

**Retiring and Appointing Trustees**

**Guidance Notes**

## Reasons for changing Trustees

Trustees are originally appointed under the Will or Trust document that creates the Trust. Sometimes, many years can pass from the creation of the Trust to the date when the Trustees are required to take up their role. Likewise, many Trusts are designed to be able to last a long time. The maximum length of a standard Discretionary Trust is indeed 125 years. That is a long time for anyone to be a Trustee!

So the need for change may simply be due to the genuine wish for a Trustee to 'retire' from the role due to the passage of time.

Other reasons for wishing to retire a Trustee:

- The beneficiaries wish for the control of the Trust to pass to other persons;
- The co-trustees wish to retire a co-trustee for ease of administering the Trust;
- Where a Trustee has not performed his/her functions reasonably;
- Where a professional Trustee is desired to be appointed in place of lay trustees for expertise or independence to be brought to the role;
- Where a lay trustee (or trustees) is preferred to the role in place of a professional Trustee in cases of simple trusts or in the attempt of saving cost.

Whatever the circumstance above, the usual approach even in contentious cases is to seek voluntary retirement of the Trustee.

## Retiring as a Trustee – what should he/she consider?

Before agreeing to retire, the Trustee should consider the impact of such a retirement. A Trustee may continue to be responsible for the Trust even though he/she retires from it. For example, a professional trustee can owe a higher degree of duty of care to a Trust and if he/she were asked to retire and appoint someone unsuitable in their place who then later makes unreasonable decisions causing damage to the Trust's value or assets, then the original professional Trustee may still be responsible in some way for their own decision to retire. Therefore, retirement must involve a careful consideration of a number of factors and ultimately it must be a decision taken reasonably and in the best overall interests of the Trust.

If you are considering retirement from the role of Trustee, consider in particular the following:

- *The wishes of the person who created the Trust. Is it likely that he/she would have wanted you to retire?*
- *The future demands on your own time/ability to continue to commit to the Trustee role.*
- *The skill and expertise and suitability of the remaining (or new) Trustees.*
- *The cost consequences of your retirement (and appointment of new Trustee).*
- *The impartiality of remaining or new Trustees and the overall sense of appropriateness of their appointment in your place.*
- *The knowledge of the remaining Trustees or professionals instructed by them in how to manage the Trust going forward.*
- *The overall dynamic and balance of the existing trusteeship and the ongoing trusteeship once you have retired. Remember that your departure will no doubt affect the balance and decision-making process.*
- *The wishes of the co-trustees and primary beneficiaries. Is it likely they would have wanted you to retire?*
- *The effect on vulnerable beneficiaries to whom you may owe additional duties.*

## The process of Retirement of a Trustee

Once a Trustee has decided to retire, the process of retirement is usually straightforward but there may be further steps to take than simply signing a document.

For voluntary retirement, the process is nearly always commenced by a formal execution of a “Deed of Retirement of Trustee”. This is a professionally prepared document and is executed by the Retiring Trustees and the co-trustees and any new Trustees being appointed. It is recommended to combine this with a detailed Minute of Trustee Meeting to confirm that due process was adopted and an appropriate decision made.

In cases where a Trustee is no longer capable of acting (due to mental incapacity, for example,) please seek advice on what is required. Sometimes an Order from the Court is necessary to effect a formal retirement (in cases where the incapacitated Trustee is also a potential beneficiary of the Trust).

Other usual processes:

- Trust Property: your name may be on HM Land Registry legal title deeds. That will need to be changed, which will take time and there are forms to complete and possibly ID requirements at solicitors. Likewise, if you are the point of contact for bills/insurance/property outgoings, this will also need to be changed.
- Trust Bank Account: your name will need to be removed and any new Trustee added.
- Trust Investments: your name will need to be removed and any new Trustee added.
- Papers and Documents: returning originals to ongoing Trustees. Digital files likewise.
- Retain a copy of the trust’s file (and take advice)

## Indemnifying a Retiring Trustee

Indemnifying the Retiring Trustee is usually a requirement for all outgoing professional trustees and some lay trustees. They are usually entitled to ask that the continuing Trustees protect the Retiring Trustee from claims from affected persons such as beneficiaries for any acts or omissions of the Retiring Trustee in the normal course of carrying out their duties. Such indemnification does not go as far as protecting against unreasonable actions of the outgoing Trustee such as criminal acts. It generally covers matters of any negligent acts or omissions.

## Appointment of New Trustees

Most common types of Trust such as Discretionary Trusts or Interest-In-Possession Trusts have a general requirement for a minimum requirement of two Trustees.

New Trustees might be required to be appointed where an existing Trustee has retired or in cases where an existing Trustee has died or is no longer mentally capable of continuing to act as Trustee.

It is usually wise to seek consent of all primary beneficiaries to the Trust before a new Trustee is appointed. Trust Management is greatly helped by good communication and transparency of acting.

As per the Retiring Trustee, a New Trustee is appointed under a Deed of Appointment of New Trustee (or it can be combined with the same Deed as the retirement of an outgoing Trustee).

New Trustees should consider carefully the position of any outgoing Trustee and the existing Trustees. Before you take up the role, consider all of those points mentioned above (regarding the Retiring Trustee) and take advice on the duties and responsibilities you are taking up.

## Removal of a Trustee

In rare cases, it may be necessary to consider removing a Trustee. First, it should be established whether the Trustee is capable of retiring and if so, a request for voluntary retirement should be made in the first instance. It would save much cost and aggravation to have a voluntary retirement rather than to attempt a forced removal.

Removing a Trustee is a difficult process. Remember that the Trustee was appointed either directly by the person creating the Trust (the testator of a Will or the Settlor of a Trust) or by outgoing Trustees upon their retirement. There may be duties of care that extend beyond what is first apparent. Removing a Trustee unwilling to retire is a difficult task and overall it has to be proven to a Court that it is in the Trust's best interests for such a removal to take place. Usually some form of wrongdoing needs to be established. Without it, a Court would rarely go behind the wishes of the person who created the Trust and remove a Trustee. Seeking advice on the best approach to take is essential and any co-Trustees must be acting correctly and reasonably at all times and should take advice. We can assist and guide you in how to proceed. Likewise, we can advise and act for a Trustee who is facing pressure for retirement and help to ensure all correct processes are carried out and that the Trust purposes are protected.

## Contact Us

For more information and for an initial discussion for advice please contact us on:

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