

## Briefing Note

### Duties of Trustees in Scotland

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*This note is not intended to cover the specific duties owed by charity trustees. For our dedicated charity trustee materials, please see the Charities section of our website.*

#### Trusts

Trusts are used to separate the ownership and management of assets from those who will ultimately benefit from them. The person setting up a trust is known as the settlor, and the settlor appoints the initial trustees.

The trustees own the trust assets and are responsible for managing them in the best interests of the beneficiaries, as laid down in the trust deed.

Trusts are frequently set up to protect assets for future generations, and can be set up during lifetime or through the settlor's will. While the beneficiaries are young, family trusts allow assets to be transferred down the generations. For example, a will written by parents of young children will nearly always contain a simple trust for their benefit.

#### Duties of Trustees under Scots Law

Under Scots law, trustees can act by a majority decision of the trustees, unless the trust deed states otherwise. All of the trustees must be consulted prior to any decisions being taken. The trustees' principal duty is to exercise their powers in the best interests of the beneficiaries of the trust.

More particularly, the duties of trustees can be summarised as follows:-

#### Duty of care

In carrying out all aspects of their role, trustees owe a duty of care to protect the trust property for the beneficiaries of the trust. The standard of care expected is that trustees act with the same care and diligence which a person of ordinary prudence would use in attending to his/her own affairs. For this purpose, the person of ordinary prudence is assumed not to be engaging in speculative or hazardous activities.

#### Duty to carry out the terms of the trust

The trustees must administer the trust in accordance with the trust deed, and must be familiar with and understand the terms of the trust deed. The trustees should, so far as possible, be aware of all possible beneficiaries of the trust and of their circumstances.

### **Duty to control the trust property**

The trustees must take steps to establish full details of the trust's assets, and keep those assets under their control. In practice, this means the assets must be held in the names of the trustees and funds should be kept in a designated trust account, not mixed with other funds.

### **Duty to keep accounts**

The trustees must keep proper records and accounts of the trust's assets. Proper records ensure that the trustees can demonstrate to the beneficiaries the actions and decisions they have taken as trustees with regard to administering the trust.

### **Duty to devote time to trust affairs**

The trustees must meet together as often as is necessary and devote such time to the trust's affairs as is required for the proper administration of the trust.

### **Duty to invest**

The trustees have a general duty to invest the trust's funds, subject to the specific terms of the trust deed. The trustees must also monitor and review these investments as appropriate. Modern trust deeds usually confer express powers of investment on the trustees. Trustees should take advice, as appropriate, from qualified advisers on the investment of the trust's funds.

### **Duty not to delegate**

The trustees may not delegate any of their powers as trustees, unless the trust deed permits them to do so. They may appoint agents to carry out certain tasks, such as appointing accountants to prepare the trust accounts and lawyers to prepare trust documents, but may not delegate their primary role of overall responsibility for the administration of the trust and for taking decisions.

### **Conflicts of interest**

The trustees should not act in a way which brings them into conflict with the interests of the trust. This means that a trustee must not derive any personal profit from the trust or cause loss to the trust as a result of a conflict between their fiduciary duty and self-interest.

The trustees must act impartially between the beneficiaries.

### **Duty to take advice**

The trustees should take advice from properly qualified persons with regard to matters on which they are not themselves expert.

### **Duty to observe the general law**

The trustees are subject to the general law, and depending on the activities in which they are involved as trustees, they may be subject to employment law, health and safety legislation, the law of delict, criminal law, human rights legislation and other legal provisions

## Trustee Liability and Immunity

Trustees may only act in accordance with the powers conferred upon them under the trust deed or the general law. If the trustees act outside of these powers and a loss results to the trust, they may be personally liable.

Trustees may be liable to beneficiaries for committing breaches of trust. Breaches of trust do not always result in a loss to the trust fund but if they do, the trustees will normally be personally liable to make good the loss.

In addition, trustees may be liable to third parties. Trustees entering into contracts are personally liable unless they specifically contract for their liability to be limited as trustees. Provided that entering into the contract is a proper exercise of their powers, they are entitled to be indemnified out of the trust fund for any costs they may incur. However, if they are acting beyond their powers, they are in breach of trust and will normally be personally liable for any resultant costs or loss.

They may also be liable to third parties in other ways, such as: in delict if a third party incurs loss or injury as a result of the negligence of the trustees or their employees; under Health and Safety legislation; under employment law; and under other legal provisions. If the liability arises through the trustees acting in breach of trust, they would normally be personally liable.

The trust deed or other governing instrument may contain an immunity clause in favour of the trustees. An immunity clause defines the limit of the trustees' liability. For example, it may say that the trustees will not be liable for any loss unless they act negligently or fraudulently. Such an immunity clause cannot completely exempt the trustees from liability.

As the law presently stands, it is possible for such exemption clauses to protect trustees against any degree of fault other than fraud or gross negligence. A trustee seeking to rely on an exemption clause will find that the courts will interpret it very strictly. If the clause is ambiguous, the trustee will not be given the benefit of the doubt.

This briefing note is a short summary of Duties of Trustees in Scotland. No responsibility can be accepted for any action taken in reliance on this note and specialist advice should be taken in every case. Turcan Connell would be happy to provide such advice.

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