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TRUSTEE (AMENDMENT) BILL, 2016

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TRUSTEE (AMENDMENT) BILL, 2016

**A BILL FOR AN ACT TO AMEND THE TRUSTEE ACT TO
STRENGTHEN THE EXISTING LAW AS IT RELATES TO THE
ADMINISTRATION OF TRUSTS AND FOR CONNECTED PURPOSES**

Enacted by the Parliament of The Bahamas

1. Short title and commencement.

- (1) This Act, which amends the Trustee Act (*Ch. 176*), may be cited as the Trustee (Amendment) Act, 2016.
- (2) This Act shall come into operation on such date as the Minister may appoint by Notice published in the *Gazette*.

2. Amends section 36 of the principal Act.

Section 36 of the principal Act is amended —

- (a) in subsection (3), in the Chapeau, by inserting, immediately after the word “removal”, the words “, transfer”; and
- (b) in subsection (4) —
 - (i) by deleting the word “indemnity” wherever that word appears and substituting therefor the words “release and indemnity”; and
 - (ii) by deleting the word “an” immediately after the words “entitled to” and substituting therefor the word “a”.

3. Amends section 40 of the principal Act.

Section 40 of the principal Act is amended by deleting subsection (5) and substituting therefor the following as a new subsection (5) —

“(5) Subject to the Fraudulent Dispositions Act (*Ch. 78*), the settlor or any other person donating property to a trust may benefit from the provisions of this section.”.

4. Inserts new section 91C into the principal Act.

The principal Act is amended —

- (a) by re-numbering section 91C as section 91D; and
- (b) by inserting, immediately after section 91B, the following as a new section 91C —

“91C. Power of court.

- (1) A person may apply to the court to declare the exercise of a fiduciary power voidable.
- (2) The court may, on an application made under subsection (1), declare the exercise of the fiduciary power void or voidable and make such determination as it deems fit, if the court is satisfied that —
 - (a) a person with the fiduciary power —
 - (i) has failed to take into account relevant considerations; or
 - (ii) has taken into account irrelevant considerations; and
 - (b) such person —
 - (i) would not have exercised the fiduciary power; or
 - (ii) would have exercised the fiduciary power, but on a different occasion, or in a different manner, to that in which it was exercised.
- (3) An application under subsection (1) may be made by —
 - (a) a trustee, protector, or any other person exercising the power;
 - (b) a successor in title of the trustee or protector;
 - (c) a power holder under section 81A;
 - (d) a beneficiary;
 - (e) an “authorised applicant” as defined in the Purpose Trusts Act (*Ch. 176A*);
 - (f) for a purpose trust, the Attorney-General if there is no authorised applicant;
 - (g) any person with leave of the court.

- (4) Whether or not in the exercise of the power the person exercising the power, or any person advising such person, acted in breach of trust, in breach of duty or was otherwise at fault shall be immaterial to the making of a declaration by the court under subsection (1).
- (5) No order may be made under subsection (2) which would prejudice a *bona fide* purchaser for value without notice of any trust property without knowledge of the matters which allow the court to set aside the exercise of a fiduciary power.”.

5. Amends section 91D of the principal Act.

Section 91D of the principal Act is amended —

- (a) in the Chapeau, by inserting, immediately after the words “sections 91A, 91B”, the words “and 91C”; and
- (b) by inserting the following definition in the appropriate alphabetical position —

““**fiduciary power**” means a power that, when exercised, must be exercised for the benefit of or taking into account the interests of at least one person other than the person who holds the power and in the case of a purpose or charitable trust, to advance the purposes of such trust;”.

OBJECTS AND REASONS

This Bill seeks to amend the Trustee Act (*Ch. 176*) to strengthen the existing law as it relates to the administration of trusts.

Clause 1 of this Bill sets out the Short title and commencement.

Clause 2 of this Bill amends section 36 of the principal Act so that the section also applies to a trustee who transfers.

Clause 3 of this Bill recognizes the right to restrict both voluntary and involuntary alienation on beneficiaries (that is, third party beneficiaries and the settlor). If a beneficiary could not alienate or abandon his interest, then a creditor could not cause an alienation or abandonment of that interest. The settlor or any other person donating property to a trust should, subject to the Fraudulent Dispositions Act (*Ch. 78*), be able to benefit from the provisions relating to restrictions against alienation.

Clause 4 of this Bill incorporates the Hastings-Bass Rule (*Re Hastings-Bass* [1974] 2 All ER 193) into the Act. The Rule states that, "*Where...a trustee was given a discretion as to some matter under which he acted in good faith, the court should not interfere with his action, notwithstanding that it did not have the full effect which he intended, unless (i) what he had achieved was unauthorised by the power conferred on him or (ii) it was clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account...*". This Rule clarifies the extent to which the court can control the exercise of trustees' powers.

Clause 5 of this Bill provides for the definition of fiduciary power.