The Perpetuities and Accumulations Act 2009 (the “2009 Act”) came into force in Bermuda on 1st August 2009, abolishing the rule against perpetuities for Bermuda law trusts in all cases except in respect of Bermuda real estate. The legislation has immediate application for instruments coming into effect on or after 1st August 2009, the commencement day. For these purposes, instruments include inter vivos trusts settled on or after the commencement day as well as trusts drafted under wills executed on or after the commencement day. The 2009 Act was passed by the Bermuda Parliament on 29th May following a period of thorough research and analysis by key industry professionals and regulatory bodies of how the new rules would best fit the traditional characteristics of Bermuda trusts. The 2009 Act is intended to enhance the flexibility and functionality of Bermuda trusts and will increase Bermuda’s attractiveness to wealthy families looking to establish trusts in offshore jurisdictions.

Prior to the 2009 Act, the position in Bermuda relating to the rule against perpetuities was derived from English law dating back several centuries where the rule was originally designed to limit the time period within which future interests in property must vest. In 1989, Bermuda enacted the Perpetuities and Accumulations Act 1989 (the “1989 Act”), which permitted a fixed trust period up to a maximum of one hundred years. A similar maximum fixed period also applied in relation to the rule against excessive accumulations of income.

Upon careful analysis, it has been determined that the old public policy rationales for the perpetuity rule no longer apply to modern society, or at least do not apply to such an extent that they continue to justify what many critics perceive as an unwieldy and unduly restrictive rule. For example, one of the purposes of the rule against perpetuities was to reduce so-called dead hand control, where the settlor of a trust attempts to tie up assets so that future generations have little or no freedom to dispose of those assets. Whilst it is generally agreed that such a restriction on the treatment and movement of assets is undesirable, an analysis of experiences in other jurisdictions suggest that the abolition of the rule against perpetuities would be unlikely to lead to an increased problem of dead hand control.

Another argument for the rule against perpetuities was that a consequence of keeping assets subject to trusts over the long term might be to stifle investment in new economic endeavours and businesses, since trustees tend to be more risk averse than absolute owners mainly due to the potential for scrutiny by third parties (for example the trust’s beneficiaries) into their actions. However, in most jurisdictions these days, trustees enjoy wide investment powers that are unlikely to result in a reduction in investment capital in the market place. Trustees are free to invest in an array of complex and wide-ranging financial products that seek to provide a balanced approach to risk and return. This argument therefore no longer appears to hold water in today’s world of sophisticated investment vehicles.

While the abolition of the rule against perpetuities in the prescribed circumstances will not necessarily extend the possible life of a trust, it will at least mean that certain trust instruments will not be at risk of being rendered invalid for failure to comply with a rule that is fraught with pitfalls.
This is not the first time the issue of the abolition of the perpetuities rule has been considered in Bermuda. Under the 1989 Act, in conjunction with the Trusts (Special Provisions) Act 1989, perpetual trusts were permitted for non-charitable purpose trusts (as opposed to private trusts with defined beneficiaries).

**Key provisions of the 2009 Act – instruments created on or after 1st August 2009**

The principal provision of the 2009 Act, contained in Section 3, sets out that, in respect of instruments created on or after 1st August 2009, the rule against perpetuities will apply where the instrument seeks to limit property in trust so as to create successive or contingent interests or estates only to the extent that the property is land situated in Bermuda. Equally, the rule against perpetuities will apply to a power of appointment created by an instrument only to the extent such power is exercisable over land in Bermuda. For the purposes of the 2009 Act, land in Bermuda does not include income from land or the proceeds of sale of land.

Thus, for example, where a trust is created over assets that include real estate in Bermuda and a portfolio of investments and cash, the rule against perpetuities will apply only in respect of the Bermuda real estate while the cash and investments may validly remain in trust in perpetuity.

It is important to note that the application of the new legislation to trusts drafted under wills depends not on the date of death of the testator, but on the date on which the will was executed. The will must be executed on or after 1st August 2009 in order to take advantage of the new rules. In respect of a will executed prior to the commencement day, it remains to be seen whether a codicil executed on or after the commencement day that purports to amend the will so as to take advantage of the new perpetuities rules (for example by abolishing the perpetuity period in respect of any trusts thereunder) will succeed in doing so.

The 2009 Act also specifically repeals Section 15 of the 1989 Act so that, for instruments created on or after 1st August 2009, accumulations of income will no longer be restricted to 100 years.

**Key provisions of the 2009 Act – instruments created prior to 1st August 2009**

For trusts already in existence on the commencement day of the 2009 Act, Section 4 of the 2009 Act expressly provides that the power of the court to extend (i) the duration of a trust, (ii) the time within which an interest in property must vest or take effect, or (iii) the time within which certain powers are exercisable, is not limited by Section 3. It is anticipated that, in order for an existing trust to “opt in” to the new rules under this section, an application would more than likely be made to the court under either Section 48 of the Trustee Act 1975 (Variation of Trusts) or under Section 47 of the same Act, which is a far simpler procedure.

Approval by the court under Section 47 will depend on whether the court deems such arrangement to be expedient and for the benefit of the trust as a whole. There are already precedents of Bermuda cases where the Court has granted a new perpetuity period in appropriate circumstances. The 2009 Act now makes that approval even easier than before with respect to existing trusts.

It is recognized that there are instances where a retroactive application of the 2009 Act (where it would have applied equally to instruments created prior to the commencement date as to instruments created on or after that date) would not have been appropriate, such as for example where the abolition of a perpetuity date might have created potential exposure to Generation Skipping Transfer Tax for US tax purposes.
While Section 4 of the 2009 Act expressly provides for the possibility of the application of the new rules to existing trusts upon a referral to the court along the lines set out above, it is less clear what would be the effect of a resettlement of assets subject to an existing trust onto new trusts pursuant to the exercise by the trustees of, say, a power of appointment. It is conceivable that the instrument, by which the power is exercised and the assets are resettled, would constitute a new instrument for the purposes of the 2009 Act and would therefore provide an alternative to an extension by the court under Section 4.

**Conclusion**

The 2009 Act arguably represents the effective completion of a set of steps to disapply the rule against perpetuities that had been commenced in the 1989 legislation in respect of purpose trusts. Although not every settlor will wish to create a perpetual trust, the removal of the perpetuity period for most trusts offers additional flexibility as it allows for enhanced multi-generational wealth planning. It will also offer opportunities for respite for the trust draftsman from the threat of falling foul of a complex set of rules which, in the modern age, have arguably become outmoded and archaic. In spite of the current worldwide economic downturn, many successful individuals have accumulated significant wealth and the 2009 Act in Bermuda opens up a new range of longer term financial planning options to ensure that their families can benefit from this wealth without it being dissipated by the third generation.

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*This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.*

**Notes to Editors**

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