

Mencap's guide to being a trustee

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Notes about this guide

This guide is intended as an outline guide only. It is not intended to be exhaustive and reliance should not be placed on it without seeking more detailed advice from a professional advisor or solicitor in light of your own circumstances. This guide is based on English law and practice in force at the date it was prepared.

The wills and trusts team can provide you with the following guides:

- **Leaving money in trust** - a guide to leaving money to someone with a learning disability. This is a starting point for parents, families and carers to think about their options
- **Mencap's guide to making wills** - a factsheet about making your will, answering common questions and giving tips
- **Mencap's guide to guardianship** - information about appointing a guardian for your child who is under 18 years old
- **Mencap's guide to writing your letter of wishes** - information about writing a letter of wishes as guidance for your trustees
- **Mencap's guide to Lasting Powers of Attorney and the Court of Protection** - information about making a power of attorney and/or a deputy application to the Court of Protection (not applicable in Northern Ireland).
- **Mencap's guide to the Mental Capacity Act** - an introductory guide to the Mental Capacity Act 2005
- **Mencap Trust Company** - information about the Mencap Trust Company (a trust company which administers discretionary trust funds for people with a learning disability)
- **A list of specialist legal professionals in your area** - an essential part of drawing up a will or trust is finding a legal professional who has the knowledge and experience to help you provide for a person with a learning disability. We can give you a list of legal professionals in your area who are specialists in preparing wills and trusts
- **Giving times magazine** - the latest edition of the wills and trusts team's annual magazine, with tips, advice and stories
- **An easy-to-read guide to wills** - information for people with a learning disability about writing their will
- **A gift for the future** - information about leaving a gift in your will to Mencap

To order any of the booklets or guides, please contact the wills and trusts team:

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Telephone: 020 7696 6925

Email: willsandtrusts@mencap.org.uk

Visit: www.mencap.org.uk/willsandtrusts

Introduction

The purpose of this guide is to give new or prospective trustees a broad overview of the requirements of being a trustee. Whenever a trustee finds himself in any doubt as to how to proceed, it is essential that professional advice is sought sooner rather than later.

This guide may also be useful for people setting up a trust to understand the responsibilities and duties that they are placing on the people they choose as trustees.

This guide contains legal terms and information regarding trusts. We suggest this guide is read if you have a basic understanding of trusts or in conjunction with our booklet 'Leaving money in trust'. This can be ordered by contacting the wills and trusts team on the details on the previous page.

Being a trustee requires a certain level of involvement; it requires the exercise of powers and the fulfilment of duties. Most modern trust documents will contain all the provisions detailing the powers of the trustees, but general law also applies. Much of that law has developed over a long period on a case-by-case basis, and also by Parliament laying down guidance in the Trustee Acts of 1925 and 2000.

The general role of a trustee is 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.

This guide gives an overview of the following areas:

- Initial responsibilities
- General standard of care
- Investment
- Distributions
- Impartiality
- Trust records
- Remuneration and profit
- Delegation
- Breach of a trustee's duties and trustee liability

Initial responsibilities

Before taking up the post of trustee, a prospective trustee should first establish what their role will involve in the context of the particular trust.

This involves finding out about:

a) The terms of the trust –

- A prospective trustee should check who the beneficiaries are and what interests they have;
- A prospective trustee should consider the extent of the trustees' powers and obligations as set out in the trust document (or, if it's a will trust, under the terms of the will);
- A prospective trustee should ensure he understands the trust documents;

b) The trust property –

- A prospective trustee must find out what assets make up the trust fund, where they are and the state they are in (for example, cash should be held in a separate trustee bank account where all the trustees are signatories); the trustee has an ongoing duty throughout his trusteeship to safeguard and properly manage the trust assets, both physically and legally;

c) The trust history (if any) –

- A prospective trustee can require previous or existing trustees to produce trust documents and papers about the administration of the trust; this also includes all relevant tax obligations.

It is good practice for trustees to seek expert advice from a trusts solicitor, at the commencement of a trust, about the terms of a trust and their powers and duties as trustees.

General standard of care

There is a **general standard of care** that governs the trustees' exercise of their duties and powers, and then in addition to this general standard, the trust document can also include additional powers and duties.

The general standard is that trustees must carry out all their functions to a certain minimum standard and must "exercise the same care as an ordinary prudent man of business would exercise in the conduct of his own affairs" (Trustee Act 1925). In essence, this means that a trustee must act in relation to trust affairs as he would to his own personal affairs. If a trustee fails to exercise reasonable skill and care in his management of a trust, he may be accused of acting in breach of the trust.

There is also a more **specific duty of care** laid down by the Trustee Act 2000 which applies whenever trustees exercise their powers in relation to:

- Investment
- Acquiring land for the trust
- Appointment of agents
- Insurance of trust property
- Delegation of any trustee duties or trust affairs

This specific duty exists alongside the general standard of care.

This specific duty requires a trustee to exercise such “skill and care as is reasonable in the circumstances” having regard to any special knowledge and experience that the trustee has or holds himself out as having. It also requires that where a trustee is acting in the course of a profession or a business, their specific duty of care should have regard to any special knowledge or experience that is reasonable to expect them to have (as they are acting in the course of that kind of profession or business). For example, if a trustee is appointed on the basis that he is an expert in relation to a certain type of investment, the standard of care required of him in relation to that investment will be higher than that expected of an ordinary trustee.

Investment

The trustees should ensure that the trust fund is properly invested. Subject to any express investment provisions in the trust document, the trustees have a general power to invest the trust fund in the same way as if the trust assets were their own. This includes the trustees acquiring land in the UK, either purely as an investment or for a beneficiary of the trust to occupy.

The precise investment strategy will depend on the circumstances of the trust and the nature of the interests of the beneficiaries of the trust (if any). Generally, however, the duty requires the trustees to act fairly in making investment decisions which may have consequences for different classes of beneficiaries.

When exercising the power of investment, a trustee should be aware of:

a) **Standard Investment Criteria (“SIC”) –**

- The Trustee Act 2000 sets out the SIC requiring a trustee to consider the suitability of a particular investment to the trust and the need to diversify the investments of the trust fund;

b) **Advice –**

- Trustees must obtain and consider proper advice about the way in which, having regard to the SIC, the power of investment should be exercised or the investments should be varied; this can be sought from a person reasonably believed by the trustees to be qualified to give it owing to his ability in, and practical experience of, financial or other matters;

c) Delegation –

- Trustees are able to delegate their investment powers to professional asset managers as agents, who must act in accordance with the same duties that apply to the trustees (such as SIC);
- Any delegation must be evidenced in writing, and a guidance policy must also be given to the agent by the trustees, which should be kept under review.

Impartiality

Trustees must act in the best interests of the trust and even-handedly between beneficiaries, and must manage the trust fund in a fair way. Before accepting the appointment as a trustee, a prospective trustee should ensure there is no conflict between them and the beneficiaries of the trust.

When administering the trust, the trustees must maintain fairness between the beneficiaries in all classes, whatever their interests. So, for example, where a trust has a beneficiary who receives the income of the trust throughout his life (known as a “life tenant”), and the other beneficiaries only become entitled to the capital of the trust fund after the death of the life tenant (known as the “remaindermen”), the trustees must take care to ensure as fair a balance is maintained over time between the life tenant’s wish to maximise the income stream and the remaindermen’s interest in maximum capital growth.

The trustees of a **discretionary trust** must often exercise their discretion over the income and capital of the trust fund between potential beneficiaries (for example, a number of siblings in one family). When exercising their discretion, trustees must avoid taking into account irrelevant or irrational factors. The trustees must exercise the power for the purpose for which it was given. If the creator of the trust (known as the “settlor”) has left a Letter of Wishes to guide the trustees, they should seek guidance from this.

Distributions

The role of the trustees is primarily to ensure that the terms of the trust are met. Depending on the terms of the trust, the trustees must consider from time to time what distributions are appropriate and how these should be funded, taking into account the value and the nature of the trust fund, the tax consequences and the interests of the various potential beneficiaries. For example:

- **Life interest trusts** require the income to be paid in full to a named beneficiary during his lifetime; the terms of the trust document may also set out when and in what proportions capital should be paid over to the beneficiary, failing which to the remaindermen on his death;
- **Discretionary trusts** give the trustees the power to decide which (if any) of the potential beneficiaries should benefit and in what manner.

Trustees should note the following before making distributions:

- Where the beneficiaries are children, the trustees may wish to use income to help support them, for example by paying school fees or for holidays;
- If the trustees have discretion over income, they must decide whether it should be paid out in full to the beneficiary, or whether it should be held back and “accumulated” to the capital (this can only apply for a maximum of 21 years and is most trust documents include a specific power of accumulation);
- Any transfer of capital from the trust fund to a beneficiary is carried out by the trustees either by exercising their powers of appointment (which must be carried out by deed) or their powers of advancement (which can be carried out by handing over an asset, but it is best practice for the trustees to document this in a resolution); trustees are advised to seek legal advice where such an appointment/advancement from the trust is to be made.

Trust records

It is essential that proper accounting records of the trust are kept. It is also desirable for the trustees to have a written record of their decisions. This includes:

- Deeds of appointment of new trustees and trustee resolutions;
- Legal opinions and correspondence between the trustees and their advisers;
- Investment advice and correspondence between the trustees and their advisers;
- Documents relating to the exercise of the trustees’ powers or those giving reasons for the trustees’ decisions;
- Correspondence with HMRC and all trust tax returns.

Remuneration and profit

Trustees are entitled to reclaim any “reasonable” expenses that they incur in carrying out their duties (such as travel or stationery); apart from this, a trustee is expected to act without charging. Only professional trustees (such as a solicitor) are allowed to charge for their services, and most modern trust documents include a trustee charging clause.

A trustee must avoid making any money or taking any substantial benefit personally which derives from his position as trustee. Any profit which does arise, even if innocently, will be classed as belonging to the trust and the trustee must pay it into the trust fund.

Delegation

Where there is more than one trustee, the trustees must act unanimously in all decisions. The trust property should be held in the names of all the trustees. However this rule can be amended by the terms of trust document and so the trustees should check this, as well as checking whether or not they have the power to delegate (for example, the investment of the trust fund to investment managers, or the maintenance of a trust property to a property management company). Where these powers exist, the trustees are free to delegate but should always keep in mind their duty to act responsibly and in the best interests of the beneficiaries, and also keep the arrangement with the agent under review.

Breach of a trustee’s duties and trustee liability

Trustees normally exercise their powers properly, but breaches of trust may occur. Most modern trust documents include an “exclusion” clause which protects a trustee from being liable for loss where any act or omission made in good faith by the trustee has occurred. Similarly, a trust may allow a trustee to claim an indemnity from the trust fund if the trustee is found liable for a breach of trust. However the present law is that liability for failure to act honestly and in good faith for the benefit of the beneficiaries cannot be excluded by a clause in the trust document.

Where there is disagreement between trustees, one trustee can be asked to retire (i.e. step down) and either allow the continuing trustees to act, or they can all agree for a new trustee to be appointed in the retiring trustee’s place.

Where no agreement can be reached, a trustee must apply to the Court for a co-trustee to be removed.

In summary, a person should not agree to act as trustee unless he has carefully considered the nature of the role; trustee duties can be demanding and they must be exercised with care at all times. If there is any doubt about the scope of the role of the trustee or the responsibilities which attach to the role, legal advice from a trusts solicitor should be sought as soon as possible.

Further support

Mencap's wills and trusts team can offer you a recommended list of legal professionals for your area so that you can either seek further advice about being a trustee or the terms of a trust, or if you are considering appointing a professional trustee. This can be ordered by contacting the wills and trusts team using the details on page 3.

Further Reading:

www.step.org/leaflets - "Why make a trust?"

www.learningdisabilities.org.uk/publications - "Discretionary Trusts - A guide for families"