The Trust vs. the Foundation

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Most people have heard of the trust and the foundation which are available to private individuals in Malta. However, not all are familiar with what these two institutes have to offer. I feel that once the main characteristics of these two vehicles are understood, they would be used more confidently and the possibilities offered would be endless.

The trust is a relationship created through a private writing, where a trustee holds and controls assets for the benefit of beneficiaries. The trustee is usually a firm or company engaged professionally and customarily in the business of trustee services and in managing assets which are legally under the ownership of said trustee, but subject to the provisions of the trust Instrument. On the other hand, a foundation is an organisation. It can be regarded as an autonomous legal entity which belongs to itself. It has characteristics of a company however it acts more like a trust. The Maltese foundation obtains separate legal personality once the foundation is registered with the Registrar for Legal Persons. Both trusts and private foundations cannot be created for a period longer than one hundred years.

The trust is established by the settlor who passes on full ownership of the property to the trustee and who should not be involved in the administration of the trust property. He may however write a letter of wishes addressed to the trustee in which he sets out his wishes in relation to the trust property and the trustee would keep those wishes in mind when exercising his powers. A foundation is established by the founder through a public deed drawn up by a notary. The founder may retain a significant degree of control in the administration of the foundation. The founder may supervise the acts of the administrators and may even be an administrator himself or may decide to be the top organ of the foundation.

On the creation of a trust there must be a transfer of ownership of money or property, however there is no minimum amount of capital that must be transferred from the settlor to the trustee. This is not true to the foundation as in the case of a private foundation a minimum of 1,164.69 Euro in money or property must be transferred to the foundation in order for it to be validly created.

The trustee holds the property in the trust in his name and administers same for the benefit of the beneficiaries. The trustee is answerable to the beneficiaries for his actions and must therefore exercise a high degree of care and skill in carrying out his functions. On the other hand, a foundation is run by administrators who also exercise their functions in the interests of beneficiaries – when we are talking of a private foundation, whilst in the case of a purpose foundation the assets would be administered in the interest of the particular purpose for which the foundation is created. Both trustees and administrators are subject to fiduciary obligations which are duties of trust and confidence that are imposed on a person in circumstances where that person, the fiduciary is bound to act for the benefit of another. A fiduciary is subject to duties of care, honesty, accountability and loyalty when exercising his functions and cannot allow personal interest to conflict with his duties.

A trustee must keep the assets held in trust segregated from his personal assets. In this way the trust assets would not be subject to the claims of creditors of the trustee and the trustee’s assets would not be subject to the claims of creditors of the trust. A foundation has a distinct personality with a patrimony of its own and would have the same effect as a limited liability company in this
sense – with creditors of the foundation having no recourse over the assets of administrators and vice versa.

The benefit in both the trust and the foundation is personal to the beneficiary and as a result the beneficiary may exercise enforcement powers. However, such a benefit terminates on the death of the beneficiary and does not devolve on his heirs. Beneficiaries in both trusts and foundations cannot instruct the trustee or administrator respectively on how he should administer the property, however the beneficiaries of both institutes may have enforcement powers against the trustee or administrators.

A very significant distinction between the trust and the foundation lies in the fact that an instrument of trust is not registered and is kept with the trustee, whilst a public deed creating a foundation must be registered. However, in practice although a foundation needs to be registered, very little information in relation to a private foundation is available to the public therefore retaining the confidentiality which is a crucial element when trusts and foundations are created for the benefit of private individuals.

As may be noted there are many aspects of the Maltese trust and foundation that are similar. However, there are also significant differences between the two institutes. At no point may the trust and the foundation be pigeon-holed into the same category of structures or may one affirm that one legal institute is better than the other. The decision on which vehicle a client would choose to set up would ultimately depend on what institute the client is most comfortable with as well as what his needs are and what he wishes to achieve. Having said this, the flexibility enjoyed by the trust and foundation and the opportunities offered by these two institutes are infinite.

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