

# QUESTIONS & ANSWERS

## Can anyone be a trustee?

All trustees must be 18 or over and have mental capacity to be able to look after the trust fund. They should also have a good financial history; in other words, not have been made bankrupt or suffered penalties for financial offences.

## Can a beneficiary be a trustee?

It is possible for a beneficiary to be a trustee, but this can create a conflict of interest. For example, where there are two children and only one of them is appointed to act as trustee, he or she may try to take advantage of this position and try to influence the other trustees into agreeing to appoint all the benefits to them and not to their brother or sister.

## How many trustees should there be?

It is recommended that there are at least two trustees. In the case of land the land registry will only register a maximum of 4 on the land register. As trustees have to act unanimously, more than 4 could lead to problems with unanimous decisions.

## Can a trustee retire?

Yes, but only if there is someone else able to continue as a trustee. The only trustee cannot retire unless the settlor appoints someone else to act as trustee instead. Hence the wisdom of having more than one trustee. Trustees can still be held responsible for actions carried out whilst they were trustees.

## Is agreement of the trustees necessary?

All of the trustees must agree to action although the trust deed could be altered to allow a majority decision-making process.

CONTINUED ON REVERSE

## Can a trustee be removed?

In some circumstances a trustee can be removed. These are:

- If a trustee is no longer deemed suitable to be a trustee. For example, disregarding duties resulting in loss to the trust fund.
- If a trustee is unable to act because of incapacity\*.
- If a trustee is unwilling to act.
- If a trustee remains outside the UK for more than 12 months.

*\*there are strict rules about trustee removal and appropriate advice must be taken.*

## Can a Settlor remove trustees?

Some trusts contain a power for the settlor to remove Trustees. They can usually only use this power if there will be at least one Trustee left to administer the Trust. Removal of a Trustee is a serious action and should only be done after appropriate legal advice is taken.

\*Removal of a trustee who has lost capacity and has a beneficial interest in the Trust Fund can be even more problematic and may require an application to the Court.

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# A guide to being a Trustee

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'THE FUTURE CAN BE WRITTEN'



# A GUIDE TO TRUSTS AND TRUSTEES

This guide has been produced as a general guide to trustee powers and duties. It is not a substitute for professional advice.

## DEFINITION OF A TRUST

A trust is a legal arrangement whereby assets are transferred by the settlor/donor to parties called 'trustees' for the benefit of third parties (beneficiaries).

This three-party relationship between the settlor, the trustees and the beneficiaries gives rise to powers, duties and obligations by the trustees. Duties are owed both to the settlor (to follow his/her directions/wishes) and to the beneficiaries, to ensure that they receive the appropriate assets as and when dictated by the trust deed.

The trustees manage the trust fund for the beneficiaries. The beneficiaries will receive the trust fund in line with the settlor's directions in the trust deed.

## TRUSTEE DUTIES

The trust deed sets out the powers of the trustees to carry out their duties. Often the settlor will have prepared a letter of wishes. This is not binding on the trustees but should always be taken into account by them.

The trustees first obligation is to read the trust document, understand it and discuss it with the co-trustees so that their duties and powers are fully understood.

Trustees must act in the best interests of the beneficiaries, as trustees are fiduciaries<sup>1</sup>. Any actions trustees carry out must be authorised by the terms of the trust and the law that governs trusts. Very often the beneficiaries can challenge whether trustees are acting in their best interests, and can take legal action against the trustees if there has been a breach or an alleged breach of duty or powers of the trustees.

### A duty to invest the trust fund

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.

### Duty to Observe Investment Criteria

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.

### Duty to Obtain Advice

Trustees must obtain advice before exercising their power of investment. Proper advice is the advice of a person reasonably believed by the trustee to be qualified to give it by his ability in and practical experience of financial and other matters relating to the investment.

### A duty to act impartially

For example, if the trust says that one beneficiary is to receive income from the trust but another beneficiary will receive the capital, the fund must be invested to produce both income and capital growth. It can be difficult to achieve this balance and discussion with professional investment advisers is absolutely necessary.

### Delegation

Investing is a specialised process. Although trustees must get specialist advice on how to invest the trust fund they cannot let anyone else make decisions or distribute any income or capital to beneficiaries. This is down to the trustees once they have taken specialist advice.

### Trustee records and accounts

Trustees must keep records of decisions and actions to prove they are managing the trust fund properly. For example, records of any changes made to the investments in the trust fund, and of any money paid or loaned to a beneficiary.

Proof of professional advice on investments must be kept. Trustees must also prepare trust accounts.

### Trustees must not benefit from the Trust

For example, investing the trust funds in something in which the trustees or one of them has a personal interest. Or trustees purchasing trust property for themselves.

## TRUSTEE POWERS

Trustees have the following powers:

- Use income from the trust for the education or maintenance of a beneficiary under the age of 18.
- Give capital to a beneficiary before they become entitled to demand it.
- Sell trust property.
- Insure trust property.

NOTE: The Trust Deed will contain additional powers. The powers in each trust can be different depending on the trust's aims but a useful power is to be able to lend money to any of the beneficiaries.

Some powers may be given only to the settlor while he or she is alive, and then will be passed to the trustees. For example, the power to appoint or remove trustees.

### Power of Advancement

Under section 32 of Trustee Act 1925 it is possible for trustees to advance capital to beneficiaries. Unless the Trust expressly states otherwise, trustees can only advance half of the beneficiary's share to them.

### Power to Charge

The Trustee Act 2000 allows charging to be made. Power of Delegation Trustee Act 2000 gives trustees acting jointly to delegate any function except functions relating to:

- The distribution of a Trust asset;
- The allocation of fees or other payments to income or capital;
- The power to appoint trustees; and
- Any specific powers set out in the Trust Deed.

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