

What is a Trust and being a Trustee

What is a Trust?

Trusts are one of the oldest forms of legal instruments and have been in use at least since the Crusades as a way for people to control and protect their wealth.

In simple terms, a Trust is the formal transfer of assets from you (the Settlor), which might be property, shares, cash etc., to what is known as an 'artificial legal personality' that is controlled by a small group of 'Trusted' people (the norm is two but can be up to four) known as "Trustees", which with some types of Trust can be you, with instructions that they hold the assets for the benefit of Beneficiaries i.e. those who will ultimately benefit from the income the Trust produces or the assets it holds. Trust can be made either during your lifetime (*inter vivos*) or after your death via a Will (*post mortem*).

The rules by which the Trust operates are set out in the Trust Deed, which is sometimes known as a Settlement and, whether the transfer is by lifetime settlement or by Will, the Trust instrument states who is responsible for looking after the gifted assets (the Trust Fund), who are to benefit (the Beneficiaries), and any rules or conditions to which the Trustees and Beneficiaries must adhere. In other words, the Trustees are the legal owners but the beneficial owners are the Beneficiaries.

As Trusts have their own legal personality, they also have their own lifespan which can be anything from a few years to the current legal maximum of 125 years. That said, Trusts can have powers which allow the Trustees to create further Trusts; and Charities, like Limited Companies, can effectively exist in perpetuity. They are also subject to tax.

Reasons for Creating Trusts

A Trust is created to keep the control of the assets in the hands of the Trustees. For example, a company owner could transfer some of the shares into Trust for the benefit of children but retain control of the voting rights on those shares as first named Trustee. Alternatively, the person setting up the Trust (the Settlor) may wish to benefit a person who is infirm or disabled or someone who may otherwise squander the money, by transferring the property to Trustees to deal with the management of the property and ensure that the Beneficiary obtains the benefit that the Settlor wishes them to have.

Trusts are widely used in estate and tax planning to obtain more favourable tax treatment, and can result in significant mitigation and/or deferment of Income Tax, Capital Gains Tax (CGT) and Inheritance Tax (IHT). That said, gifts or capital whether in cash or kind which are above the Nil Rate Band (the amount one can give away free of IHT) are known as Chargeable Lifetime Transfers (CLTs) and can be liable to entry, periodic and exit IHT charges. This is a complex subject and you please contact us if you require more information.

I am considering acting as a Trustee. What duties would I be under?

As Trust funds do not personally belong to the Trustees (they hold the funds for the Beneficiaries), the law places a heavy duty of care upon them (see Trustee Act 2000) to ensure that such funds are managed in the most beneficial way. That may be a somewhat subjective matter, especially when it comes to risk vs. reward, and a lay person should think long and hard before agreeing to act as a Trustee.

The principal duties of Trustees are as follows: -

1. To take reasonable care in making investments

The main duty is contained in Section 1 of the Trustee Act 2000: "*.. a Trustee .. must exercise such care and skill as is reasonable in the circumstances, having regard in particular:*

- (i) *to any special knowledge or experience that he has or holds himself out as having, and*
- (ii) *if he acts as Trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.."*

Trustees are personally liable for any breach of Trust and will not have recourse, unless there is anything to the contrary in the Trust Deed relieving them of liability. In addition, the Courts have the power to relieve a Trustee from liability where the Trustee has acted honestly and reasonably and ought fairly to be excused for the breach of Trust, but this power should not be relied upon.

2. To read and understand the Trust instrument

If you are not sure as to what is involved, then it is essential that you seek appropriate advice.

3. To act fairly between Beneficiaries

In the case of a Life Interest Trust, the Trustees should strike a fair balance between immediate income return for the Life Tenant and capital growth for the Beneficiaries after the Life Tenant's death.

In the case of a Discretionary Trust, the Trustees must fairly consider the interests of the Beneficiaries and make a decision on reasoned grounds. Their decision must not be brought about through malice or discrimination against any one particular beneficiary.

4. To comply with the terms of the Trust

The Trustees will be liable for breach of Trust if they do not comply with express terms of the Trust and the law relating to the Trust. The Beneficiaries may be able to take the Trustees to Court for compensation should they breach such terms.

5. To provide information and accounts to the Beneficiaries on request

The Beneficiary can be asked to pay the cost of producing the documents.

6. To act unanimously

Unless otherwise stated, Trust Deeds sometimes provide an express power for decisions to be reached by majority of Trustees.

7. To act without reward

The general rule is that a Trustee cannot charge for their services, unless that is they are acting in a professional capacity i.e. they are a solicitor or accountant etc..

8. Not to make a secret profit from the Trust

This means that Trustees cannot supply goods or services to the Trust from their own business without express powers being granted by the Trust Deed or being able to demonstrate that their supplying goods or services to the Trust was the only or best option .

What Powers do I have as Trustee?

A well-drafted Trust Deed gives the Trustees very wide powers to enable them to carry out their duties in the best way. If they do not have these express powers, the Trustees will have to rely on statutory and equitable powers, which are fairly limited and often inadequate.

The main powers are: -

1. Power to Advance Capital to a Beneficiary

Section 32 of the Trustee Act 1925 empowers Trustees to advance up to half of a beneficiary's presumptive entitlement to them earlier than might otherwise be the case. This Power is often widened in the Trust Deed to the whole of the share.

2. Power to Distribute Income to a Beneficiary

Section 31 of the Trustee Act 1925 gives the Trustees' power to use the income from a Trust for the benefit of a minor Beneficiary whilst under the age of 18 for the beneficiary's maintenance, education or other benefit. To the extent that the income is not used for the beneficiary, it must be accumulated for the beneficiary.

3. Power to Delegate

As the Settlor has expressly appointed the Trustees to look after the Trust funds, the general rule is that a Trustee cannot delegate powers and duties unless expressly stated in the Trust Deed.

However, delegation is possible in two situations:

- (a) through the appointment of an Attorney under Section 25 of the Trustee Act 1925, but the appointment cannot exceed 12 months and the Donee of the Power must not be the only other Trustee of the Trust; and
- (b) under the Trustee Act 2000, which enables the appointment of an agent and, in particular, an investment manager to look after the investment of the Trust Fund?

Trustees powers often incorporate what are know as Standard Provisions and all of the Special Provisions of the Society of Trust and Estate Practitioners (2nd Edition) which can be found at http://www.step.org/sites/default/files/Comms/SSP2_rebrand.pdf.

What about investing the Trust Fund?

Trustees have both the power and duty to invest the Trust assets for the benefit of the beneficiaries; as, without such, the funds in the Trust may be eaten away by inflation. In which regard, Trustees should consider the following: -

1. Duty of Care

Trustees should act prudently and conservatively by trying to preserve the Trust funds rather than go for speculative growth.

2. Take Proper Advice

Should the Trustees decide to make their own investment decisions themselves without appointing a professional investment advisor; then, under Trustee Act 2000, the Trustees are under a duty to show that they have the necessary skill and expertise so to do. Thus, unless the Trustees have special knowledge or skills, they should appoint a professional investment advisor with agreed terms of engagement reflecting the Trust's policy for investment and aims. Trustees cannot delegate all responsibility; they must also ensure that the performance of the investment manager is regularly monitored.

3. Duty to Balance the interests of the Beneficiaries

Where there is more than one Beneficiary and their ages differ, the Trustees have a duty to ensure that if one Beneficiary becomes entitled before the other, than the remaining ones aren't prejudiced or vice versa.

The Settlor, has/had strong ethical beliefs and can Trustees restrict the investment of the Trust Fund only to ethical investments?

Unless the Trust Deed otherwise provides, Trustees cannot make investment decisions based on ethical reasons unless those investments can be justified on a pure investment basis.

You should please note that this is general guidance only and is based upon our understanding of the law as at September 2015 and you should not act upon it without first taking advice as to your specific circumstances.

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