

A Guide to

Trustees Powers and Duties

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gray

Always here for you.

■ Understand the power to invest on behalf of a Trust.

■ Understand the powers and duties of a Trustee in relation to a beneficiary.

■ Understand the duty of care when acting as a Trustee.

This Guide has been designed to assist you with some of the general issues and to answer questions that you may have. This Guide is only intended to be a general overview of the law in relation to Trustees powers and duties. Legal advice should always be obtained from Leonard Gray in application to a particular case.

Section

1

The Powers of a Trustee

This Section of the Guide highlights what powers Trustees have when administering a Trust and how they can go about undertaking those powers.

Trustees have various powers which are given to them by law to administer trusts mainly under the Trustee Act 1925 and the Trustee Act 2000. Quite often these powers are added to, varied or restricted in the document that creates a trust. In the case of a trust arising from a Will it is the Will which will define how those powers should be added to, varied or restricted. This section sets out the various powers trustees do have at their disposal and common variations.

Statutory powers

These are general powers which are provided at law and include:

- Power to insure trust property. This might be used, for example, in the event that a trust owns a property which should be covered against damage or issues arising by buildings insurance.
- Power to delegate trusts, powers and discretion under a Power of Attorney. If a trustee was to be unavailable for a period of time then such a power could be useful.
- Power to apply the income of a trust for the benefit and maintenance of young beneficiaries and to make advances from capital held. This power may well be used in the event that a parent died before their child attained adulthood to



release funds from a trust to look after the child, pay for school fees and other similar expenses.

- Power to appoint a person as a nominee/custodian in relation to assets of a trust. This power could be used if perhaps an investment manager or stockbroker was appointed to look after funds held by the trustees.
- Powers of investment. This power, of course, would be used by trustees if they receive cash and need to then invest it to create income and/or capital growth.

Often powers which are granted at law to trustees are altered or expanded within the trust document itself.

Powers that might therefore be referred to within such a document could include the following:

1. Power of Appropriation

In an estate, trustees can “appropriate” actual items from an estate instead of cash in satisfaction of a legacy or an entitlement to the residuary estate. If the asset is worth more than the beneficiary’s entitlement then the asset may be sold to that beneficiary. Under the standard power provided under s41 of the Administration of Estates Act 1925, appropriations can only be made with consent of the relevant beneficiary and if that beneficiary is a minor then their parent or guardian may accept on their behalf.

Often this power is altered in a Will whereby the trustees do not need to obtain formal consent from a beneficiary before appropriating assets in their favour.

2. Power of Advancement

Where a beneficiary is a minor (under 18) and not married or is required to attain an age higher than 18 to become entitled to capital left to them in trust then trustees will be obliged to manage the trust funds until they attain the relevant age.



Under section 32 of Trustee Act 1925 it is possible for trustees to advance capital onto beneficiaries. Unless the Will expressly provides, trustees can only advance half of the beneficiary's share onto them. This is often varied in Wills to allow the entire amount to be advanced on.

If someone is said to benefit from a trust during their life they are termed as the "life tenant" of that trust. They receive income from the trust during their lifetime and do not have access to the capital. Where a life interest exists in an estate then it is not possible to advance monies on to the ultimate beneficiaries without the life tenant giving written consent. This point is often varied in Wills. Monies can be advanced on and even put into a new trust.

Unless varied in the Will, trustees will need to take into account the amount of capital advanced onto a beneficiary from their share of a trust before distributing their entitlement.

3. Power to Charge

For many years trustees were not entitled to be paid for their work unless a charging clause applying to them had been inserted into the Will or trust deed. The Trustee Act 2000 changed this. Where a charging clause exists in the document but it does not cover a trustee charging for acts which could have been done by a lay person the Trustee Act 200 allows this charge to be made. Where there is no professional charging clause trustees, where they are professionals, may charge with the agreement of other trustees.

4. Power of Investment

Under the Trustee Act 2000, trustees can make any kind of investment as if they were personally entitled to the funds being invested. This is subject to a duty of care and observance of the Investment Criteria set by statute. Trustees are obliged to obtain



specialist advice before they act. Most trusts are drafted to allow for wide powers of investment in any event.

5. Power to make loans

There is no statutory power to make loans (unless to be secured on land) but often trust documents will include a power for trustees to make loans to beneficiaries.

The next Section of this Guide sets out the duties imposed on a trustee.

The Duties of a Trustee

This Section of the Guide highlights the duties that trustees have when administering trusts and being asked to deal with matters on behalf of beneficiaries.

There are various duties that effect trustees in the exercise of their powers. It is essential that trustees are at least familiar with these matters so that they know what particular factors are of importance when considering a decision.

The duties of a trustee are as follows:

1. Duty to Act Fairly to Beneficiaries

Trustees must be fair in their actions to benefit beneficiaries of the Trust. This is particularly true where a “life interest” has been set up. This may take the form of a husband leaving money in trust for his wife to receive the income from during her life and then on her death for the capital of that trust to be divided among his children.

Assets held in the trust must be fair. It would be unfair, for example, to retain in a trust where a life interest exists some assets which produce high income which benefits the person with the life interest but no capital growth which disadvantages the ultimate beneficiaries of the trust.

There are complicated rules which govern how debts and expenses of an estate should be discharged from either capital or income but often a clause is included in the Will giving the Trustees a discretion over this. The cost of administering an estate generally falls on the capital of the estate.



2. Duty to Comply With Terms of Trust and Supply Information

Trustees must act in accordance with the terms of the trust. Equally, if requested they must supply (at a cost to the beneficiary making the request if necessary) information concerning the investments and trust accounts.

3. Duty of Care

The Trustee Act 2000 brought with it a new duty of care. Trustees must now use such care and skill as is reasonable in the circumstances. A higher duty of care will apply to professionals such as solicitors. The duty of care applies to many actions taken by trustees to include reviewing investments, managing land and appointing agents.

4. Duty to Observe Investment Criteria

Under the Trustee Act 2000 trustees must review investments held in a trust from time to time and must have regard to:

- the suitability to the trust of a particular investment; and
- the need for diversification of investments taking into account the circumstances of the trust.

5. Duty to Obtain Advice

Trustees must obtain proper advice before exercising their power of investment. Proper advice is the advice of a person reasonably believed by the trustees to be qualified to give it by his ability in and practical experience of financial and other matters relating to the investment. The only exception to this requirement is that that trustees need not take such advice is they conclude that, in all the circumstances, it is unnecessary or inappropriate to do so. Such circumstances would have to be looked at individually.



6. Duty to Act Jointly

Trustees must make decisions unanimously. Most Wills include a “Trust for sale” with a separate power to postpone the sale. This means that the property of the deceased should eventually be sold but the trustees can prevent this from happening for a period of time before it is sold or appropriated to beneficiaries. If trustees wish to postpone the sale they must act unanimously.

The next Section of this Guide will look at how to make an appointment.

Section

3

Making an Appointment

If you would like to discuss the issues raised in this Guide further then please contact a member of our team: **Chris Kelly**, **Jenna James** or **Sigourney Rutkowski** who will be happy to do so.

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We are based in Chelmsford town centre, a two minute walk from Chelmsford Rail Station with car parking and disabled access at the rear of our office for the use of clients.

Open Monday to Friday, 9am to 5pm. Alternative times by arrangement.

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