

ADMINISTRATION OF TRUSTS

Appointment of Trustee

The person creating the trust appoints the original trustees. They need not take up their appointment. It is always possible for a trustee to retire. A trust must have at least one trustee though it is usual to have two or more. It is possible to allow decisions to be made by a majority. The trust legislation allows the existing trustees to appointed new trustees. There may be additional or substituted trustees.

There is special legislation which facilitates the vesting of trust assets in new trustees. This transfer will be completely tax neutral so that no stamp duty, capital gains tax or inheritance tax arises, merely because the trust property is passed from one trustee to another.

A trustee should generally be somebody who is trusted. It may often be appropriate to appoint someone who has a personal involvement. Beneficiaries can be trustees but this may cause conflicts of interest. A disinterested relative or friend may be appropriate to simple trusts, without significant ongoing obligations. Sometimes professional trustees, such as trust corporations or professional advisers, are appropriate in order to avoid a conflict of interest and to ensure professional management.

The person creating the trust can himself be a trustee or the sole trustee and thereby retain a certain involvement or influence in how it operates. There may, however, be tax considerations which make this course undesirable.

The person creating the trust may wish to influence the trustee in the exercise of their powers in a "letter of wishes" addressed to them. This is not legally binding but is intended to set out the hopes of the person who has created the trust in relation to how it will operate.

Trust Powers

The document creating a trust may be a lifetime deed or a will. In either case, it should contain the necessary trust powers and should deal with all aspects of trust administration. There are certain “default” rules that apply by law to trusts, which it is often desirable to vary.

The Trustee Act 2000 gives trustees a general power to invest trust assets as if they were absolutely entitled to the assets. . The trustee must comply with certain requirements in exercising their powers. These include reviewing investments chosen from time to time and taking proper advice before investing. Regard must be had to the suitability to the trust of the investment type chosen. Trustees must consider the need for diversification insofar as appropriate. Trustees should review the trust fund regularly in terms of its investment objectives.

The Trustees Act, 2000 confirms that the management powers can be delegated and that nominees or custodians can be appointed. Previously a specific power was needed for this. Certain procedures must be followed in delegating, including a written policy statement, which must be reviewed from time to time.

The Trustees Act gives powers to trustees to acquire freehold and leasehold land in the UK for investment or occupation by a beneficiary or other reason. A specific power is required to purchase or invest in property outside the United Kingdom.

Trustees may be empowered to keep the original trust asset or may be obliged to sell and realise them and convert it into some other form such as cash. This may be necessary in order to put the trust assets in liquid form.

There are certain overriding rules of law applicable to trustees which cannot be varied by the person creating the trust. A trustee is not entitled to purchase the trust property nor to profit from transactions. Trustees have a duty to avoid conflicts of interest.

Where beneficiaries are all alive, of sound mind and over 18 years of age they may collectively direct the trustees to retire and appoint new trustees. They may also in fact terminate the fund and distribute the trust assets amongst themselves.

The trustees are obliged to consult with beneficiaries of full age who are entitled to possession of trust assets insofar as this is consistent with the general interests of the trust.

The trustees must keep accounts. There is no prescribed form but they should be clear so it can be easily understood by beneficiaries.

Transfer of Benefits and Assets to Beneficiaries

A trust "appointment" or advance is the transfer of assets or a benefit such as a right to receive a particular income, from the trust to the ownership of a particular beneficiary. The asset, income or other benefit will then cease to be subject to the trust or be owned by the beneficiary to whom it has been appointed.

Trustees have certain powers to advance benefits. The default position by law is often modified by the trust deed so as to provide powers appropriate to the circumstances. The trustees must act in good faith in exercising their powers of advance and appointment.

Where trustees exercise a power to advance, they bring forward the beneficiary's entitlement. If, for example, property is to be held for a beneficiary contingently upon attaining 25 years of age the statutory powers allow capital to be advanced at an earlier age. In a discretionary trust the trustees often have powers to advance income or capital to a beneficiary. The power can be used in order to give a definite interest to a beneficiary at a particular age, or for a particular period. There is potentially the wider discretion.

Unless the contrary is stated, where a person is entitled to capital of the trust either unconditionally or conditionally on reaching a certain age, the Trustee Act implies that the trustee may pay or apply the capital money for the advancement or benefit of that person before that age. The amount advanced may not exceed one half of the

presumptive share. The money paid or applied is to be brought into account when the beneficiary becomes entitled to his share.

Potential beneficiaries of a discretionary trust do not have an interest in the capital and therefore cannot benefit from this section. Statutory power is often modified to allow the trustee to apply up to the whole and not merely half of the share and/or to remove that the requirement of distribution is to be brought into account or to remove the requirement for a person with a prior interest to consent.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.