

LEONARD GRAY SOLICITORS

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A Guide to Trustees' Powers and Duties

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These notes are intended to be a general overview of the law in relation to the subject detailed above.

Legal advice on the issues and the application to a particular case should still be obtained.

This constitutes our understanding of the law as at February 2003.

Powers of a Trustee

THIS SECTION

- Trustees Powers

- Variations

- Additions

- Restrictions

What Trustees can do when administering a Trust and how they can go about doing it.

Trustees have various powers which are given to them by law to administer Trusts. 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.

The Powers

Common powers are as follows.

1. Advancement

Under s32 of Trustee Act 1925 it is possible for Trustees to advance capital onto beneficiaries. A beneficiary can be absolutely entitled to benefit from a Trust or entitled upon the occurrence of a certain event, ie, attaining 25 years of age. 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.

2. Appropriation

In an estate Trustees can pay over instead of cash actual items from an estate 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. If the beneficiary is a minor then consent to accept 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. When dealing with assets in an estate Trustees have the power to value assets but to do this should employ a qualified valuer where necessary. For the purposes of appropriation the relevant date a value should be taken is the date of transfer, not the date of death.

3. Businesses

Where a business is a sole trader then the Trustees may continue the business only for the purpose of selling and then only for a maximum of a year. The Trustees become personally liable for the debts of the business but can seek an indemnity from the estate. The Trustees can only use assets employed in the business at the date of death which could prove insufficient. This is another point which is often varied in order to allow Trustees to run a business for as long as they need, employ a manager, etc. For a partnership provision will normally be made in a partnership agreement and for companies the deceased may hold shares in a company but it could continue to trade.

4. Charging

Previously Trustees were not entitled to be paid for their work unless a charging clause applying to them has been inserted into the Will. The Trustee Act of 2000 changes this. Where a charging clause exists in the Will but it does not cover a Trustee charging for acts which could have been done by a lay person the new Act allows this charge to be made.

Where there is no professional charging clause Trustees being professionals may charge with the agreement of other Trustees.

5. Delegation

Prior to the Trustee Act 2000 delegation of Trustees' powers was very limited as was use of agents to carry out Trust work. Individual Trustees continue to be permitted to delegate their powers for a maximum of 12 months by Power of Attorney. However, now Trustees acting jointly may delegate any function except functions relating to:

- a) distribution of a Trust asset
- b) allocation of fees or other payments to income or capital
- c) power to appoint Trustees
- d) specific powers set out in the Will.

In addition, a Trustee may not delegate their powers to a beneficiary of the Trust.

6. Insurance

Trustees are now free to insure any Trust asset for any risk as they see fit. This was previously restricted under the old law. Bare Trustees must comply with directions from beneficiaries about insurance.

7. Investment

Again the old law was very restrictive but many difficulties have been alleviated by the Trustee Act 2000. Now 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. Trustees are obliged to obtain specialist advice before they act.

Duties of a Trustee

THIS SECTION

- Trustees' Duties

- Obligations

- Duty of Care

- Investment Criteria

There are many points Trustees must bear in mind 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

1. Fairness 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 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, or indeed visa versa.

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. The cost of administering an estate generally falls on the capital of the estate.

2. 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 has 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

Trustees must review investments held in a Trust from time to time and must have regard to:

- a) the suitability to the Trust of a particular investment
- b) the need for diversification of investments taking into account the circumstances of the Trust.

The criteria cannot be excluded in a Will.

5. 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.

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.