

Guide To Being A Trustee

Introduction

This note is intended to provide assistance to individuals acting as trustees of trusts established under the law of Scotland. It aims to highlight some of the main issues which a trustee should be familiar with, so that he or she has a better understanding of the nature of the role and when to seek further advice.

The note is a summary of general issues and should not be relied upon to address specific situations. Professional advice should be sought when particular difficulties arise.

The note can be read in conjunction with the Anderson Strathern "Trust Guide" which provides further information on trusts and the types of trust commonly found in practice.

What does a trustee need to know about?

Acting as a trustee carries with it a number of responsibilities and potential liabilities and is not a position to be taken on lightly. Some issues which a trustee should be familiar with are:

- What is a trust?
- The general role of a trustee
- A trustee's general duties
- A trustee's specific duties
- The standard of care required when acting as a trustee
- The liabilities of trustees
- The protections available to trustees

What is a trust?

A trust is a legal arrangement which is created when a person (known as the "settlor" or "truster") transfers property (which could be land or buildings, or moveable property such as cash or shares) to another individual or a trust company (known as the "trustee"). The trustee is obliged to hold and apply the trust property for the benefit of other persons, (known as the "beneficiaries"). The trustee has a fiduciary duty always to act in the best interests of the trust, regardless of his own personal interests and preferences.

The terms and conditions under which the trustees will administer the trust are normally established in a written document. This will set out, for example, the interests of the beneficiaries in the trust property, when the trust will come to an end and the powers of the trustees. A trust can also be accompanied by a non-binding “letter of wishes” from the settlor, giving guidance as to how he would like to see the trust provisions applied.

The general role of a trustee

A trustee is required to hold and administer trust property for the benefit of the trust beneficiaries in accordance with the purposes set down in the trust deed and according to general trust law.

In effect, this means that once a trust is set up and the trustees appointed, the trustees must identify and gather in all trust property, then administer the trust property, then apply the income and capital of the trust in favour of the beneficiaries, all in accordance with the trust purposes.

The trust deed may give the trustees certain discretionary powers of appointment. Discretionary powers can involve the trustees deciding which beneficiaries will receive the income or capital of the trust, when, how much, and how.

The trust deed will also set out trustees’ administrative powers for routinely dealing with trust property. The extent of a trustee’s day to day activities will depend on the nature of the trust assets. Administrative powers will normally be set out at length in the trust deed.

A trustee’s general duties

In carrying out his primary duty of administering trust property for the benefit of the beneficiaries in accordance with the purposes set down in the trust deed, a trustee is under a general duty to act:

- In good faith in the interest of the beneficiaries. A trustee must avoid a conflict of interest.
- In accordance with the powers set out in the trust deed or otherwise in accordance with the general law. To act outside these powers is a breach of trust.
- Personally, unless the trust deed allows delegation.

If the trust is a charitable or public trust, the trustee’s role will be more onerous.

A trustee's specific duties

There is no definitive list of duties owed by trustees to beneficiaries. A number of specific duties have, however, been identified over the years which serve as guidelines:

- To gather in trust property and keep it under their control.
- To invest trust property. Investments must be “proper” (ie with a suitable risk profile) and “authorised” (ie not excluded by the trust deed). When making investment decisions, trustees must ensure that the interests of the various beneficiaries are balanced fairly.
- To manage the trust assets on reasonable business principles.
- To consult co-trustees, although decisions can be taken by a majority of trustees unless the trust deed specifies otherwise.
- To account to beneficiaries. This would normally be done by preparing accounts detailing all income, sales and purchases, payments, etc.
- To take advice where appropriate eg legal or investment advice.
- To act reasonably when exercising any discretionary powers.

Duties can be limited or excluded by the terms of the trust deed. For example, although a trustee is not in principle allowed to profit from his position, it is common to find a clause permitting remuneration of professional trustees for work carried out in the administration of the trust.

A trustee can delegate the carrying out of certain administrative functions to agents, provided that such a course of action would be carried out by a reasonably prudent person in relation to his own affairs. It is possible to delegate management of investments to an agent to manage on a discretionary basis. Delegation must, however, be supervised. It is also possible to appoint nominees to hold title to trust assets. Decisions requiring exercise of judgement such as making over trust income or capital to beneficiaries cannot, however, be delegated.

The standard of care required when acting as a trustee

The law requires that a trustee exercises the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs.

At present, it is not clear whether Scots law requires a higher standard of care from professional trustees. It is likely that the law will be reformed to provide that a trustee

who acts as such in the course of his business or profession should, in addition, be required to use any special knowledge that it is reasonable to expect from a member of that business or profession. That is already the standard applicable to professional trustees of charities.

The liability of trustees

Trustees can be personally liable to reimburse any shortfall suffered by the trust fund in a number of situations which are often described as being breaches of trust:

- Where something occurred which is not authorised by the trust deed or the general law eg payment to non-beneficiaries or the making of an unauthorised investment. Trustees are not, however, responsible for loss outside their control eg embezzlement by a properly appointed agent.
- Where the standard of care was not met in carrying out an action authorised by the trust deed.
- Where a trustee has been involved in a conflict of interest.

A trustee is personally liable for the breaches of trust of his co-trustee.

Trustees can also be personally liable to third parties for contracts, although it would be normal to specify in the contract that only the trust estate is liable, and personally liable for the acts of negligence of those carrying out a business on their behalf, such as employees, although normal commercial insurance and other protections are available.

The protections available to trustees

There are a number of protections available to trustees in carrying out their duties:

- Immunity clauses - the trust deed may provide that there is no liability in certain circumstances eg the trustees are not liable for the loss in value of trust property, or for the acts of agents. There is no immunity, however, for gross negligence or breach of fiduciary duty.
- Indemnity clauses - the trust deed may provide that a negligent trustee who is found personally liable is entitled to be reimbursed out of the trust fund. It may be

possible for trustees to take out insurance to replenish the trust fund in the event of a trustee being indemnified.

- Application to the courts – the court can give relief from personal liability if the trustees have acted honestly and reasonably.

Conclusion

The terms of the trust deed and the general law of trusts in Scotland will set out the role of a trustee in administering a trust and in exercising powers of appointment, and the duties and liabilities that a trustee has.

Certain aspects of the law trusts in Scotland are under review and The Scottish Law Commission has brought forward and is expected to bring forward further proposals for reform in the years ahead.

If you would like any advice in connection with points raised in this guide, or wish to discuss your ideas for creating a trust further, please contact Colin Henderson or your usual contact at Anderson Strathern.

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No action should be taken based on this information without seeking professional advice.