

TECHNICAL SALES BRIEFING

TRUSTEE DELEGATION

KEY POINTS

- › This briefing is designed to explain how some of the duties and powers of trustees can be delegated to other people
- › There are three separate legal jurisdictions in the UK; England and Wales, Scotland and Northern Ireland, with each having their own rules concerning delegation. This briefing outlines the differences of approach in each jurisdiction
- › When ascertaining the ability of a trustee to delegate duties and powers, the trust instrument itself must always be considered. Thus any bespoke drafting of a trust should take the needs of the settlor into account at the outset in respect of the trustee's ability to delegate their duties and powers. Relying on various statute may limit the duties and powers that can be delegated in future or restrict the ability to delegate.

INTRODUCTION

Trust instruments impose duties on and provide numerous powers to the trustee and, traditionally, trustees were expected to act in person when performing trustee duties and exercising their trustee powers. As the complexity of administering trusts has increased it is no longer realistic to assume trustees are able to perform all the necessary duties and powers of a trustee. For example, decisions

regarding trust investments and the ways these are carried out have become increasingly complex and it is now common for some duties and powers to be delegated to specialists. To facilitate this, various amendments have been made to trust law to allow for trustee delegation and this briefing is designed to look at the legislation governing trustees' general powers of delegation.

TRUSTEE DELEGATION FUNDAMENTALS

Trustees can only delegate the exercise of their powers and duties if permitted by the trust deed or statutory acts of law. Whilst changes to the statutory acts in the UK in more recent times have allowed trustees wider scope to delegate their duties and powers, any examination of a

trustee's specific powers of delegation must consider the powers given to the trustees in the deed. If the trust deed itself contains provisions for the delegation of trustees' duties and powers then these trust provisions will take precedence over the statutory powers of delegation.



This information is based on Utmost's understanding of current legislation and the general legal position in the UK as at 31 March 2022. This may change in the future and depends on individual circumstances. This information does not constitute legal or tax advice and must not be taken as such. The companies of Utmost Group plc take no responsibility for any loss which may occur as a result of relying on this information. Trustees and their advisers should always seek individual professional legal advice.

THE THREE JURISDICTIONS OF THE UNITED KINGDOM

It is important to remember the United Kingdom is divided into three separate legal jurisdictions:

- › England and Wales
- › Scotland, and
- › Northern Ireland.

In general, the statutes in each of the three jurisdictions are similar but are subject to some differences, particularly in Scotland.

ATTORNEY

ENGLAND AND WALES

An individual trustee may execute a Trustee Power of Attorney under section 25 of the Trustee Act 1925 ("the TA 1925") as amended by the Trustee Delegation Act 1999. This allows the trustee to delegate powers including discretionary powers (except for the power of delegation under s25 itself) to an attorney for a period of up to 12 months unless contrary to the trust deed. This statutory ability to delegate is a practical necessity of the statutory requirement in England and Wales for trust decisions to be made by all trustees. Without this ability, a trustee's absence through ill-health for example could significantly disturb the administration of a trust. The delegating trustee is liable for all the attorney's acts and defaults.

The prescribed form of the Power of Attorney must be used and the Power of Attorney expressed to be made under the TA 1925.

An attorney under an Enduring Power of Attorney for which an application to register was made before 1 March 2000 and in effect before 1 October 2007 can exercise the trustee powers of the donor.

It is important to note that, when a trustee delegates any of their powers under s25 of the TA 1925, they must provide details within seven days to the other trustees (or anyone capable of appointing a trustee) of why they have delegated their powers, the date the delegation comes into operation, the powers delegated and who they have delegated these powers to.

SCOTLAND

Trustees, in general, may not delegate their discretionary powers but they may delegate administrative powers and functions either in accordance with the trust deed or in accordance with statute.

Trustees are under a duty to delegate if they do not have sufficient experience or expertise to act in an area.

Unlike in England and Wales and Northern Ireland, an individual trustee cannot appoint an attorney as a temporary substitute. This difference is perhaps explained by the ability of trustees under Scottish law to act by majority or quorum unless the trust deed provides otherwise. However the body of Trustees can appoint an attorney by an ordinary power of attorney to deal with administrative functions. It is important a written record of the appointment:

- › is signed by all trustees
- › states clearly the functions and powers being delegated, and
- › states the period of time the functions and powers are being delegated for.

An attorney appointed under a Continuing Power of Attorney cannot act for a trustee in relation to their trustee function or execute trust documents.

NORTHERN IRELAND

The laws in Northern Ireland dealing with the delegation of Trustee powers have closely followed, subject to some period of delay, the laws in England and Wales. As an example, an individual trustee can delegate powers under a Trustee Power of Attorney for a period of 12 months under s26 Trustee Act (Northern Ireland) 1958 in line with the legislation in England and Wales.

AGENTS

ENGLAND AND WALES

Under s11 of the Trustee Act 2000 "the TA 2000", trustees as a collective body may authorise the exercising of delegable powers and duties, except certain discretionary powers*, by an agent. If the delegated powers and duties would be subject to restrictions if exercised by the trustees then the agent must abide by the same restrictions.

As covered under s14 of TA 2000, if trustees delegate their powers and duties to an agent, the terms of the delegation must not:

- › allow the agent to appoint a substitute
- › limit the agent's liability in any way
- › allow the agent to act in circumstances that could create a conflict of interest, unless it is reasonably necessary to agree to such terms.

*Certain functions cannot be delegated under the TA 2000 unless specifically provided for under the deed itself. These functions are included in s11(2) and, for non-charitable trusts include, but are not limited to, powers in relation to distribution of the assets, power to decide whether fees should be paid out of income or capital, power to appoint a person as trustee of the trust and any power that permits the trustee to delegate any of their functions or appoint a person as nominee or custodian.

SCOTLAND

Agents may be appointed by Trustees under s4(1)(f) Trust (Scotland) Act 1921. A co-trustee can be appointed as the agent of another trustee.

Trustees should ensure agents so appointed:

- › be suitably qualified and competent to act
- › have the appointment recorded in writing and signed by all trustees
- › be monitored and supervised, if necessary, by the trustees.

NORTHERN IRELAND

Part IV of the Trustee Act (Northern Ireland) 2001 closely follows the legislation in England and Wales for the appointment of agents.

ASSET MANAGEMENT

ENGLAND AND WALES

Under s15 of the TA 2000 asset management powers and duties may also be delegated if:

- › the terms of the agency are in writing or evidenced in writing
- › the trustees provide a written policy statement; and
- › the agent confirms an intention to comply with the policy statement.

The trustees must keep a record of the policy statement and monitor the asset manager's compliance with the same. The policy statement gives guidance as to how the management powers should be exercised. It is likely that these conditions still apply where the delegation is made under an express power in the trust instrument.

As set out in s15 of the TA 2000, asset management powers and duties include:

- › the investment of assets which are subject to the trust
- › the acquisition of property which is to be subject to the trust; and
- › managing property which is subject to the trust.

SCOTLAND

Agents may be appointed under s4C of the Trust (Scotland) Act 1921 to exercise the trustees' investment powers.

NORTHERN IRELAND

Trustees may delegate their asset management functions under s15 of the Trustee Act (Northern Ireland) 2001. Similar to the TA 2000 the Northern Ireland legislation requires the agency agreement to be in writing, a written policy statement to be provided to the agent, and the agents' written confirmation to abide by the policy statement.

CUSTODIANS AND NOMINEES

ENGLAND AND WALES

Under s17 of the TA 2000, trustees may also appoint custodians to look after the trust assets, unless the trust has a custodian trustee. The trustees may also appoint a nominee to have the nominee's name on the legal title to the trust assets. The same person may be an agent, a nominee, a custodian, and a trustee.

Custodians and nominees must be a:

- › person who carries on a business which includes acting as a nominee or custodian
- › corporate body which is controlled by the trustees
- › corporate body recognised under s9 of the Administration of Justice Act 1985.

SCOTLAND

s4B of the Trust (Scotland) Act 1921 allows trustees to appoint nominees to hold trust assets in the nominee's name on behalf of the trustee.

A trustee should reasonably believe such a nomination is appropriate and that the nominee has the necessary skills, knowledge and expertise to act as a nominee.

The appointment should be recorded in writing and be subject to the trustee's continued review and supervision.

NORTHERN IRELAND

Trustees in Northern Ireland may appoint custodians and nominees under the Trustee Act (Northern Ireland) 2001 following provisions based on the TA 2000.

GENERAL

ENGLAND AND WALES

Agents, nominees and custodians who are not trustees are entitled to reasonable remuneration and proper expenses as set out in s32 of the TA 2000.

Trustees must comply with a statutory duty of care under the TA 2000 when selecting and entering into an arrangement with agents, custodians and nominees. Trustees must also monitor appointments and intervene if necessary by giving directions or revoking the appointment of the agent, custodian or nominee. Third parties who deal with trustees' agents, nominees or custodians do not need to satisfy themselves that the trustees have complied with the TA 2000.

Trustees will only be liable for acts of agents, custodians and nominees if the trustees fail to comply with the statutory duty of care in selecting and agreeing the terms of appointment, or in monitoring the appointment.

The Court of Protection can exercise a trustee power on behalf of a person lacking mental capacity or authorise a deputy to do so (sections 16 and 18(1)(j), Mental Capacity Act 2005).

Trustees may authorise another trustee to act on their behalf but such an authorisation should be recorded in writing.

SCOTLAND

A trustee has a general duty of care to ensure any agent is suitable for the position and to review the performance of the agent. The trustee may be personally liable for any loss incurred due to acts or omissions of the agent if the duty of care is not properly fulfilled.

Trustees can appoint another trustee as an agent to the trust if authorised by the trust deed, or by all beneficiaries.

NORTHERN IRELAND

Again, the Trustee Act (Northern Ireland) 2001 closely follows the provisions of the TA 2000 for remuneration and the duty of care imposed on delegation.

SUMMARY

While delegation may be deemed necessary now or in the future, consideration should be given when drafting the trust deed to the inclusion of clauses that allow trustees to delegate their duties and powers to avoid potential restrictions under various acts of law.

There are jurisdictional differences between England and Wales, Northern Ireland and Scotland, however these are of a minor nature apart from the ability to delegate discretionary powers using a Trustee Power of Attorney in England and Wales and Northern Ireland.

Finally, when considering the delegation of their powers, trustees must find the right balance between providing flexibility in the delegation of powers, especially in those areas that require specialised knowledge, and their duty to protect the beneficiaries. Trustees should ensure careful written record is made of any delegation of duties and powers especially when relying on acts of law.

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