

Trust briefing

Definition

A Trust can be defined as an equitable obligation imposed on persons, known as Trustees, by another person, known as the Settlor or Grantor, for the benefit of other persons, known as the Beneficiaries, of which the Settlor can be one.

This means that a Trust is not: a company, a power of attorney, a contract, a will, or a foundation.

The terms of a trust are set out in a document known as a Trust deed. This will lay out the duties and powers of the Trustee and any other person who may be called to involve themselves in the Management of the Trust property.

The Trust Deed is a confidential document and is generally not registered with any government or authority. Please note that for a foundation, which is considered to be the civil law equivalent of a Trust, registration of a foundation document is normally required.

The important characteristics of a trust to remember are:

- 1) Legal ownership of Trust property is transferred from Settlor to Trustee
- 2) The legal relationship is between the Trustee and the beneficiary
- 3) There is a separation between the legal and the beneficial interest of property
- 4) The Trust property is a separate fund and does not form part of the Trustees personal property.
- 5) The Trustee has an obligation to comply with the terms of the Trust and is accountable to the beneficiaries but not the Settlor.

Persons involved

Settlor (Grantor): This is the person who establishes the Trust. He transfers the money or other property to be held by the Trustees. Any individual or a corporate entity, who is capable of owning and transferring property, has the ability to be a settlor of a Trust. The role of the Settlor traditionally ends after the transfer of property but modern Trusts can be carefully drafted to allow certain administrative and / or dispositive powers to be retained by the Settlor. Care, however, must be taken when drafting a deed where the Settlor retains powers as too extensive provisions could cause the Trust to fail, and be held to be a "sham".

Trustee: The Trustees receive the legal title of the property. The initial trustees are appointed by the Settlor. Subsequent or additional trustees can be appointed and the deed will specify as to whom has the power to add or remove a trustee. The Trustees are obliged to manage and dispose of the Trust property in accordance with the terms of the Trust which have been laid out by the Settlor. It is to the beneficiaries, however, that the Trustees owe a duty to act in the manner prescribed in the Trust Deed (a fiduciary duty). Any person or corporate entity capable of owning a legal interest in property has the ability to be a Trustee.

Beneficiary: The person(s) for whose benefit the Trust is created. They can either be specifically named in the deed or referred to by a collective name, for example: my children and grandchildren. The beneficiaries have equitable interest in the Trust. This means they have the right to enjoy the property or its income in accordance with the terms of the Trust. The beneficiaries do not have to receive the Trust property in equal amounts and the disposition of Trust property can be layered so different classes of beneficiaries receive property at different times. The beneficiaries have no right to influence how the Trust should be administered but they have a personal right to enforce the Terms of the Trust and ensure that the Trustees adhere to the terms and provisions. Most Trust deeds will also allow for beneficiaries to be added and excluded by the trustee, very often with the consent of a person defined in the deed as having the power to consent to the addition or exclusion of a beneficiary. This person may be referred to as a Protector.

Protector: The Protector is appointed to ensure that the trust assets are protected and that the Trustee complies with the terms of the Trust. A protector does not have to be appointed. The powers of a protector will be defined in the Trust deed by the Settlor. The Protector can be a beneficiary as well but a conflict of interest could arise in such a situation.

Letter of Wishes: This is not a legally binding document. This means that the Trustees have no obligation to follow the requests made in the Letter of Wishes. The purpose of the letter is to provide the Trustee with further information and guidance from the Settlor on his wishes. This document should never be confused with an individual's last will and testament.

Declaration of Trust versus a Settlement: Simply put a declaration of Trust is a deed whereby the Trustee declares that he has received property to place under Trust. The person who has settled the property is not named and does not sign the deed. By contrast, a settlement is a deed where the Settlor is named and signs evidencing his intention to create a Trust.

Types of Trust:

Broadly trust types are divided into:

Discretionary Trusts – Where the disposition of assets is left to the discretion of the Trustee as to which of beneficiaries shall benefit, to what extent and when.

Fixed Trusts – A Trust where one or more of the beneficiaries and their interests are identified by the Settlor in the Trust deed. The Trustee has therefore no duty to select the beneficiary or quantify their interest.

Purpose or Charitable Trusts – Trusts that are set up for a specific purpose or charity. There must be an identifiable person or entity that can enforce the Trust on behalf of the beneficiaries. Care must be taken in the drafting of such a Trust as they are more open to challenge in courts for failure to comply with one of the three certainties of a Trust (object, subject and intention).

Why create a trust?

Below are a few reasons as to why a Trust would be created.

- 1) Legitimate tax planning
- 2) To protect spendthrift beneficiaries or beneficiaries unable to protect themselves
- 3) To avoid adverse publicity from a published will
- 4) To protect purchasers entering into commercial transactions
- 5) For clubs and associations
- 6) Maintenance of property.
- 7) Benefit of Society as a whole (Charitable trusts only).
- 8) Transmission of a private business

Trustee Fees

In order for a Trustee to charge for his services there is a fee clause added into the deed. This clause will normally only state that the Trustee can charge for reasonable costs incurred. It is therefore left to the parties involved to decide what is reasonable.

Moore Stephens policy generally, is to charge a fixed set up and annual charge for the provision of a Trustee plus any costs for the daily administration of the trust and underlying entities based on time spent, which varies according to the hourly rate for the members of staff involved. Disbursements are charged separately.

I acknowledge that I have read and understood this briefing

Date

Signed