GUIDE FOR TRUSTEES

Trustees can be appointed through statute, Will or lifetime trust deed. Trustees owe a fiduciary duty to the beneficiaries of the trust which means that they must always act in the beneficiaries' best interests. They need to ensure that they are acting both in accordance with the terms of the trust in question and the general laws governing trusts.

What is a trustee?

A trustee is the legal owner of the assets held in the trust which are managed by the trustees for the benefit of the beneficiaries of the trust in question. Trustees receive their powers from the trust instrument and/or from statute.

Types of trust

The main ways to create a trust are by a lifetime trust deed, on death by Will, by a statutory trust (such as a trust created on intestacy) and when purchasing a property (where there are multiple owners). A trust may be created orally, although this is generally done inadvertently, and it is much better to record any trust arrangement in writing.

There are multiple types of trust but the main trusts we see today are discretionary trusts (where there is a class of beneficiaries who have the hope of benefitting from the trust at the trustees' discretion), interest in possession trusts (where a beneficiary has the right to income) and bare trusts (where the beneficiary can call for the trust property to be transferred to him at any time).

Trustees' duties and responsibilities

As stated, trustees must always act in the best interest of the beneficiaries and they are under a legal obligation to "exercise such care and skill as is reasonable in the circumstances". Professional trustees have a higher duty of care than non-professional trustees. Trustees must act unanimously unless the trust instrument contains provision to the contrary.

Trustees have an obligation to consider their powers and any discretion granted to them under the trust instrument, even if they choose not to exercise those powers or discretion. Trustees should therefore hold meetings, and minutes should be made of those meetings, on at least an annual basis. Extra meetings may be held during the year if circumstances require it.

Tax and the trustee

Trustees should keep accounts detailing the trust capital and income and, where appropriate, trust tax returns should be completed and submitted to HM Revenue and Customs (HMRC). Any payments out of the trust to a beneficiary should be correctly documented whether by way of income distribution or capital advance or appointment. Beneficiaries should be provided with income tax certificates when necessary for use in completing their own income tax returns.

Depending on the type and value of the trust in question the trustees may also be required to submit inheritance tax returns to HMRC either on the happening of certain events (such as a distribution of capital to a beneficiary of the trust or on any ten year anniversary of the creation of the trust).

Trustees' remuneration

Trustees are under a duty not to profit from the trust and, as a rule, only professional trustees are entitled to charge for acting as a trustee, although this is subject to any directions in the trust instrument. All trustees are entitled to recover from the trust any out of pocket expenses that were reasonably incurred in the running of the trust.

Appointment of trustees

The way the original trustees are appointed will vary depending on the trust in question. In a Will trust or a lifetime trust the trustees are chosen by the testator/settlor and they are named in the trust instrument itself. For a statutory trust created following intestacy trustees are appointed in accordance with a set list contained in statute. If new trustees are appointed during the lifetime of the trust, this should be carried out by deed. The trust instrument may specify who has power to appoint new trustees but, if it does not, the trustees for the time being have this power under statute.

A trustee can become personally liable for any breach of the terms of the trust, either committed by themselves or in some instances by a co-trustee, so an individual should carefully consider the terms of the trust in question, the identity of their co-trustees (if any), the beneficiaries of the trust and any potential problems that may occur in the future before accepting the appointment as trustee.

Retiring or removing a trustee

A trustee can choose to retire from their post at any time. As with the appointment of trustees, the trust instrument can also give a specific person or persons power to force the retirement of a trustee. In addition, both statute and case law provide for several occasions on which a trustee can be removed from their post. Any such retirement is dealt with by a Deed of Retirement of Trustee or court order.

Trustees' powers of investment

Powers of investment are conferred on trustees by the trust instrument itself and by statute, generally the Trustee Act 2000. It is usual for trustees to appoint professional investment advisers to carry out the investment of the trust assets, although their performance should be kept under review by the trustees.

Delegation of responsibility

If allowed by the trust instrument, trustees can delegate their powers and responsibilities in several ways (such as through the appointment of an agent, an investment manager or through a trustee power of attorney). However, even when trustees have delegated their powers in this way, they still have a responsibility to monitor the running of the trust.

How can GL Law help you?

We have specialist lawyers who will take time to get to know you in order to provide you with advice tailored to your specific needs and wishes. Full and transparent information about our fees structure will be provided at the outset, and the basis of our charging agreed before we begin work.

For more information or to speak to a solicitor please contact us by calling 0117 906 9400 or email hello@gl.law

6 Queen Square Bristol BS1 4JE
0117 906 9400
hello@gl.law