patrimony for the establishment of the foundation of private interest as an independent legal entity.

II. The purpose(s) of the foundation

This constitutes the objective element of the juridical figure, its reason of being. We should always keep in mind that the foundation of private interest is created by the founder with the purpose of pursuing, until achieving, the realization of a specific end or ends.

Ferrer M., Eduardo. La Fundacion de Interes Privado bajo la Legislacion de la Republica de Panama. GRaphix Editoriales, S.A. Panama. 1995. P. 11 [translated by author]
Given this reality, the founder shall describe the purpose(s) for which the bundle of goods which constitute the foundational patrimony have been transferred or donated to the foundation.

III. The dedication of goods that will integrate the patrimony of the foundation

This means that there is a need for the founder or another person to dispose of part of his or her patrimony with the intention of endowing the foundation with sufficient resources that would guarantee or make possible the pursuance of the objectives for which it was initially constituted.

IV. The designation of the foundational council or the form of designation

As I have mentioned before, the foundations of private interest must have a foundational council. Such council will be the administrative branch or organ, which will be in charge of the management of the assets of the foundation and of the accomplishment of the objectives of the foundation.

For such a reason, at least the first members of the foundational council must be designated by the founder in the foundational act. In a similar fashion, the mechanism to replace the members of the foundational council, in the cases in which the foundation is supposed to outlive the founder, can also be established in the foundational act.

V. The designation of the beneficiary or beneficiaries

It is imperative that the founder determine who will be the receptor(s) of the economic benefits of the foundational activity, this has been established in Panamanian Law (Numeral 7 of article 5 of Law No. 25 of 1995 – Law of Foundations of Private Interest).

2. Constitution Process
The foundation of private interest may be created by one or more persons, including corporations (as founders) for the benefit of third persons (beneficiaries), amongst which could be the founder himself, herself or itself (see article 1 of Law No. 25 of 1995).

Its constitution will be realized by means of a private document subscribed by the founder, whose signature must be authenticated or verified by a Public Notary. In a similar fashion, it may be constituted by means of a public document directly subscribed before a notary of the place of its constitution.

In both cases, the aforementioned document will be denominated foundational act, and it will have to be inscribed in the Foundations of Private Interest Section of the Panamanian Public Registry Offices, so that the foundation may acquire its juridical personality.

In the case that the private foundation is created so that it acquires validity after the death of the founder, it will not be necessary to comply with pre-established formalities for the bestowal of will (testament) (See article 4 of Law No. 25 of 1995).

3. Essential clauses of the foundational act

The law that regulates the foundations of private interest (Law No. 25 of 1995), states that the foundational act must contain, at least, the information that for its constitution is established in its article No. 5, which is:

I. The name of the foundation

Because foundations are juridical persons, with its corresponding rights and obligations which are relevant in legal traffic, private foundations, like other juridical persons recognized or contemplated under the law, must have a name. Given this reality, numeral 1 of article 5 of the Law of Foundations of Private Interest established certain parameters that such name must comply with.
a.) That the name of the foundation be written in characters written in any language with characters of the Latin alphabet (it cannot be expressed in languages like Russian or Japanese, which utilize different characters in their writing)

b.) That such name not be equal or similar to the name of another pre-existent foundation in the Republic of Panama. (To avoid a situation of confusion between two foundations of equal or similar names).

c.) That the word Foundation be included in the name. (To easily differentiate them from other persons, natural or juridical of a different nature).

II. The initial patrimony of the foundation

To constitute a foundation of private interest in the Republic of Panama, a capital equivalent to ten thousand dollars ($10,000.00) is required as a minimum. Such capital may be expressed in any currency of legal validity (See numeral 2 of article 5 of Law No. 25 of 1995).

It is important to mention that due to reasons of discretion and privacy, in many occasions, founders will create a private foundation with the minimum capital established by the law, and once it has been constituted, new sums of money and/or goods will be transferred to the foundation to increment it. The consequence of such procedure is that the real total capital of the foundation will not appear in the Public Registry files; in some cases founders prefer that the real amount of the capital of a foundation not be a matter of public knowledge.

III. The designation of the members of the foundational council

In this clause all the members of the foundational council must be named. Such designation must be performed in a complete and clear way, including the corresponding address of each one of the members.
Such foundational council must be conformed by a minimum of three (3), with the exception of the case in which it is conformed by a juridical person.

All these demands are directed towards the finality of granting or attributing security and seriousness to the Panamanian jurisdiction. This information would also be useful in circumstances in which authorities would have to inquire or investigate cases in which foundations were utilized for illicit ends.

Finally, it is pertinent to mention that nothing impedes the founder from becoming a member of the foundational council or establishing in the foundational act that all or certain decisions of the council must be taken in unanimity. By taking such measures, the founder can be sure that no important decision may be taken by the council, without his, her or its approval.

IV. The domicile or address of the foundation

The address or venue of the headquarters of the foundation must be expressed in the foundational act, which will consequently determine the nationality of the foundation (Numeral 4 of article 5 of Law No. 25 of 1995).

Again, it is relevant to mention that due to certain fiscal advantages that the Panamanian legislation offers, the domicile or address of the foundation will be in Panama, even when the activities of the foundation are executed abroad (outside Panama). What’s more, it may be authorized that the foundations already constituted in conformation to a foreign law (outside Panama) may be received and harboured under Panamanian Law and domicile (articles 28 and 20 of the Law of Foundations of Private Interest).

V. The name and address of the resident agent of the foundation

The founder shall designate a practicing lawyer in the Panamanian Jurisdiction or a law firm to countersign the constitution act of the foundation before its inscription in the Public Registry Offices.
This requisite has as a purpose that every foundation must have a representative in the Republic of Panama, in case that the Panamanian authorities have to make contact with a specific foundation. At the same time, such a requisite results in the revision of foundational documentation by a lawyer prior to countersigning it; this in turn results in the avoidance of inconveniences related to the presentation of defect containing documents (formal defects mostly) at the Public Registry Offices (Numeral 5 of article of Law No. 25 of 1995).

It is important to mention that in article 34 of the Law of Foundations of Private Interest it is established that the Executive Decree No. 468 of 1994, which regulates the obligations and responsibilities of resident agents of Anonymous Societies (other juridical persons similar to Limited Liability Corporations), is applicable to resident agents of private foundations. This measure is aimed at combating money laundering schemes and operations which are products of the international traffic of drugs. These juridical measures force agents to practice the “know your client” policy in an effort to discourage and encumber the utilization of the Panamanian financial center in illicit operations.

VI. The purpose(s) of the foundation

At the moment of constitution of a foundation of private interest, it is necessary that the founder indicate, in the constitution act, the purposes for which the goods were transferred to and consequently became part of or the entirety of the foundational capital.

Usually, these foundations are constituted to administer goods or assets, as well as for the distribution of obtained rents. Having mentioned that, it is pertinent to say that a foundational purpose could be the accumulation of goods to guarantee future economic stability.

It is very important at this point to assert that the objectives of the foundations of private interest cannot solely be of pecuniary and commercially remunerative nature. Nevertheless, these foundations
are permitted to execute commercial activities in a non habitual manner, provided that the result or economic product of such activities be dedicated exclusively to the purposes of the foundation.

“A commercial type of business will only be permitted if such serves the consecution of the extra-economic objective of the foundation, or if the type and quantity of the participations so demand it. This last condition, especially, has led to the formation of numerous enterprise or corporate foundations. Aside from this, the foundation can be configured as a foundation for the participation of personnel, as an instrument of prevision for personnel, or as a bearer of cultural institutions”.

To sum up, the law enables the foundation to pursue any type of purpose, provided that it is legal, non lucrative and previously determined by the founder.

VII. The manner in which the beneficiaries of the foundation are designated, amongst which the founder can be included.

As can be inferred from previously mentioned statements, private foundations do not have owners per se. In their place, the Panamanian legislation endows the founder with the faculty of freely designating beneficiaries in the statutes or regulations of the foundation, or delegating such designation task to a foundational council.

The beneficiaries are persons, natural or juridical (amongst which the founder can be included), favoured and chosen to be the receptors of the patrimony, earnings and present and future rights that proceed from the foundation in conformity with what has been expressed by the founder.

As a general rule, the name and sequence rank of the beneficiaries as well as the nature and reach of the right of the beneficiaries are established in the regulations containing document established by the

---

founder or by the foundational council in conformation with instructions from the founder. This rule containing document, which regulates foundational activities, is confidential and will be deposited according to instructions from the founder, but its inscription in the Public Registry Offices is not necessary.

The exercise and enjoyment of the rights of the beneficiary can be unlimited, conditional or linked to instructions or restrictions. The rights and obligations of the beneficiaries will be determined in the regulations.

Beneficiary acceptance of the rights will always be assumed provided that such rights are linked only to advantages. It is relevant to mention that by having patrimonial rights, correlative rights are acquired as well, among which we can mention the right to be informed about foundational operations and activities, the right to receive a report by the foundational council concerning foundational operations, the right to request the revocation of the members of the foundational council and the right to demand compensation in relation to damage suffered or endured as a consequence of irregular foundational operations.

Finally, it is appropriate to state that this clause has great importance because it is in its development where express authorization or the juridical grounds for the creation of the supplementary rules or statute reside. Such rules or statute constitute a parallel and complementary document to the foundational act, but with the difference of being of a totally private nature.

In that way, the confidentiality that characterizes the foundations of private interest is safeguarded. The foundational rules document, where the beneficiaries of the foundational patrimony are named, will only be of the knowledge of interested parts (unless the founder desires otherwise and decides to include such information in the foundational act) and in that way, privacy is obtained which adds attractiveness to this juridical instrument in the Panamanian jurisdiction.
VIII. The reservation of the right to modify the foundational act when considered convenient

Usually this right is reserved by the founder for him or herself, nevertheless this right can be reserved by the founder for the foundational council in the constitution act of the foundation.

The reservation of this right of manifestation is demanded to be established in the foundational act so that government officials or civil servants of the Public Registry, as well as third persons that hold a relation to the foundation, can be aware of the existence or not of this modification faculty and the possibility of its exercise or implementation in a given moment.

IX. The duration of the foundation

The foundation of private interest can be constituted for a determined period of time in the foundational act, until the accomplishment of a specific objective, or for an indefinite period of time with the intention of granting it perpetual duration.

X. The destiny of the assets of the foundation and the manner of patrimony liquidation, in case of dissolution

This clause is intimately linked with the circumstances that constitute cause for dissolution of the foundation of private interest (article 25 of Law No. 25 of 1995). After cancelling debts and complying with foundational obligations, it shall be decided at this point what to do with the remaining patrimony.

In this clause the founder shall manifest which will be the application of the final foundational patrimony.

XI. Any other legal clause that the founder may consider convenient

As we can imagine, in addition to the minimum requisites with which every foundational act must comply with, it is feasible to include a number of clauses pertaining to the organization of the
foundation, the way of resolving differences and controversies, the representation of the foundation as it relates to third persons, the necessity or not of presenting an annual, monthly, quarterly, etc. account report, faculties and obligations of the foundational council, the possibility of relocating the foundation, or any other, which would delineate the way of handling or dealing with certain conflictive circumstances instead of resorting to the law or any other supplemental sources of law, which ultimately would result in the avoidance of unnecessary controversies.
CHAPTER IV

TRUSTS

A. Historical Presentation

It has been demonstrated that the origin of the trust is to be found in the Germanic Salman or Treuhand whom apparently performed the function of receiving the transference of a property for purposes to be executed during the life or after the death of the transferor.\(^{17}\)

We can state though, that trusts are English products which owe their existence to a particular situation in the English Judicial system, the separate maintenance of courts of equity and courts of law. The trusts and their predecessor, the use, are products of equity, this means that they were enforced in the courts of Chancery in which preponderant power, attention and priority were assigned to conscience.

It is important to mention that there is a distinction between legal and equitable procedures. “A judgement obtained in the common law courts gives the plaintiff the right to do certain things. The judgement declares those rights. But a decree in equity imposes obligations on the defendant. Equity does not declare rights. It acts in personam. That is, it demands that a person refrain from exercising certain rights for reasons personal to himself or herself which make it inequitable to exercise those rights”\(^{18}\).

“The common law recognized ownership of property, that is, legal ownership. Situations arose, however, in which a person held the legal title to property – a title recognized by law – but which the title holder had agreed to hold for the benefit of some other person – an obligation not recognized at law. If the owner of the legal title refused to carry out the undertaking to the other person, Chancery


\(^{18}\) Ibid P. 5
could compel the title holder to exercise his or her legal rights for the benefit of the other person in accordance with the dictates of conscience. More important, in due course the Chancellor would not only compel the legal owner to act in accordance with the dictates of conscience, but would also come to recognize and enforce those rights against purchasers who took with notice of the equitable interest and against gratuitous purchasers. In effect, the person for whose benefit the property was held, acquired ownership in the eyes of equity. The result was a kind of dual ownership, or two recognizable interests in property.”

As mentioned above, the trust of today evolved from the use. The first period in which the use began to develop was right after the Norman conquest of England. “Maitland suggests that uses were first employed in relation to land during the 13th century. At that time the Franciscan friars were coming to England. The rules of their order required them to maintain perfect poverty. In order to make provision for them, the wealthy faithful adopted the device of conveying land to a town or city, or to individuals for the use of friars”.

In the following century the uses were utilized for various purposes like: Evading the feudal burdens of wardship and marriage, to defeat one’s creditors, to acquire a kind of testamentary power with relation to land, etc.

The second period of development of the uses began when the Chancellor began to enforce the uses, and ended with the enactment of the Statute of Uses in 1535. “The Chancellor was forced to take cognizance of the use because of the many complaints against faithless feoffees brought before him, and because the courts of law would not enforce the obligations undertaken by the feoffees. The Chancellor, therefore, began to demand that feoffees honour their obligations in conscience. This greatly reduced the risk of employing the use, namely, the risk that feoffees would refuse to perform

19 Ibid p. 6
20 Ibid P. 6
their obligations, also it laid the foundation for the distinction between equitable and legal estates in land”. 21

The third period in the history of uses began with the enactment of the Statute of Uses and lasted for about one hundred years. The effect of such Statute was not to abolish the use, but to give the legal title to the property to the beneficiary. If the beneficiary had an equitable estate for life formerly, he acquired a legal life estate. “It was said that the statute executed the use because it removed the feoffee from the scene and directed that the cestui que use step into the feoffee’s place. In the result, the use became a legal interest enforceable in courts of law”. 22

The fourth period of the history of uses began when sly conveyancers realized that there were ways to circumvent to Statute of Uses. There were a number of instances and situations in which it was held that the Statute does not execute the use; the one that impressed me the most was the following:

“A use upon a use, as in a conveyance, ‘To X and his heirs to the use of A and his heirs to the use of B and his heirs.’ The Statute would execute only the first use, so that A got the legal estate”. 23

Trusts began to be known as such after Equity began to enforce the second use, the words “in trust for” supplanted the phrase “to the use of” in the second use, yet there isn’t a legal distinction between the two phrases. It is important to know that it is the second use that creates the trust.

Originally trusts were for estates in land solely. During Feudal times, ownership of chattels was not considered important, although possession was. It was not uncommon to hold chattels to the use of another from early times, but that did not create equitable interests or estates, the parties’ rights were not enforced in equity, but at law. “However, the common law remedies became inadequate when the

21 Ibid P.8
22 Ibid p.9
23 Ibid p.9
nation’s wealth shifted from realty to personalty. At that stage, which was in comparatively modern times, equity took over the enforcement of trusts of personal property. The principles which pertain to trusts of real property also apply to trusts of personal property”. 24

B. CONCEPT

As I understand, it is a daunting task to attempt to define a Trust. In order to do that, a definition would have to be so comprehensive it would appear almost impossible to understand. Most existent and accepted definitions attempt to define the express private trust, sometimes they try to capture the essence of purpose trusts as well. Keeping this in mind the following definitions of trusts are relevant to our quest.

Underhill definition:

“A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one and any one of whom may enforce the obligation. Any act or neglect on the part of the trustee which is not authorized or excused by the terms of the trust instrument, or by law, is called a breach of trust”. 25

Lewin defines a trust as:

“...the duty or aggregate accumulation of obligations that rest upon a person described as a trustee. The responsibilities are in relation to property held by him, or under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner of lawfully prescribed by the trust instrument, or where there be no specific provision written or oral, or to the extent that such

24 Ibid p.11
25 Ibid. P. 13
provision is invalid or lacking, in accordance with equitable principles. As a consequence the administration will be in such a manner that the consequential benefits and advantages accrue, not to the trustee, but to the persons called cestius que trust, or beneficiaries, if there be any; if not, for some purpose which the law will recognize and enforce. A trustee may be a beneficiary, in which case advantages will accrue in his favour to the extent of his beneficial interest”.  

The trust is a fiduciary relationship assigning certain obligations on the person who holds title to a property. “The relationship is fiduciary, because, while the trustees have substantial control over the trust property, they are bound to act in strict confidentiality, with honesty and candour, and entirely in the interests of the cestuis que trust”.  

As we can see, the trusts differ from Foundations of Private Interest conceptually in the sense that while the foundations are separate legal entities from their founders and beneficiaries, meaning, they are juridical persons, the trusts are not.

C. The three certainties

For a trust to come into existence, it must have three essential characteristics. The language of the alleged settlor must be imperative; the subject-matter or trust property must be certain and the objects of the trust must be certain.  

From that statement we could infer that the settlor must have the intention to create a trust; the trust property must be defined sufficiently, or be ascertainable at least, and the way in which the property will be divided between beneficiaries must be sufficiently certain; and the beneficiaries of the trust must

26 Ibid. P 13 - 14
27 Ibid. P. 14
be sufficiently or satisfactorily identified. It is important to realize that those three certainties are inter-related and reflexive.  

The inter-relationship among the three certainties is described in Knight v. Knight, an originally influential English case, which has been followed in Canada on multiple occasions, such relationship is described as follows:

“On the other hand, if the giver accompanies his expression of wish, or request by other words, from which it is to be collected, that he did not intend the wish to be imperative; or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request; or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created. Thus the words ‘free and unfettered’, accompanying the strongest expression of request, were held to prevent the words of the request being imperative. Any words by which it is expressed or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object, that is, a description by which the giver neither clearly defined the object himself nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the objects from being certain within the meaning of the rule; and in such cases we are told that the question:

never turns upon the grammatical import of words – they may be imperative, but not necessarily so; the subject-matter, the situation of the parties, and the probable intent must be considered”.

---

30 (1840), 3 Beav. 148, 49 E.R. 58 (Ch.)
An example of the reflexive nature of the three certainties can be encountered in cases in which a person A gives property to person B, and using the same instrument attempts to give a portion of the property to another person C. In this situation, the issue or controversy arises when B finds itself in a situation where he or she takes the property absolutely, as a gift subject to a condition or personal obligation, or as a life estate subject to a trust in favour of C. If a court is inclined to find a trust in favour of C was intended, it must go on to determine the subject-matter of the trust. There seems to be no answer to this issue, the subject-matter appears uncertain. This uncertainty, casts doubt on whether the intention to create a trust truly exists.  

1. Certainty of Intention to create a trust

To satisfy this requirement, the court must find an intention that the trustee is placed under an imperative or mandatory obligation to hold property on trust for the benefit of another, and ultimately, to distribute the property to the other. Certainty of intention is a question of construction; such an intention is inferred from the nature and manner of the disposition considered as a whole. It is important to mention that the language employed must convey more than a moral obligation or mere wish as to what is to be done with certain property. The language utilized does not need to be technical, what is important is the certainty with which the intention to create a trust can be inferred. When determining whether the requisite intention exists, it is important to consider, not only the words of request but the document as a whole. This point is highlighted by a consideration in Le Blanc Estate v. Belliveau. A testator directed that his executor may hold certain Bonds to maturity, and keep in trust thereafter, in order to help some bright young people through college. The court found that although

the language did not initially appear to be imperative, when the will was considered as a whole the
language was sufficient to meet the certainty of intention requirement. 34

As long as we are on this subject, what would be the result if, on construction, it is found that no
certainty of intention exists? To correctly answer this question, it is necessary to elucidate what was
intended. If the intention was that the trustee receive an outright gift, then the trustee will take
absolutely; the rules determining ownership in this particular situation are those that govern gifts, not
trust law. If the intention was that the holder of the property was to have a power of appointment over
it, then the persons entitled in default of exercise of the power will take equitable title subject to
divestment. In this particular situation, the relevant rules are those related to powers, not trust law. 35

2. Certainty of subject-matter

“The certainty of subject-matter requirement has two components. First, a trust must have property
which can clearly be identified as its subject-matter. Second, the terms of the trust must either define
the portion which each beneficiary is to receive or vest the discretion to so decide in the trustees” 36

I. When the subject-matter of the trust is uncertain

If the subject matter of a trust is not ascertained or ascertainable the trust does not exist, even when
the language in the trust instrument signifies clearly the intention to create a trust. 37

Any type of property is susceptible to being the subject-matter of a trust. The meaning of the word
property contains or includes all equitable and legal interests in realty and personalty. Following from

Toronto. 2004. P. 168
35 Ibid P. 168
36 Ibid P. 171
37 Ibid P. 171
this, an equitable interest under a trust is property and is capable of forming the subject matter of a further trust; a similar example can be made when taking into consideration the benefit of a contract, which is a property right capable of forming part of the subject-matter of a trust. \(^{38}\)

It is important to stress that whatever type of property is involved, it must be ascertained or ascertainable. “The subject-matter is ascertained when it is a fixed amount or specified piece of property; it is ascertainable when a method by which the subject-matter can be identified is available from the terms of the trust or otherwise.” \(^{39}\)

II. Uncertainty in the quantum of the beneficiary’s interest

If the quantum of the beneficial shares is uncertain, a trust will fail and the property will result to the creator’s estate. Nevertheless, the requirement of certainty of quantum of the beneficiaries’ interest is unusual, given that the courts have accepted that this kind of uncertainty can be cured. \(^{40}\)

3. Certainty of objects

The final requirement that all trusts must comply with in order to have validity is that the objects must be described with sufficient certainty. The phrase “certainty of objects” is utilized to describe two significantly different concepts. First, it is sometimes used to indicate that a trust must be in favour of persons, not non-charitable purposes. However, this phrase is used more frequently to indicate that the class of beneficiaries must be described with sufficient certainty as to facilitate the performance of the trust. The relevant concept for our purpose is the second one. \(^{41}\)

\(^{38}\) Ibid P. 171  
\(^{39}\) Ibid P. 171  
\(^{40}\) Ibid, p. 176  
\(^{41}\) Ibid, p. 179
Certainty of objects is necessary and required because, unless the objects are clearly specified at the time of distribution, the trustee cannot be sure that they are performing properly. This requirement is important as well to the creator of the trust and beneficiaries. The creator must be certain that the trustees will carry out his intention. If the creator has failed to define the class to be benefited in sufficiently clear terms, there cannot be an assurance that the intended class will take. The beneficiaries have an obvious interest in the requirement. If the class of objects is not sufficiently defined, no one can know whether he or she is a member of the class and therefore entitled to a proprietary interest in the subject-matter of the trust. The beneficiaries will be unable to join together and terminate the trust once all are sui juris and absolutely entitled. The court has an interest in having the class adequately defined in the case that the trustees fail to distribute, the court must have the ability to step in and perform. A trust that fails to pass the certainty of objects test will fail and the property will result to the settlor or testator’s estate.

Objects can be considered a neutral word, because trusts may be created in favour of persons, and to a limited extent, in favour of purposes which the settlor or testator would like to see carried out.

1. Persons

“Persons, human or incorporated, are the familiar objects of trusts, and the problem of certainty which they present is whether it is possible to say that the persons intended as objects are ascertainable. Ascertaintable is a somewhat ambiguous word, but in this context it means two things: first, that it is possible to determine, if the intended beneficiaries are not referred to by name but by a class description, whether any person is a member of that class, and, second, that the totality of the membership of that class is known. Ascertainment means certainty, and it is certainty on both of those matters that must be established if the trustees have no discretion as to distribution among the class
members, but hold the property for beneficiaries who have interests whose amount or quantum is set out on the instrument creating the trust.\textsuperscript{42}

Every person drafting a trust instrument should be very aware of the importance of a clearly spelt out objects clause that would effectively address a circumstance in which any question of which persons come into a class description arises.

“If the objects clause is not spelt out carefully so that the court is asked to guess at the membership of the class, the trust may well fall whether it is discretionary or non-discretionary.”\textsuperscript{43}

2. Purposes

We can identify a trust as a mechanism whereby one person manages property for the benefit of another. The manager of the property or trustee has consequent duties, and it is up the beneficiary to see that those duties are executed. If such duties are not executed, and loss has to be recovered from the trustee or from a liable third party, it is the beneficiary who brings an action for breach against the trustee, or recovers the trust property from the liable third party.

The settlor or testator, however, may not wish to benefit persons directly. He or she may have an indirect benefit in mind. He or she may wish to leave money on trust to fund research into legislation that regulates freedom of speech in Canada; or the desired benefit may be more direct as would be to leave money on trust to fund the building of basketball courts of a specific high school in Hamilton, Ontario. In these cases the trusts would not be for persons but for purposes, and since the trustee cannot be compelled to execute his duties by a purpose, the law has traditionally opposed them. In principle, purpose trusts are void.


\textsuperscript{43} Ibid p. 162
There is a significant exception to this principle. “If the purpose is charitable within the meaning that the law gives to that term, the trust will be valid. This is an age-old concession in recognition and encouragement of acts of giving which are concerned to improve the welfare of society or sizeable groups within it. A further concession to charity is that the objects of the charitable trust – that is, the purpose or purposes – need not be set out with the same degree of certainty as is demanded of the objects clause of a trust for persons. It is true the court cannot execute a purpose trust where the purpose is unascertained; but, provided the purpose, whatever its range of possible activities, comes within the scope of charitable activities as the law defines that term, the trust will be said to have certainty of objects. Certainty is “charitable” – the court will order a scheme to be drawn up setting out a specific proposal for the expenditure of the trust funds if such an ambiguity within the scope of charity is found. The trust is then capable of being executed or carried out. But, if the testator or settlor does not confine his purpose to those which are charitable, his trust will either partly or wholly fail”. 44

Non-charitable purpose trusts generally do not come within the scope of the aforementioned concessions, and therefore, are usually invalid. However, “in the nineteenth century, first instance courts in England conceded validity to two types of such trusts, and it is only because of the antiquity of those decisions that they have not been reversed by twentieth century appellate courts. The list is made up of (1) trusts for the care and maintenance of specific graves and burial places, and the erection of gravestones and monuments, (2) trusts for the maintenance of specific animals. If they are not charitable, doubt surrounds trusts for the saying of masses for the death, and considerable controversy of a related, but more complex kind has surrounded trusts for unincorporated associations”. 45

At this point, it is important to mention RE DENLEY’S TRUSTS (1968), [1969] 1 Ch. 373, [1968] 3 All E.R. 65 Chancery Division, better known as Re Denley’s Trusts. In this case, a trust deed, H.H. Martin and Co.

44 Ibid p. 163
LTD. conveyed real property to trustees for the purpose of creating a recreation or sports ground for the benefit of its employees; such trust was found to be valid. “The court showed a remarkable willingness to treat as a class of beneficiaries the people who would benefit from the implementation of the trust’s non-charitable purpose. This has since provided the means of saving a number of trusts created for good, but not charitable, purposes. This is not an exception to the normal rule that trusts for non-charitable purposes are invalid, but a situation to which that rule does not apply. The beneficiaries of the trust have standing to enforce it”.

In addressing the validity of specific non-charitable purpose trusts it is also relevant to mention the Statutory Reform in section 16 of the Ontario Perpetuities Act which is reproduced below:

16.(1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is exercised either by the original trustee or the trustee’s successor, within a period of twenty-one years, despite the fact that the limitation creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the limitation to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

(2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended within a period of twenty-one years, or within any annual or other recurring period within which the limitation creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person or persons, or the person or person’s successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation, are entitled to such unexpended income or capital. R.S.O. 1990, c. P.9, s. 16.

D. Inter vivos and Testamentary Trusts

---

47 Perpetuities Act, R.S.O. 1990, Chapter P. 9
Although it is understood that a comprehensive definition of trusts is difficult to establish, I will provide a definition of inter vivos and testamentary trusts in order to have a good starting point of discussion concerning their differences.

According to the Legal Dictionary division of The Free Dictionary by Farlex Inter vivos trust is “a trust created by a writing (declaration of trust) which commences at that time, while the creator (called a settlor) is alive, sometimes called a "living trust." The property is then placed in trust with a trustee (often the settlor during his/her lifetime) and distribution will take place according to the terms of the trust---possibly both during the settlor's lifetime and then upon the settlor's death. This is different from a testamentary trust which is created by the terms of a will and places some assets from the dead person's estate in a trust to exist from the date of death and until fully distributed”. 48

Another statement that might be useful concerning the subject would be; “The well-known words which set out the test to be applied determining whether a trust is testamentary are those of Sir John Wilde in Cock v. Cooke. ‘It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death and it is dependent upon his death for its vigour and effect, it is testamentary”. 49

We could infer that testamentary trusts are intended to and take effect after the death of the person executing them. Taking that statement into consideration, inter vivos trusts are intended to and take effect while the person executing them is still alive.

Another way to notice differences between them is to focus on the formal requirements that characterize them.

---

I. Inter vivos formalities

The formal requirements governing contracts to create inter vivos trusts, the creation of inter vivos trusts and the transfer of equitable interests under trusts are contained in the Statute of Frauds. The original English Act is in force in Alberta, Saskatchewan, Newfoundland, the Northwest Territories, and Yukon Territory as received English law. This Act was also in force in Manitoba and British Columbia but was repealed in both provinces. The Statute of Frauds of Prince Edward Island does not contain any similar provisions.\(^{50}\)

The relevant sections of the Ontario version are reproduced below:

4. No action shall be brought to charge any executor or administrator upon any special promise to answer damages out of the executor’s or administrator’s own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of any other person, or to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which the action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some person thereunto lawfully authorized by the party. R.S.O. 1990, c. S.19, s. 4; 1994, c. 27, s. 55.

9. Subject to section 10, all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by a writing signed by the party who is by law enabled to declare such trust, or by his or her last will in writing, or else they are void and of no effect. R.S.O. 1990, c. S.19, s. 9.

10. Where a conveyance is made of lands or tenements by which a trust or confidence arises or results by implication or construction of law, or is transferred or extinguished by act or operation of law, then and in every such case the trust or confidence is of the like force and effect as it would have been if this Act had not been passed. R.S.O. 1990, c. S.19, s. 10.

11. All grants and assignments of a trust or confidence shall be in writing signed by the party granting or assigning the same, or by his or her last will or devise, or else are void and of no effect. R.S.O. 1990, c. S.19, s. 11

II. Testamentary Formalities

The formalities for testamentary trusts are those required of wills. These were previously contained in the Statute of Frauds, but they were transferred, with amendments, to legislation governing wills. The Ontario requirements are contained in the Succession Law Reform Act, the relevant sections are reproduced below:

3. A will is valid only when it is in writing. R.S.O. 1990, c. S.26, s. 3.

4.(1) Subject to sections 5 and 6, a will is not valid unless,
(a) at its end it is signed by the testator or by some other person in his or her presence and by his or her direction;

(b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and

(c) two or more of the attesting witnesses subscribe the will in the presence of the testator.

(2) Where witnesses are required by this section, no form of attestation is necessary. R.S.O. 1990, c. S.26, s. 4.

51 Ibid. 252
6. A testator may make a valid will wholly by his or her own handwriting and signature, without formality, and without the presence, attestation or signature of a witness. R.S.O. 1990, c. S.26, s. 6.

7.(1) In so far as the position of the signature is concerned, a will, whether holograph or not, is valid if the signature of the testator made either by him or her or the person signing for him or her is placed at, after, following, under or beside or opposite to the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his or her will. R.S.O. 1990, c. S.26, s. 7.
CHAPTER V
BRIEF DESCRIPTION OF BUSINESS TRUSTS

We have established that one of the principal characteristics of the Panamanian foundations of private interest is their flexibility. The Law that regulates them allows the possibility of designing them to serve numerous purposes and functions in accordance with the will or intention of their founder; the only limitations in this respect pertain to the impossibility of habitually participating in profit making activities and of course, the objectives and activities of the foundation must be legal.

The Canadian Trusts can also be characterized as flexible. Like the foundations of Private Interest, trusts can be designed for multiple purposes in accordance with the intention of their creator. If they are created by individuals through inter vivos or testamentary disposition for the benefit of family members or other similar personal purposes we can describe them as personal trusts. Amongst the personal trusts we can mention Insurance Trusts, Testamentary Trusts, Discretionary Trusts, Separation or Divorce Trusts, Cemetery or Perpetual Care Trusts, etc.

Given the possibility of habitual participation in profit generating activities by trusts, which is one of the characteristics that distinguishes them functionally from the foundations of private interest, it would be relevant to mention a few examples of what are known as business trusts. It is important to keep in mind that these are only a few examples out of a significant amount of trusts utilized for business purposes.

a. Pension Trusts: This is an investment trust. The funding party, which may be the employer or both employer and employees will be the settlor or sponsor of the trust and plan. That party decides upon what terms the funds so applied shall be held. Private individuals, frequently a pension committee, may be appointed as the trustees, or a trust company may act in this role.

---

53 Ibid p. 533
Basically, the purpose of the trust is to ensure the investment of the funds to the maximum advantage, and to this end the trustee or trustees will be given a very wide power of investment.\(^{54}\)

b. Profit-Sharing Trusts: A company engaged in a cyclical industry can set up and fund a trust whose income will provide remuneration for employees during the company’s low periods of operation. The object of these trusts is to provide supplementary or unemployment income to employees. The list of permitted investments is normally supplied to the trustee by the employer.\(^{55}\)

c. Stock Purchase Agreement: The owner of a small company may decide as a recognition of the long service of his employees to make himself a co-owner with them. Therefore, he may put company stock into a trust for the employees which they will then purchase over an extended period.\(^{56}\)

d. Business Sale Trusts: Tends to be utilized with relatively small businesses. For instance, a retail store or pharmacy involving something like a $60,000 inventory is sold by the owner, and the assets of the business are pledged by the purchaser to the trustee until full payment has been made to the vendor.\(^{57}\)

e. Real Estate Investment Trusts: Such trusts have been particularly used in connection with real estate transactions both for the advantages to the beneficiaries and the flow-through of depreciation allowances, and because it is a flexible alternative to incorporation when there would be difficulties in splitting the legal ownership between a number of persons.\(^{58}\)

---

\(^{54}\) Ibid p. 545  
\(^{55}\) Ibid p. 547  
\(^{56}\) Ibid p. 551  
\(^{57}\) Ibid p. 552  
\(^{58}\) Ibid p. 553
CHAPTER V
COMPARATIVE ANALYSIS

The Panamanian Foundations of Private Interest and the Canadian Trust could be compared in a plethora of aspects. The following are the aspects that we consider to be more important and relevant in this comparative analysis:

A. Asset Ownership

Foundations of Private Interest:

The following articles of the Law of Foundations of Private Interest are directly relevant with respect to asset ownership.

Article 9. The registration at the Public Registry of the foundation charter shall bestow upon the foundation juridical personality without the need for any other legal or administrative authorization. Besides, the registration at the Public Registry constitutes a means of publicity before third parties.

Consequently, the foundation may acquire and own assets of any kind, incur obligations and be a party to any type of administrative and judicial proceedings in accordance with applicable legal provisions.

Article 11. For all legal purposes, the assets of the foundation shall constitute a separate patrimony from the personal assets of the founder. Therefore they cannot be sequestered, embargoed or subject to any precautionary action or measure, except for obligations incurred, or for damages caused by virtue of fulfilling the purposes and objectives of the foundation, on behalf of the legitimate rights of its beneficiaries. In no case shall the assets respond for personal obligations of the founder or of the beneficiaries.
Article 17. The foundation should have a Foundation Council, whose duties or responsibilities shall be established in the foundation charter or in its regulations. Unless it be a juridical person, the number of members of the Foundation Council hall not be less than three (3).

Article 18. The Foundation Council shall be in charge of carrying out the purposes or objectives of the Foundation. Unless otherwise stated in the foundation charter or its regulations, the Foundation Council shall have the following general obligations and duties:

1. To administer the assets of the foundation, in accordance with the foundation charter or its regulations.

2. Enter into acts, contracts or lawful businesses that may be suitable or necessary to fulfill the object of the foundation, and to include in such contracts, agreements and other instruments or obligations, such clauses and conditions as are necessary and convenient, which conform to the purposes of the foundation and are not contrary to the law, to morals, to bonus mores or to public order.

It is important to mention that the foundations of private interest do not conform to the concept of absolute and indivisible ownership that is reported to exist in modern civil law systems. As has been asserted; “In modern civil law, the principle derived from classical Roman sources, it is axiomatic that ownership of property involves the owner in having all the rights associated with ownership, namely, disposition, management and enjoyment. Ownership is an abstract concept in absolute terms. The owner is lord of the asset, the dominus. If anyone of those rights is severed, by definition ownership does not exist”.59

As can be inferred from the previously cited articles and previously expressed information, the foundational patrimony is independent from that of its founder, administrators and beneficiaries. The

---

foundation as a juridical person can take part in different activities in which the patrimony is utilized, nevertheless, such activities are circumscribed by the objectives and purposes of the foundation which are established in the foundation charter or its regulations. Luis Chalhoub makes a valid observation in this respect when he asserts that “the will of the Foundations of Private Interest, as juridical persons, is not autonomous, it is heteronomous, which means that its administration entities must respect the will of the founder, becoming executors of it, so that the destiny and organization of the foundation shall not vary”.  

I take the opportunity to reiterate that although the patrimony transferred by the founder to the foundation is to be administered according to the objectives and purposes established by the founder, these purposes may not be lucrative.

We can conclude from what has been expressed that foundations of private interest, as rights associated with ownership are concerned, are not created to enjoy the assets or patrimony under its administration as that would be the right of the beneficiary, furthermore, the disposition and management of the foundational assets are to be carried out according to the will of the founder, reflected in the objectives and purposes of the foundation which are in turn established in the foundation charter and regulations. The Foundation of Private Interest is a separate legal entity without autonomous will.

Trusts:

A characteristic of the Trust, “one which distinguishes it from civil law relationships, is what has been called the dual ownership of trustee and beneficiary”.  

---

In order to analyse this characteristic we have to inevitably refer to the history and development of the trust.

Maintaining focus on the evolution of the “ownership” aspect related to trusts, and in general, to common law, we can state that “the old common law never thought in terms of absolute ownership, because all land was owned by the Crown.” 62 The subjects of the King only had an interest in the land.

“Under Plantagenet feudalism his interest was measured in terms of the kind of tenure, or holding which he had. The tenure would be granted by the King or a lesser overlord in the feudal hierarchy who was himself holding by tenure traceable to an original royal grant, and would involve the performance of services for the King or overlord”. 63

“As a result of feudalism, absolute ownership of land never appeared”. 64 What became important was tenure, as a reflection of a man’s status in the community, and then estate or interest, which would be an economic way of measuring the rights of ownership to which a person could lay claim. 65 Another way of expressing this idea would be that, “the common law could never be concerned with direct ownership of land; it was concerned instead with the rights involved in ownership. These rights, basically, are to dispose, to manage, and to enjoy”. 66 The common law, differing from the civil law system, arrived at the conception of a man “owning” an interest or estate in the land.

The aforementioned rights (disposition, management and enjoyment) lasted as long as a man’s estate endured. “He might for example have those rights forever (the estate in fee simple), or he might have them only for the length of his life (the estate for life)”. 67

62 Ibid p.10
63 Ibid p.10
64 Ibid p.10
65 Ibid p.10
66 Ibid p.10
67 Ibid p.10
“The beneficiary’s rights were protected and enforced not by the common lawyers, but, as we have seen by the Court of the Lord Chancellor who ensured that in the working of the law equity or justice was done. If a man promised to hold his legal estate so that the property was to be enjoyed by another, the Chancellor saw to it that that duty was enforced. The trust beneficiary’s right of enjoyment therefore came to be seen as his interest in the trust property; and, in describing the extent of this interest, what beneficiary’s estate became the equitable interest or estate. Thus, these two sets of estates, the legal and the equitable, became the base upon which the modern trust is built. In the popular sense described, trustee and beneficiary share in the ownership of the trust property. The rights associated with property are distributed between them; technically each holds his estate in the trust property.”

We have seen that the Canadian Trust is characterized by a dual ownership of property by the trustee and beneficiary, each one holding a valid interest in the trust property. As well, we have learned that the Panamanian Foundation of Private Interest can be considered as a separate legal entity, endowed with juridical personality and entitled to participate in judicial and administrative proceedings. Interestingly enough, such an independent entity cannot exercise autonomous will since its responsibilities, objectives and duties are determined by the founder. This means that it does not fit the expected civil law concept of absolute ownership as it cannot exercise the rights of disposition, management and enjoyment in an autonomous fashion.

Given the previous descriptions, conceptually reached through somewhat different paths, it is imperative to emphasize that both, the foundations of private interest and the trust, in spite of their somewhat different ownership concepts, are characterized by the existence of a commitment by an entity or person to hold and manage property for the benefit of another who has exclusive enjoyment of the property, namely the beneficiary. It is important to mention that the management of the trust and

68 Ibid pp. 10 - 11
A foundation of private interest must be executed with the intention and objective of acting in the best interests of the beneficiary. This similarity, I believe, is the most important aspect of their functional essence.

B. Creation Mechanisms

As we have seen in section D of Chapter IV of this thesis, the Canadian Trusts can be classified in Inter vivos or testamentary trusts. These can be created by deed of settlement or by will respectively, and these creation mechanisms or vehicles are to comply with the formalities established in the Statute of Frauds and the Succession Law Reform Act.

The Foundations of Private Interest, referring to this aspect, differ from the Trust in the sense that the formalities that must be complied with in order to create them are contained in one piece of legislation, which is the Law of Foundations of Private Interest.

These formalities are mentioned and analyzed in Section E of Chapter III of this thesis, which is titled Constitution of Foundations of Private Interest.

It is important to comment that Foundations of Private Interest can be designed in such a way that they take effect at the moment of their creation or after the death of their founder (By establishing the desired moment in which the foundation is to take effect, in the Foundation Act). So, we can conclude that like Trusts, Foundations of Private Interest can be created to take effect during the life or after the death of their founder, the difference lies in the formalities that have to be followed and complied with in order to create them. Article 4 of Law No. 25 of June 12th, 1995 covers this subject as we can see:

Article 4.

Private foundations may be constituted to become effective at the time of constitution or after the death of its founder, by anyone of the following methods:
a) Through a private document, executed by the founder, whose signature must be authenticated by a notary public at the place of constitution.

b) Directly before a notary public at the place of constitution.

Whichever may be the method of constitution, it must comply with the formalities established in the present Law, for the creation of foundations.

In case of a foundation being created either by public or private document, to have effect after the death of the founder, the formalities stipulated for the execution of testaments shall not apply.

If we examine the formalities associated with the creation of Inter vivos and testamentary trusts, which as has been mentioned, are established in the Statute of Frauds and the Succession Law Reform Act respectively (relevant sections of Ontario versions reproduced in Section D of Chapter IV of the present thesis) and compare them with the formalities associated with the creation of foundations of private interest, established in the Law of Foundations of Private Interest (which are analyzed in Section E of Chapter III of the present thesis) we can make two assertions. The first one would be that unlike the Canadian trust, which in order to be created must comply with formalities established in the aforementioned Statute and Act, the foundation of private interest must only comply with formalities established in the law that regulates it. It is important to highlight that the Law of foundations of private interest establishes that if a foundation is created to have effect after the death of the founder, the formalities stipulated for the execution of testaments does not apply. This, interestingly enough, allows people intending to bequeath patrimony to take two different legal paths. To express it in another way, the foundation of private interest can serve as viable legal replacement of wills in Panama.

The second assertion is more general in nature. Basically, the formalities associated with the creation of trusts and foundations of private interest differ in structure, detail and form; nevertheless, they are
aimed at a similar purpose, to give them validity, to assure that the will of the founder and settlor or testator, the commitment of the trustee and foundation and the right of enjoyment of the beneficiaries are solidly established. These formal differences, I strongly believe, are the result of the different historical trajectories and general idiosyncrasies of the legal cultures out of which the two institutions emanated.

C. Certainty of Objects vs. Designation of Beneficiaries in the Foundation Act

As we have seen, the creation of trusts is premised upon the existence of the three certainties. The relevant certainty to be discussed in this section is the certainty of objects, which roughly means that the beneficiaries of the trust must be sufficiently identified.

As I mention on Part 3 of section C of Chapter IV, trusts may be created in favour of persons, and to a limited extent, in favour of purposes. I have discussed the circumstances in which trusts for purposes do not become invalid, namely trusts for charitable purposes and non-charitable purpose trusts that have been conceded validity by first instance English courts, whose validity has not been reversed by twentieth century appellate courts because of the antiquity of those decisions. As well, I have mentioned cases and legislation that address the validity of certain specific non-charitable purpose trusts.

In contrast, the Panamanian Legislation regulating Foundations Private Interest does not offer the possibility of creating a Foundation of Private Interest in which the beneficiary is a purpose. A beneficiary must be designated. As established in Numeral 7 of Article 5 of the Law No. 25 of June 12, 1995:

   Article 5.

The foundation charter shall contain:
7. The manner in which the beneficiaries of the foundation shall be designated, among which the founder may be included.

Special attention should be given to the language of the article as it establishes an obligation to designate a beneficiary or beneficiaries, not only the possibility.

The Beneficiaries of Foundations of Private Interest, as a Luis A. Chalhoub expresses may be “natural or juridical persons” which means that juridical persons that are created with the intention of performing charitable acts, and other activities which may not be perceived as charitable, can be designated as beneficiaries of a particular Foundation of Private Interest.

Undoubtedly, the most significant difference between the certainty of objects necessary for the validity of trusts and the required designation of the beneficiaries of foundations of private interest is the possibility of creating a trust in favour of charitable purposes. I believe, as evidently many in the past have as well, that that possibility encourages and facilitates acts of giving which are intended to improve the welfare of society or sizeable groups within it. Aside from that difference, we have seen that sufficient and proper identification of beneficiaries of both foundations of private interest and trusts must be made in order to ensure their proper functioning and the carrying out by administrators of the creator’s will and intention, this in turn makes them quite similar.

With respect to the possibility of creating foundations of private interest in favour of charitable purposes, and not concrete charitable organizations and institutions, I just do not see it happening any time soon. The law requires that a beneficiary be identified; at the same time, an authoritative infrastructure has not been created to determine proper, just and effective distribution of funds of a foundation of private interest in favour of a purpose.

With respect to the reasoning behind Re Denley’s Trusts, in which a non-charitable purpose trust was held as valid given that it benefited a group or category of people, I doubt that it would pave the way for the possibility of creating a foundation of private interest in which the beneficiary would be a purpose; not because it would be unfeasible, simply because it would be costly in terms of time, money and effort to establish an infrastructure devoted to discern which categories of beneficiaries are specific and explicit enough, particularly if the infrastructure, as would be necessary, would be designed to solve disputes related to the right of enjoyment of the patrimony comprised in the foundation of private interest. It is my impression that Panamanian courts and arbitrage institutions are already operating at levels beyond their capacity, therefore, the possibility of designating a purpose as a beneficiary of a foundation is not likely to exist in the near future, of course, that is my humble opinion. It just seems more efficient and practical at this point in time to designate a person or persons, either juridical or natural, to be the beneficiaries of a foundation, leaving no room for the possibility of a dispute with regard to the right of enjoyment of the patrimony comprised in a foundation.
A. Lessons

Given that Foundations of Private Interest and Trusts constitute vehicles through which a person or an entity holds and manages property for the benefit of another person or entity, and in the case of trusts even a purpose, and given that these vehicles can be utilized for several advantageous and sometimes lofty purposes, I consider it relevant to analytically compare them, particularly since they originated and developed in different legal cultures.

The most significant lesson that can be extracted from the study and analysis of foundations of private interest is its malleable nature, of course made possible by its regulating law. I understand that the trust is quite adaptable to effectively uphold the intentions of its creator but not to the extent that foundations are. The fact that a clause can be incorporated into the Foundational Act in which it is determined that possible disputes may be resolved through arbitrage instead of recurring to the judicial sphere makes it a very attractive vehicle, particularly in Panama, where judicial processes tend to be slow and bureaucratic.

In relation to lessons that can be learned by studying and analyzing trusts, the faculty to enter into and participate in profit making activities while still effectively holding and administering property according to the intentions and will of its creator is of great significance. If managed correctly and adeptly, the value of the assets contained in a trust can potentially increase, better serving its original objective, conversely, if investment operations and other profit making activities are poorly executed, the consequences can be detrimental with respect to the value of the trust assets. There is an element of risk that accompanies the profit making capability of trusts.
B. Conclusion

The acquaintance with the historical aspects, concepts and characteristics of the Canadian Trust and the Panamanian Foundation of Private Interest has served as a proper preamble for an ensuing comparative analysis between these two asset management legal vehicles. Taking this analysis into consideration together with the information presented in chapter V of the present thesis, which describes a few types of Business Trusts and introduces us to the idea that there are multiple types of business trusts which are utilized abundantly in certain areas of the world, we can conclude that although there is quite a lot of correspondence between trusts and foundations of private interest regarding their non-commercial applications, their similarity is limited significantly when considering the multiple applications that can be given to the trust in a commercial context. The fact that the Canadian Trust can be utilized in profit making activities makes its range of application substantially broader.

As we analytically compared Foundations of Private Interest and Trusts based on their asset ownership concepts, creation mechanisms and designation of beneficiaries we became aware of a number of differences between them. Nevertheless, such differences are natural consequences of the doctrinal and historical development of the different legal cultures from which the two institutions emanated. We can maintain that in spite of their differences both are legal vehicles through which a person or entity holds property for the exclusive enjoyment of a beneficiary in accordance to the intention of their creator. It is interesting to see how two different legal cultures produced such functionally similar institutions (with regard to non-commercial applications), it inevitably brings me to the reflection that despite our differences we are essentially the same.
Books


Legislation


Perpetuities Act, R.S.O. 1990.


Succession Law Reform Act, R.S.O. 1990

Secondary Material: Monographs


Panama Law No. 25 of June 12, 1995

Whereby Foundations of Private Interest are Regulated

Translation
THE LEGISLATIVE ASSEMBLY
DECRES:

Article 1.
One or more natural or juridical persons by themselves or through third parties, may create a private foundation in accordance with the provisions set forth in this law. For such purposes, the endowment of a patrimony exclusively dedicated to the objectives or purposes expressly stipulated in the foundation charter is required. The initial patrimony may be increased by the creator of the foundation, hereinafter called the founder, or by any other person.

Article 2.
Private foundations shall be governed by the foundation charter and its regulations, as well as by the provisions of this law and other legal or regulatory provisions that may be applicable. The provisions of Title II of Book I of the Civil Code shall not apply to these foundations.

Article 3.
Private foundations shall not be for profit. However, they may carry out mercantile activities in a non-habitual manner or exercise the rights deriving from titles representing the capital of mercantile corporations that make up the patrimony of the foundation, provided that the economic results or proceeds of such activities be dedicated exclusively for the purposes of the Foundation.

Article 4.
Private foundations may be constituted to become effective at the time of constitution or after the death of its founder, by anyone of the following methods: a) Through a private document, executed by the founder, whose signature must be authenticated by a notary public at the place of constitution. b) Directly before a notary public at the place of constitution. Whichever may be the method of constitution, it must comply with the formalities established in the present Law, for the creation of foundations. In case of a foundation being created either by public or private document, to have effect after the death of the founder, the formalities stipulated for the execution of testaments shall not apply.

Article 5.
The foundation charter shall contain:

1. The name of the foundation, expressed in any language with characters of the Latin alphabet, which shall not be equal or similar to that of a foundation previously existing in the Republic of Panama, 80 as to avoid confusion. The name must include the word "foundation" to distinguish it from other natural or juridical persons of a different nature.
2. The initial patrimony of the foundation, expressed in any currency of legal tender that in no case shall be less to a sum equivalent ten thousand Balboas (B/10,000.00) =U.S. Dollars.
3. A complete and clear designation, of the member or members of the Foundation Council, to which the founder may belong, including their addresses.
4. The domicile of the foundation.
5. The name and address of the Resident Agent of the foundation in the Republic of Panama, which shall be an attorney or a law firm, who must countersign the foundation charter prior to its registration at the Public Registry.
6. The purposes of the foundation.
7. The manner in which the beneficiaries of the foundation shall be designated, among which the founder may be included.
8. The reservation of the right to amend the foundation charter whenever deemed convenient;
9. The duration of the foundation.
10. The destination to be given to the assets of the foundation and the method of liquidation of its patrimony in case of dissolution;
11. Any other lawful clause that the founder may deem convenient.

Article 6.
The foundation charter, as well as any amendment thereto must be written in any language with characters of the Latin alphabet, and must comply with the regulations for the registration of acts and titles in the Public Registry; for which purpose it must be previously protocolized by a notary public of the Republic (of Panama). If the foundation charter or its amendments are not written in the Spanish language, they must be protocolized together with their (Spanish) translation by an authorized public translator of the Republic of Panama.

Article 7.
Any amendment to the foundation charter, when permitted, shall be carried out and executed in accordance with what is established therein. The respective agreement, resolution or act of amendment shall contain the date on which it was carried out and the name, clearly identifiable, of the person or persons subscribing it and their signatures which shall be authenticated by a notary public of the place where the document is executed.

Article 8.
Every private foundation must pay a registration fee and an annual maintenance tax equivalent to those established for corporations in Articles 318 and 318A of the Fiscal Code. The procedure and method of payment, the surcharge for late payment, the consequences for lack of payment and all other complementary provisions of the aforementioned legal principles, shall be applied to private foundations.

Article 9.
The registration at the Public Registry of the foundation charter shall bestow upon the foundation juridical personality without the need for any other legal or administrative authorization. Besides, the registration at the Public Registry constitutes a means of publicity before third parties. Consequently, the foundation may acquire and own assets of any kind, incur obligations and be a party to any type of administrative and judicial proceedings in accordance with applicable legal provisions.

Article 10.
Once the foundation has obtained its juridical personality, the founder or third parties that have
pledged to contribute assets to the foundation, on their own or at the request of any person with interest in the foundation, shall formalize the transfer to the foundation of the assets so pledged. When the foundation is constituted to be effective upon the demise of the founder, it shall be deemed to have existed prior to such death, in respect to the donations that he (she) may have made to the foundation.

**Article 11.**
For all legal purposes, the assets of the foundation shall constitute a separate patrimony from the personal assets of the founder. Therefore they cannot be sequestered, embargoed or subject to any precautionary action or measure, except for obligations incurred, or for damages caused by virtue of fulfilling the purposes and objectives of the foundation, on behalf of the legitimate rights of its beneficiaries. In no case shall the assets respond for personal obligations of the founder or of the beneficiaries.

**Article 12.**
Foundations shall be irrevocable, except in the following cases: a) When the foundation charter has not been registered at the Public Registry; b) When the opposite is expressly established in the foundation charter. c) For any of the causes of revocation of donations. The transfers (of assets) made to foundations shall be irrevocable by whoever has made the transfer, unless the opposite is expressly established in the act of transfer.

**Article 13.**
In addition to the provisions of the previous article, when the foundation has been created to be effective after the demise of the founder, the latter shall have the exclusive and unlimited right to revoke it. The heirs of the founder shall not have the right to revoke the creation or the transfers, even if the foundation has not been registered in the Public Registry prior to the demise of the founder.

**Article 14.**
The existence of legal provisions in inheritance matters in the domicile of the founder or of its beneficiaries, shall not be opposable to the foundation, nor shall it affect its validity, or prevent the fulfilment of its objectives as provided for in the foundation charter or its regulations.

**Article 15.**
The creditors of the founder or of a third party shall have the right to dispute the contributions or transfer of assets in favour of a foundation, when the transfer constitutes an act of fraud to the creditors. The rights and actions of such creditors shall prescribe three (3) years from the date of the contribution or transfer of the assets to the foundation.

**Article 16.**
The patrimony of the foundation may originate from any lawful business and may consist of present or future assets of any nature. Periodic sums of money or other assets may also be incorporated to the patrimony by the founder or by third parties. The transfer of assets to the patrimony of the foundation may be effected by public or private document. Nevertheless, in the case of real estate, the transfer must conform with the rules for the transfer of real estate.
Article 17.
The foundation should have a Foundation Council, whose duties or responsibilities shall be established in the foundation charter or in its regulations. Unless it be a juridical person, the number of members of the Foundation Council hall not be less than three (3).

Article 18.
The Foundation Council shall be in charge of carrying out the purposes or objectives of the Foundation. Unless otherwise stated in the foundation charter or its regulations, the Foundation Council shall have the following general obligations and duties:

1. To administer the assets of the foundation, in accordance with the foundation charter or its regulations.
2. Enter into acts, contracts or lawful businesses that may be suitable or necessary to fulfil the object of the foundation, and to include in such contracts, agreements and other instruments or obligations, such clauses and conditions as are necessary and convenient, which conform to the purposes of the foundation and are not contrary to the law, to morals, to bonus mores or to public order.
3. To inform the beneficiaries of the foundation of the patrimonial situation of the latter, as established in the foundation charter or its regulations.
4. To deliver to the beneficiaries of the foundation the assets or resources set up in their favour by the foundation charter or its regulations.
5. To carry out all such acts or contracts which are permitted to the foundation by the present Law and other applicable legal or regulatory provisions.

Article 19.
The foundation charter or its regulations may provide that the members of the Foundation Council may only exercise their powers by obtaining previous authorization of a protector, a committee or any other supervisory body, appointed by the founder or by the majority of the founders. The members of the Foundation Council shall not held liable for the 1088 or deterioration of the assets of the foundation, nor for any damages or prejudice caused, when said authorization has been duly obtained.

Article 20.
Unless otherwise provided for in the foundation charter or its regulations, the Foundation Council must render an accounting of its activities to the beneficiaries and, when applicable, to the supervisory body. If the foundation charter or its regulations stipulate nothing in this regards, the rendering of accounts must be done annually. If the accounts 90 rendered are not objected within the term established in the foundation charter or its regulations, in lack of it, it shall be deemed as having been approved within ninety (90) days from the day it was received, for which purpose, record of this term shall be made in the report rendering the accounts. Such period having lapsed or the account approved, the members of the Foundation Council shall be exempted from liability for their administration, unless they had failed to act with the diligence of a bonus paterfamilias. Such approval does not exonerate them before the beneficiaries or third parties having an interest in the foundation, for damages caused due to gross negligence or fraud in the administration of the foundation.
Article 21.
In the foundation charter the founder may reserve for himself/herself or for other persons, the right to remove the members of the foundation Council, as well as to appoint or add new members.

Article 22.
When the foundation charter or its regulations do not establish anything in respect to the right to and the causes for removal of the members of the Foundation Council, these may be judicially removed, through summary proceedings, for the following causes:

1. When their interests are incompatible with the interests of the beneficiaries or the founder.
2. If the administration of the assets of the foundation lacked the diligence of a bonus paterfamilias.
3. If they are convicted for a crime against private property or public faith. In this case, while the criminal proceedings are in progress, the temporary suspension of the member on trial may be decreed.
4. For incapacity or impossibility to carry out the objectives of the foundation, from the time such causes may arise.
5. For insolvency or bankruptcy proceedings.

Article 23.
The founder and beneficiary or beneficiaries may request the judicial removal of the members of the Foundation Council. Should the beneficiaries be disabled or under age they may be represented by whoever exercise upon them the "patria potestas" or guardianship, as the case may be.

The judgement of the court decreeing the removal, shall appoint new members in replacement of the previous ones, who shall be persons with sufficient capacity, competence and good moral standing to administer the assets of the foundation, in accordance with the purposes established by the founder.

Article 24.
The foundation charter or its regulations may provide for the constitution of supervisory bodies, that may be constituted by natural or juridical persons, such as auditors, protectors of the foundation or others. The duties of the supervisory bodies shall be established in the foundation charter or its regulations and may include, among others, the following:

1. To ensure the fulfillment of the purposes of the foundation by the Foundation Council and (to protect) the rights and interests of the beneficiaries;
2. To demand from the Foundation Council, the rendering of accounts;
3. To modify the purposes and objectives of the foundation, if and when they become too costly or impossible to fulfil.
4. To appoint new members of the Foundation Council due to temporary or permanent absence or for expiration of the period of anyone of them.
5. To appoint new members of the Foundation Council in cases of temporary or accidental absence of anyone of them.
6. To increase the number of members of the Foundation Council.
7. To approve the acts adopted by the Foundation Council, as indicated in the foundation charter or its regulations.
8. To guard the assets of the foundation and observe their application to the uses or purposes stated in the foundation charter.
9. To exclude beneficiaries of the foundation and to add others in accordance with the provisions of the foundation charter or its regulations.

Article 25.
The foundation shall be dissolved due to:

1. Reaching the day in which the foundation must terminate, in accordance with the foundation charter.
2. The fulfillment of the purposes for which it was constituted or if their fulfillment becomes impossible.
3. Being in a state of insolvency, cessation of payments or due to bankruptcy proceedings having been declared judicially.
4. The loss or total extinction of the assets of the foundation.
5. Its revocation.
6. Any other cause established in the foundation charter or in the present Law.

Article 26.
Every beneficiary of the foundation may contest any acts of the foundation that may damage the rights conferred upon him/her, denouncing such circumstance to the protector or to other supervisory bodies, if any; or lacking them, directly promoting the respective judicial claim, before a competent court of the domicile of the foundation.

Article 27.
The acts of constitution, amendment or extinction of the foundation, as well as the acts of transfer, transmittal or encumbrance of the assets of the foundation and the income derived from such assets or any other act in connection therewith, shall be exempt from all taxes, contributions, duties, liens or assessments of any kind or denomination, provided that such assets are:

1. Assets located abroad.
2. Money deposited by natural or juridical persons whose income is not derived from Panamanian sources nor taxable in Panama for any reason whatsoever.
3. Shares or securities of any kind, issued by corporations which income is not derived from Panamanian sources or when such income is not taxable for any reason whatsoever, even when such shares or securities be deposited in the Republic of Panama.

The acts of transfer of real estate, titles, certificates of deposit, securities, money or shares, carried out in fulfillment of the purposes or objectives, or for the extinction of the
Article 28.
Foundations constituted in accordance with a foreign law may become subject to the provisions of this law.

Article 29.
Foundations referred to in the previous article that opt to become subject to the provisions of this Law, shall present a Certificate of Continuation, issued by such bodies as their internal regime may call for, and which shall contain:

1. The name of the foundation and the date of its constitution.
2. Data about its registration or deposit (of the charter) at its country of origin.
3. An express declaration of its desire to continue its legal existence as a Panamanian foundation.
4. Requirements stipulated under Article 5 of this Law, for the constitution of private foundations.

Article 30.
The certification containing the resolution of continuation and other requirements mentioned in the preceding paragraph must have the following documents attached thereto:

5. Copy of the original act of constitution of the foundation expressing its desire to continue in Panama, along with any subsequent amendment;
6. A power of attorney granted to a Panamanian attorney to carry out the necessary proceedings to make effective the continuation of the foundation in Panama.

The certificate of continuation, as well as the documents attached thereto referred to in this Law, shall be duly protocolized and registered at the Public Registry so that the foundation may continue its legal existence as a private foundation in the Republic of Panama.

Article 31.
In the cases foreseen in Article 26, the responsibilities, duties and rights of the foundation acquired prior to the change or domicile or legislation, shall continue in force, as well as the proceedings already initiated against it or those that the foundation may have promoted, without being affected such rights and obligations due to the change authorized by the aforesaid legal provisions.

Article 32.
The foundations constituted in accordance with this Law, as well as the assets comprising its patrimony, may be transferred or become subject to the laws and jurisdiction of another country, as may be provided by the foundation charter or its regulations.
Article 33.
Registrations related to private foundations shall be effected at the Public Registry in a special section that shall be named "Section of Private Foundations". The Executive Branch through the Ministry of Government and Justice shall issue the regulations applicable to such section.

Article 34.
To avoid the unlawful use of private foundation, all legal provisions contained in Executive Decree No. 468 of 1994 and any other rule in force aiming at fighting money laundering derived from drug-trafficking, shall apply for their operation.

Article 35.
The members of the Foundation Council, of the supervisory bodies, if any, as well as the public or private employees who might have any knowledge of the activities, transactions or operations of the foundations shall at all times maintain secrecy and confidentiality in this respect. Infringement of this shall be penalized with six (6) months imprisonment and a $50,000.00 fine without prejudice of the corresponding civil liability.

The provisions of this article shall apply without prejudice of the information which must be disclosed to the official authorities and of the inspections that they must carry out in the manner established by the law.

Article 36.
Any controversy for which there is no special procedure in this Law, shall be resolved through summary proceedings. The foundation charter or the regulations of the foundation may establish that any controversy arising in respect to the foundation shall be resolved by arbiters or arbitrators, as well as establish the procedure they should abide by. In the event that such procedure is not established, the rules in respect to such matters, as contained in the Judicial Code, shall apply.

Article 37.
This law shall be effective from the date of its publication.
Copyright Acknowledgments

Citations regarding trusts reprinted by permission of Carswell, a division of Thomson Reuters Canada Limited.