RESERVED POWERS & BENEFICIARY DISCLOSURE
A Reserved Powers Trust is an arrangement where a Settlor transfers property to the Trustee in trust for the benefit of the beneficiaries where the Settlor retains possesses or acquires certain powers in respect of the trust.
RESERVED POWERS PROVISIONS OF THE TRUSTEE ACT

“The retention, possession or acquisition by the settlor of any one or more of the matters referred to in subsection (2) shall not invalidate a trust or the trust instrument or cause a trust created inter vivos to be a testamentary trust or disposition or the trust instrument creating it to be a testamentary document.”

- Section 3(1) of the Trustee Act, Chapter 176, Statute Laws of The Bahamas.
RESERVED POWERS PROVISIONS OF THE TRUSTEE ACT

Subsection (2) expands upon subsection (1), listing the various matters that a settlor under the Trustee Act may validly exercise within a trust structure. Section 3(2) states:

The matters referred to in subsection (1) include:

a) any powers to revoke the trust or the trust instrument or any trusts or powers granted thereby, or to withdraw property from the trust;
RESERVED POWERS PROVISIONS OF THE TRUSTEE ACT

b) any powers of appointment over any of the trust property;
c) any powers to amend the trust or the trust instrument;
d) any powers to appoint, add, or remove any trustees, protectors or beneficiaries;
e) any powers to give directions to trustees in connection with the exercise of any of their powers or discretions;
RESERVED POWERS PROVISIONS OF THE TRUSTEE ACT

f) any provisions requiring the consent of the settlor to any act or abstention of trustees;
g) any such other powers as are referred to in subjection (2)(a) to (h) of section 81;
h) the appointment of the settlor as a protector of the trust;
RESERVED POWERS PROVISIONS OF THE TRUSTEE ACT

i) any beneficial interests of the settlor (including absolute beneficial interests) in the capital or income of the trust property or in both such capital and income; and

j) any interests of the settlor in any companies or assets underlying the trust property and any control of the settlor over such companies or assets.”
RESERVED POWERS PROVISIONS OF THE TRUSTEE ACT

Section 81 of the Trustee Act provides:

“(1) A trust instrument may contain provisions by virtue of which the exercise by the trustees of any of their powers and discretions shall be subject to the previous consent of the settlor or of some other person as protector, and if so provided in the trust instrument the trustees shall not be liable for any loss caused by their actions if the previous consent was given and they acted in good faith.
(2) The trust instrument may confer on the settlor or on any protectors any powers including (without limitation) power to do any one or more of the following-

a) determine the law of which jurisdiction shall be the proper law of the trust;
b) change the forum of administration of the trust;
c) remove trustees;
RESERVED POWERS PROVISIONS OF THE TRUSTEE ACT

d) appoint new or additional trustees;
e) exclude any beneficiary as a beneficiary of the trust;
f) add any person (including the settlor and any private or charitable trust or foundation) as a beneficiary of the trust in addition to any existing beneficiary of the trust;
g) give or withhold consent to specified actions of the trustee either conditionally or unconditionally; and
h) release any of the protectors' powers.
RESERVED POWERS PROVISIONS OF THE TRUSTEE ACT

(3) A person exercising any one or more of the powers set forth in paragraphs (a) to (h) of subsection (2) shall not by virtue only of such exercise be deemed to be a trustee and, unless otherwise provided in the trust instrument, is not liable to the beneficiaries for the *bona fide* exercise of the power. ...”
81A. “(1) This section applies where a trust instrument provides –
a) that (in addition to any other conditions or restrictions) an investment power shall be exercised by the trustees as and when directed by another person (referred to in this section as the “power holder”) and, in the absence of a direction, shall not be exercised; and
b) that this section shall apply to the investment power.
RESERVED POWERS PROVISIONS OF THE TRUSTEE ACT

(2) Where this section applies, the trustees shall not be liable for any loss arising by virtue or in consequence of the trustees –

a) acting in accordance with a direction;

b) upon receipt of a direction failing to do anything other than acting in accordance with the direction;

or

c) failing to do anything in the absence of a direction,

And no duty shall be owed by the trustees giving rise to any such liability.
RESERVED POWERS PROVISIONS OF THE TRUSTEE ACT

(3) Subsection (2) shall not apply to anything done or not done contrary to an order of the court.
(4) In this section, “investment power” means any power vested in the trustees relating to the management or investment of the trust property or any party of the trust property and without prejudice to the generality of the foregoing includes any power to –

   a) acquire or borrow property;
   b) alienate or lend trust property;
d) engage or appoint custodians, investment advisers and investment managers and to terminate their appointments;

e) exercise any right or power attaching to any trust property (including any power to vote or pass resolutions as a member of a company, a holder of any security in a company or a partner of a partnership); and

f) delegate any of these powers.”
Caution Signs: Where a settlor retains, acquires or possesses too many powers under the trust instrument and over the trust assets raises various concerns which could be detrimental to the creation of the trust.

• Allegations of sham;

• Questions regarding effective control of the trust; and

• Questions regarding whether retained powers amount to property, through which trust assets can be obtained, and the trust possibly terminated.
• JSC Mezhdunarodniy Promyshlenniy Bank and another v Pugachev and others [2017] EWHC 2426 (Ch) (Pugachev)

   – Settlor as Protector held significant power
   – Settlor failed to divest beneficial ownership of assets
• Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co. (Cayman) Ltd [2011] UKPC 17 (TMSF v Merrill Lynch)

– Settlor’s power of revocation was no fiduciary

– Power of revocation is tantamount to ownership

– A receiver could be appointed to exercise the power of revocation in favour of judgment creditors
• What options are available?
  – Avoid powers of revocation (not likely!)
  – Appoint independent protectors;
  – Use veto powers rather than consent powers;
  – Mandate that certain retained powers be fiduciary and exercisable in the best interests of beneficiaries
  – Prohibit self dealing
Beneficiary Disclosure

• Statutory Disclosure: Section 83 of the Trustee Act
  – Disclosure in respect of trusts is very comprehensively dealt with in section 83 of the Trustee Act.
  – Subsections (1) through (4) concerns the provision of information on the trusts and the entitlement to such information of vested and contingent beneficiaries, minor and incapacitated beneficiaries as well as objects of discretionary powers
Beneficiary Disclosure

• Section 83 (5) concerns the disclosure of trust documents
• Subsection (6) lists the documents covered by subsection (5), which includes:
  – Trust instruments and documents containing trust terms and which contain the exercise of trust, power or discretion; and
  – Financial statements of trusts and wholly owned companies
Beneficiary Disclosure

• Confidentiality of other beneficiaries may be preserved when disclosure is being made, whether upon their request or in the discretion of the Trustee (s.83(7))

• Subsection (8) enables memoranda or letters of wishes, trustee deliberations or other documents and advice on which trustee decisions are based, to be withheld from beneficiaries.
Beneficiary Disclosure

- Common law Disclosure: Schmidt v Rosewood Trust Ltd [2003] UKPC 26
Thank you for your attention

Sharmon Y Ingraham
Senior Associate
QUESTIONS?