

Trustees' Guide



Introduction

This pack is to guide you in your role as a trustee. It encompasses your duties, responsibilities and obligations going forward. There is a lot to consider on becoming a trustee – it is far from a passive role and instead one which requires continued careful thought and action. **Any person considering becoming a trustee should consider the contents of this pack carefully and take independent legal advice before deciding whether to take on the role.**

Role of trustees

You have been appointed as a trustee to manage the trust assets in accordance with the terms of the trust. A trust is an arrangement whereby somebody (a trustee) is looking after something (e.g. cash, investments, property) for the benefit of someone else (a beneficiary).

Individuals may be appointed to be trustees in their personal capacity or as members of a particular profession such as a solicitor. Professional trustees are often chosen to ensure independent and objective decisions are made in relation to the trust. A trust corporation may also be appointed as a trustee. Appointing a trust corporation provides continuity and ensures that there will always be a professional trustee available as the corporate entity will continue to exist indefinitely.

A trust can be created by an individual during their lifetime, established under a Will or created by an order of the court. The type of trust and the trust deed will determine the nature of the trust and the implications for you as a trustee. There are four broad categories of express trust (trusts intentionally created by a settlor) which are as follows:

Bare trusts

Under a bare trust, beneficiaries have an immediate and absolute right to both the capital and the income of the trust. Trust assets are held in the name of the trustees but the trustees have no discretion over the assets. The trustees are mere 'nominees' in whose name property is held. When the beneficiaries reach 18, they are entitled to call for the assets to be transferred to them outright by the trustees. While a beneficiary is under 18, the trustees have control of the administration of the trust assets and can exercise some control over the flow of income i.e. through their choice of investments. Otherwise, the trustees have no active duties to perform.

Interest in possession (IIP) or life interest trust

These are trusts where one or more of the beneficiaries has the immediate right to receive the income generated by the trust assets or has the use and enjoyment of them, for example a beneficiary is entitled to occupy property which is held as an asset of the trust. The beneficiary is said to have a 'life interest' in the trust and is referred to as the 'life tenant'.

Discretionary trusts

These are very flexible trusts under which no beneficiary has a fixed right to income or capital. Trustees have total discretion as to who, from a class of beneficiaries named in the trust document, should benefit. Discretionary trusts are often used when there is a group of beneficiaries a settlor would like to help but they are unsure exactly how, when and in what proportions. Trustees will be able to consider the circumstances of beneficiaries at the relevant time in order to decide the distribution of assets.

Contingent interests

These are interests which do not take effect until a condition (or contingency) has been met. These are commonly used so that children may benefit from a trust on reaching a certain age (often 18 or 25).

Trustees will typically have powers to use the income and capital to benefit the children before they reach the specified age.

Trust document

Copy of trust document

The first point of reference to establish the terms of the trust is the trust document. As a trustee, you need to have a copy of this (and of any supplementary documents such as deeds of appointment) in order to familiarise yourself with the trust's terms. It is this document which will appoint the initial trustees, whereas any later trustees may be appointed by a deed of appointment or by the court. If the trust is set up by a Will, then the Will acts as the trust document.

Terms of the trust

You need to know who the beneficiaries of the trust are, when they are entitled to capital and income and whether, as a trustee, you have any discretion as to who should benefit and when. It is important to be aware that you have a legal obligation to deal with any trust assets in accordance with the terms of the trust.

Trust assets

You need to appreciate what the trust assets consist of. These may be listed in the deed which appoints you as a trustee. You should also have a copy of the latest accounts if you are being appointed trustee of an ongoing trust.

Trustees' duties

The first point of reference to determine the scope of trustees' duties is the trust instrument and associated trust documents. However, the law (both statutory and common law) also imposes duties and where the trust deeds are silent, these are implied.

You must exercise such care and skill as is reasonable in all circumstances having regard to any special knowledge or experience you have or hold yourself out as having, or in the case of professional trustees, any special knowledge or experience that it is reasonable to expect of you.

The general areas in which a trustee has a duty under the law are as follows:

- 1 Duty to disclose any potential conflicts of interest**

If any conflict is known to you before accepting the position of trustee, you should disclose this before your appointment. If any conflict becomes apparent afterwards, you should disclose this immediately to the settlor and your co-trustees.
- 2 Duty not to profit from the trust**

You must not use your position to your personal advantage. A disposition of trust property to a trustee is automatically voidable unless the trust deed provides otherwise and there is a strict duty to account to the trust for any profits arising from the trust property. In terms of remuneration, you may not charge for acting as a trustee unless there is specific authority in the trust deed to do so.
- 3 Duty to acquaint yourself with the terms of Trust Deed**

As a trustee, you are entitled to access all trust documents and have a duty to acquaint yourself with the trust instruments so that you can play an active role in managing the trust.
- 4 Duty to use due diligence and exercise reasonable care in managing the trusts**

You are under a duty to act with reasonable care and prudence in all matters relating to the trust. In instances where you act under advice from a solicitor or barrister, this will not necessarily excuse you from liability.
- 5 Duty to act jointly with your co-trustees**

Unless otherwise provided in the trust documentation, you must act unanimously with your co-trustees in exercise of your powers. Normally all trustees have to be parties to transactions and decisions concerning the trust. The trust instrument may however allow individual action in some specified circumstances and you can appoint an attorney to act on your behalf for a limited period (not exceeding 12 months).
- 6 Duty to exercise your discretion**

The trust deed, and statute, gives you the power to act or not act. You must therefore exercise your discretion as to whether or not to use the powers

conferred on you by the trust instrument and by law, i.e. the powers must be considered and there must be an active mental process.

7 Duty to account and give information

You must be prepared, at all times, to give a beneficiary information as to the trust accounts and the state of the trust property. This means that you must maintain financial accounts and up to date records on the trust property and administration. It is also a good idea to keep a trust diary, or minute book, in which you and your co-trustees can record your decisions.

8 Duty to invest

You cannot lawfully invest trust funds upon any securities other than those authorised by the trust instrument or by statute. The statutory powers of investment are contained in the Trustee Act 2000 which allows trustees to invest trust monies in any kind of investment, in which they would be allowed to invest if they were the absolute owner of those funds. The 2000 Act imposes a duty on the trustees to have regard to the diversification of investments, and to the suitability of the proposed investment. When making or reviewing investments you should also obtain proper advice unless you reasonably conclude it is unnecessary or inappropriate to do so, and when considering any investment, you are under a duty to exercise your powers in the best interests of the present and future beneficiaries. A modern trust deed will normally include express investment powers to supplement the powers in the Trustee Act 2000.

9 Duty to act impartially between the beneficiaries

You must act fairly and reasonably towards the beneficiaries, considering and balancing the interests of all the beneficiaries so that one beneficiary or class of beneficiaries is not advantaged at the expense of the other. This does not mean that you must treat all of the beneficiaries equally.

Who can't be a Trustee?

You cannot be a trustee if you have been declared bankrupt, if you have been disqualified from acting as

a company director or if you have been convicted of any dishonest offence (such as theft).

How should I handle requests from a beneficiary?

This will depend on the trust, what the request is for and who the beneficiary is. If the trust is a discretionary trust then nobody has an absolute right to the funds. You therefore have the discretion to appoint funds to a beneficiary, however you can also refuse to do so. You have a responsibility to act fairly and to consider the circumstances of each member of a class of beneficiaries, however you do not have to treat each beneficiary equally.

If you are asked for money, you may wish to consider:

- The reason for the beneficiary making the request;
- The amount of funds held in the trust;
- Whether the beneficiary's needs can be met via capital or income payments;
- The formalities that would be needed to effect this; and
- The tax implications of the decision.

Trusts in Divorce

If a beneficiary is getting divorced then the courts may consider the trust funds to be a financial resource of the parties depending on whether the trust is discretionary or not, and whether the beneficiary has an absolute or contingent interest. Often, where a trust pre-dates a marriage, it may be considered to be non-marital and therefore not a resource for the purposes of the divorce. In contrast, if the trust is considered to be a financial resource then this could mean that the trustees are encouraged to act in a certain way by the court, or affect the distribution of other assets within the marriage.

If you are asked for financial information by the spouse of a beneficiary during a divorce, you should obtain independent legal advice before engaging with such a request. If the trust is based offshore, it will be important to also take local advice based on that jurisdiction.

Trust administration compliance

There are various trust administration matters that must be considered to ensure compliance with the various regimes in operation. Our Trusts Administration team are equipped to manage such trust housekeeping on behalf of your trust however it is important that you are aware of the main points to consider:

- Preparation of trust annual accounts and tax returns (for simple and complex trusts) and organising payment of any trust tax liabilities.
- HMRC's online Trust Registration Service ("TRS") – almost all trusts must be registered and updated on the TRS portal and annual declarations made.
- Completion of the trust's annual compliance paperwork for Foreign Account Tax Compliance Act ("FATCA") and Automatic Exchange of Information ("AEIO") compliance.
- Inheritance tax ("IHT") compliance – there may be charges to IHT on: entering assets into trust; the ten year anniversaries of setting up trusts and on assets exiting trusts.
- Terminating trusts administration.
- Capital Gains Tax ("CGT") – Trustees are required to report and pay capital gains tax on the sale of Trust assets, they are also subject to the CGT 60-day reporting requirements for residential property disposals.
- Preparation and ongoing review of an investment policy statement where trustees delegate asset management functions.

Liability

Trustees are personally liable for the liabilities of the trust, for instance claims made against the trust property, and a trustee's personal liability is not limited to the value of the trust property. If you act outside of your powers as a trustee or you do not fulfil the requisite duties, you may be held liable for breach of trust. You will have to make good personally any loss incurred by the trust. Professional trustees typically have the benefit of professional indemnity insurance whereas the position for lay trustees is often more exposed.

The points made in this note relate to the general position of trustees; the trust instrument may alter this position and must be referred to in order to establish the exact extent of your duties under the relevant trust. There are also other more detailed considerations to be taken into account which cannot be covered by this note.

Best practice for trust compliance:

Once a trust holds more than a nominal amount, various compliance matters will need to be adhered to:

- Regular trustees' meetings are recommended;
- All decisions taken by trustees should be documented appropriately;
- Be aware if the trust needs to be registered with HMRC; and
- Trust accounts are generally advisable.

Trustees, Mills & Reeve and data protection

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