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Law

Trusts

Overview

Control of an outright gift is lost once it has been given away. This could be a problem if a beneficiary of the gift is not yet an adult, or is to divorce, die, be made bankrupt or need means tested benefits.

One solution to this problem is to create a Trust, either during your lifetime or in your Will, for the chosen beneficiaries.

You then transfer the assets you wish to be given away (the 'trust fund') to the trustees, who hold it on behalf of the people who are to benefit from it – the beneficiaries – in accordance with the trust document. Whether a trust is set up during your lifetime or in your Will, it'll be in writing, and so this guide uses the term 'trust document' throughout.

Trustees' powers

Trustees can usually do anything with the trust fund, on behalf of the beneficiaries, that they could do with their own money. They may spend it, invest it, buy and insure property etc, as long as this is permitted by the terms of the trust document. They may also distribute it to beneficiaries, but again only in accordance with the terms of the trust.

Trustees' responsibilities

When they're appointed, each trustee has a duty to make sure that they understand the terms of the trust, and to review previous trustees' activities to ensure no breaches of trust have occurred in the past. Going forwards, trustees need to comply with the terms of the trust document and all laws relating to trust administration, and in particular the statutory duty of care imposed by the Trustees Act 2000. This provides that a trustee must act with reasonable skill and care in carrying out their role, taking into account any special knowledge or experience they have.

The beneficiaries can take legal action against the trustees for any actions which are not authorised by the trust document or trust law. Trustees may have to personally reimburse any loss so incurred by the trust.

Unless the trust document provides otherwise, some general duties for trustees include:

- Not to make a personal profit from the trust, or have their personal interests conflict with those of the trust
- To seek professional advice on matters in which they aren't competent. This includes financial advice: trustees have a duty to seek investment advice before using their power of investment and when periodically reviewing the investment, unless they formally conclude its unnecessary to do so (e.g. if the fund is small and the cost of advice would outweigh the benefit to the fund). "Advice" must come from someone who's reasonably believed by the trustees to be qualified to give it, based on their ability in and practical experience in the

matters relating to the proposed investment. The Law Society views only independent financial advice as proper advice.
- To consider the best interests of all the beneficiaries, not just one beneficiary or class of beneficiaries in particular
- To keep records of their decisions and actions, and prepare trust accounts. Trustees are accountable to the beneficiaries
- To ensure trust property, investigate the condition of the property on an on-going basis, and ensure that the title to the property and any other relevant documents are in order
- To recover any debts due to the trust, and instigate legal proceedings if necessary. Trustees also have a duty to defend any action brought against them in their capacity as trustees'. Trustees who participate in litigation should consider seeking protection against personal liability for adverse costs orders resulting in court proceedings.
- To declare any Trust income or capital gains to HM Revenue and Customs, and pay any tax.

Can trustees be paid?

Professional trustees can be paid, usually from trust funds, for services provided to or on behalf of a trust. Other trustees may not be paid for their time but can claim reasonable out of pocket expenses from the Trust fund.

Trustee liability

Trustees are personally liable for their actions and defaults as trustees. However, the trust document may contain a clause which seeks to limit or exclude this liability. In the absence of such a clause, trustees may wish to consider taking out insurance against such liability.

Trustee delegation

Trustees cannot delegate the power to decide when or how the trust fund should be distributed.

Generally speaking, they can delegate certain other functions, subject to the following safeguards:

- Delegation mustn't last more than 12 months
- Notice of the delegation must be given to all co-trustees
- The original trustee remains liable for the acts or defaults of the person taking on the deflated role

Trustees may delegate their powers of investment and fund management to an agent, subject to written Investment Policy Statement by which the agent must abide.

Replacing a trustee

If a trustee is temporarily unable to act, certain powers may be delegated as explained above. If the trustee is regularly or permanently unable to act, retiring and being replaced would be preferable.

A trust can last for up to 125 years. While most end much sooner, there may come situations where a trustee needs to retire. Retiring trustees need to be protected from personal liability for any future breaches of trust; their replacement also needs to be protected from personal liability for breaches occurring before their appointment. Indemnities are put in place to ensure this.