

STANDARD PROVISIONS OF THE SOCIETY OF TRUST AND ESTATE PRACTITIONERS

1. INTRODUCTORY

- 1(1) These Provisions may be called the standard provisions of the Society of Trust and Estate Practitioners (1st Edition).
- 1(2) These Provisions may be incorporated in a document by the words:-
The standard provisions of the Society of Trust and Estate Practitioners (1st Edition) shall apply
or in any manner indicating an intention to incorporate them.

2. INTERPRETATION

- 2(1) In these Provisions, unless the context otherwise requires:-
- (a) **Income Beneficiary**, in relation to Trust Property, means a Person to whom income of the Trust Property is payable (as of right or at the discretion of the Trustees).
 - (b) **Person** includes a person anywhere in the world and includes a Trustee.
 - (c) **The Principal Document** means the document in which these Provisions are incorporated.
 - (d) **The Settlement** means any settlement created by the Principal Document and an estate of a deceased Person to which the Principal Document relates.
 - (e) **The Trustees** means the personal representatives or trustees of the Settlement for the time being.
 - (f) **The Trust Fund** means the property comprised in the Settlement for the time being.
 - (g) **Trust Property** means any property comprised in the Trust Fund.
 - (h) **A Professional Trustee** means a Trustee who is or has been carrying on a business which consists of or includes the management of trusts or the administration of estates.
- 2(2) These Provisions have effect subject to the provisions of the Principal Document.

3. ADMINISTRATIVE POWERS

The Trustees shall have the following powers:

3(1) Investment

- (a) The Trustees may invest Trust Property in any manner as if they were beneficial owners. In particular the Trustees may invest in unsecured loans.
- (b) The Trustees may decide not to diversify the Trust Fund.

3(2) Management

The Trustees may effect any transaction relating to the management administration or disposition of Trust Property as if they were beneficial owners. In particular:

- (a) The Trustees may repair and maintain Trust Property.
- (b) The Trustees may develop or improve Trust Property.

3(3) Joint property

The Trustees may acquire property jointly with any Person.

3(4) Income and capital

The Trustees may decide not to hold a balance between conflicting interests of Persons interested in Trust Property. In particular:

- (a) The Trustees may acquire
 - (i) wasting assets and
 - (ii) assets which yield little or no income for investment or any other purpose.
- (b) The Trustees may decide not to procure distributions from a company in which they are interested.
- (c) The Trustees may pay taxes and other expenses out of income although they would otherwise be paid out of capital.

3(5) Accumulated income

The Trustees may apply accumulated income as if it were income arising in the current year.

3(6) Use of trust property

The Trustees may permit an Income Beneficiary to occupy or enjoy the use of Trust Property on such terms as they think fit. The Trustees may acquire any property for this purpose.

3(7) Application of trust capital

The Trustees may:

- (a) lend money which is Trust Property to an Income Beneficiary without security, on such terms as they think fit,

- (b) charge Trust Property as security for debts or obligations of an Income Beneficiary, or
- (c) pay money which is Trust Property to an Income Beneficiary as his income, for the purpose of augmenting his income

Provided that:–

- (i) the Trustees have power to transfer such Property to that Beneficiary absolutely; or
- (ii) the Trustees have power to do so with the consent of another Person and the Trustees act with the written consent of that Person.

3(8) *Trade*

The Trustees may carry on a trade, in any part of the world, alone or in partnership.

3(9) *Borrowing*

The Trustees may borrow money for investment or any other purpose. Money borrowed shall be treated as Trust Property.

3(10) *Insurance*

The Trustees may insure Trust Property for any amount against any risk.

3(11) *Delegation*

A Trustee may delegate in writing any of his functions to any Person. A Trustee shall not be responsible for the default of that Person (even if the delegation was not strictly necessary or expedient) provided that he took reasonable care in his selection and supervision.

3(12) *Deposit of documents*

The Trustees may deposit documents relating to the Settlement (including bearer securities) with any Person.

3(13) *Nominees*

The Trustees may vest Trust Property in any Person as nominee, and may place Trust Property in the possession or control of any Person.

3(14) *Offshore administration*

The Trustees may carry on the administration of the trusts of the Settlement outside the United Kingdom.

3(15) *Payment of tax*

The Trustees may pay tax liabilities of the Settlement (and interest on such tax) even though such liabilities are not enforceable against the Trustees.

3(16) Indemnities

The Trustees may indemnify any Person for any liability properly chargeable against Trust Property.

3(17) Security

The Trustees may charge Trust Property as security for any liability properly incurred by them as Trustees.

3(18) Supervision of company

The Trustees are under no duty to enquire into the conduct of a company in which they are interested, unless they have knowledge of circumstances which call for enquiry.

3(19) Appropriation

The Trustees may appropriate Trust Property to any Person or class of Persons in or towards the satisfaction of their interest in the Trust Fund.

3(20) Receipt by charities

Where Trust Property is to be paid or transferred to a charity, the receipt of the treasurer or appropriate officer of the charity shall be a complete discharge to the Trustees.

3(21) Release of powers

The Trustees may by deed release any of their powers wholly or in part so as to bind future trustees.

3(22) Ancillary powers

The Trustees may do anything which is incidental or conducive to the exercise of their functions.

4. POWERS OF MAINTENANCE AND ADVANCEMENT

Sections 31 and 32 Trustee Act 1925 shall apply with the following modifications:

- (a) The Proviso to section 31(1) shall be deleted.
- (b) The words one-half of in section 32(1)(a) shall be deleted.

5. TRUST FOR SALE

The Trustees shall hold land in England and Wales on trust for sale.

6. MINORS

- 6(1) Where the Trustees may apply income for the benefit of a minor, they may do so by paying the income to the minor's parent or guardian on behalf of the minor, or to the minor if he has attained the age of 16. The Trustees are under no duty to enquire into the use of the income unless they have knowledge of circumstances which call for enquiry.
- 6(2) Where the Trustees may apply income for the benefit of a minor, they may do so by resolving that they hold that income on trust for the minor absolutely and:
- (a) The Trustees may apply that income for the benefit of the minor during his minority.
 - (b) The Trustees shall transfer the residue of that income to the minor on attaining the age of 18.
 - (c) For investment and other administrative purposes that income shall be treated as Trust Property.

7. DISCLAIMER

A Person may disclaim his interest under the Settlement wholly or in part.

8. APPORTIONMENT

Income and expenditure shall be treated as arising when payable, and not from day to day, so that no apportionment shall take place.

9. CONFLICTS OF INTEREST

- 9(1) In this paragraph:
- (a) **A Fiduciary** means a Person subject to fiduciary duties under the Settlement.
 - (b) **An Independent Trustee**, in relation to a Person, means a Trustee who is not:
 - (i) a brother, sister, ancestor, descendant or dependent of the Person;
 - (ii) a spouse of the Person or of (i) above; or
 - (iii) a company controlled by one or more of any of the above.
- 9(2) A Fiduciary may:
- (a) enter into a transaction with the Trustees, or
 - (b) be interested in an arrangement in which the Trustees are or might have been interested, or
 - (c) act (or not act) in any other circumstances even though his fiduciary duty under the Settlement conflicts with other duties or with his personal interest;

Provided that:—

- (i) The Fiduciary first discloses to the Trustees the nature and extent of any material interest conflicting with his fiduciary duties, and
- (ii) there is an Independent Trustee in respect of whom there is no conflict of interest, and he considers that the transaction arrangement or action is not contrary to the general interest of the Settlement.

9(3) The powers of the Trustees may be used to benefit a Trustee (to the same extent as if he were not a Trustee) provided that there is an Independent Trustee in respect of whom there is no conflict of interest.

10. POWERS OF TRUSTEES

The powers of the Trustees may be exercised:

- (a) at their absolute discretion; and
- (b) from time to time as occasion requires.

11. TRUSTEE REMUNERATION

11(1) A Trustee who is a solicitor or an accountant or who is engaged in a business may charge for work done by him or his firm in connection with the Settlement, including work not requiring professional assistance. This has priority to any disposition made in the Principal Document.

11(2) The Trustees may make arrangements to remunerate themselves for work done for a company connected with the Trust Fund.

12. LIABILITY OF TRUSTEES

12(1) A Trustee (other than a Professional Trustee) shall not be liable for a loss to the Trust Fund unless that loss was caused by his own fraud or negligence.

12(2) A Trustee shall not be liable for acting in accordance with the advice of Counsel of at least five years standing, with respect to the Settlement, unless, when he does so:—

- (a) he knows or has reasonable cause to suspect that the advice was given in ignorance of material facts; or
- (b) proceedings are pending to obtain the decision of the court on the matter.

13. APPOINTMENT AND RETIREMENT OF TRUSTEES

13(1) A Person may be appointed trustee of the Settlement even though he has no connection with the United Kingdom.

13(2) A Professional Trustee who is an individual who has reached the age of 65 shall retire if:—

- (a) he is requested to do so by his co-trustees, or by a Person interested in Trust Property; and
- (b) he is effectually indemnified against liabilities properly incurred as Trustee.

On that retirement a new Trustee shall be appointed if necessary to ensure that there will be two individuals or a Trust Corporation to act as Trustee.

In this sub-paragraph Trust Corporation has the same meaning as in the Trustee Act 1925.

This sub-paragraph does not apply to a Professional Trustee who is:

- (a) a personal representative
- (b) the settlor of the Settlement or
- (c) a spouse or former spouse of the settlor or testator.

14. PROTECTION FOR INTEREST IN POSSESSION AND ACCUMULATION AND MAINTENANCE SETTLEMENTS

These Provisions shall not have effect:-

- (a) so as to prevent a Person from being entitled to an interest in possession in Trust Property (within the meaning of the Inheritance Tax Act 1984);
- (b) so as to cause the Settlement to be an accumulation or discretionary settlement (within the meaning of section 5 Taxation of Chargeable Gains Act 1992);
- (c) so as to prevent the conditions of section 71(1) Inheritance Tax Act 1984 from applying to Trust Property.

INTRODUCTION TO THE STANDARD PROVISIONS

CLAUSE BY CLAUSE COMMENTARY

Clause 1 Introductory

This is self-explanatory.

Clause 2 Interpretation

Clause 2(1) sets out some definitions which are used in the Provisions. It should be noted that "Trustees" includes personal representatives as well as trustees; and "Trust Property" includes property in a deceased's estate as well as property in a settlement.

Clause 2(2) provides that in the event of a conflict between the Provisions and the will or deed in which the Provisions are incorporated, the terms of the will or deed should prevail.

Clause 3 Administrative Provisions

This clause provides the trustees with the powers they should have to manage the trust fund in the best way in the interest of the beneficiaries.

3(1) Investment

This gives the trustees a power of investment slightly wider than that of the Trustee Act 2000.

The second sentence is only for the avoidance of doubt. There is no general rule which requires trustees to diversify trust investments. The rule is that trustees must consider the need for diversification. See Trustee Act 2000, s.4(3)(b). Trustees may - if they are satisfied it is appropriate to do so - invest the trust fund in a single asset.

3(2) Management

Trustees should be allowed to manage trust property without restrictions; this is the effect of clause 3(2). The powers conferred by the general law are not quite comprehensive.

3(3) Joint Property

Trustees may wish to acquire property jointly with others and this needs express authorisation.

3(4) Income and Capital

This would allow trustees if they thought fit:

- to acquire wasting assets or capital growth assets;
- to pay capital expenses out of income.

The general trust law normally requires trustees to hold a balance between the interests of life tenant and remainderman. That is, trustees should normally invest trust funds so as to produce a reasonable amount of income *and* to protect capital values.

It is easy to foresee occasions where, for good reasons, trustees would like to increase the income of the life tenant at the expense of the remainderman.

It seems to the STEP Technical Committee that decisions on this balance are best left to the good sense of the trustees. The trustees are in principle persons chosen by the testator, he may be taken to have some faith in them; and in a typical case, the testator's first wish is that his widow should be provided for, in priority to other beneficiaries.

Nevertheless the point has rightly been made that the existence of this power will be contrary to the intention of some testators. A testator may have very firm views that his widow's income should not in any circumstances be increased at the expense of the remainderman. This is particularly likely in circumstances where the remaindermen are not the children of the widow; eg a will trust:

- (1) to the widow for life, remainder to charity; or
- (2) to the widow for life, remainder to children of an earlier marriage of the testator.

In such cases it would be appropriate for the drafter to exclude this paragraph of the STEP Standard Provisions.¹

It should be noted that this power does not permit income to be accumulated after the expiry of the accumulation period. This power is permitted in an interest in possession settlement and in an accumulation and maintenance settlement.

3(5) Accumulated Income

This clause authorises trustees to apply accumulated income as if it were income. This may be necessary to obtain the tax credit under Income and Corporation Taxes Act 1988, s.687.

3(6) Use of Trust Property

This authorises trustees to acquire, in particular, a dwelling-house, for a beneficiary. The powers conferred by the general law are too narrow.

3(7) Application of Trust Property

Trustees will generally have power to transfer trust property to some of the beneficiaries. Where this is the case, the claim allows trustees three alternatives to a simple transfer of trust capital. They may:

- lend money to the beneficiary interest free;
- allow the beneficiary to borrow from a bank on the security of the trust property;
- transfer the trust property to the beneficiary as his income rather than as capital. (This may offer tax advantages).

3(8) Trade

This permits trustees to carry on a trade. See *Drafting Trusts and Will Trusts* 6th ed., 20.40.

3(9) Borrowing

This clause gives the trustees unrestricted power to borrow. The general law gives trustees power to borrow for restricted purposes but not (*inter alia*) for investment purposes.

3(10) Insurance

This permits trustees to insure trust property but this is now conferred by the general law: s.19 TA 1925 as amended by s.34 TA 2000.

3(11) Delegation

This extends the statutory power.

3(12) Deposit of documents

This slightly extends the statutory power: Trustee Act 2000, ss.16 - 21.

3(13) Nominees

This strictly extends the statutory power.

3(14) Offshore administration

If trustees are to be non-UK resident, for CGT purposes, it is generally necessary to administer the trusts abroad. This clause permits this in terms which echo the statutory provision: Taxation of Chargeable Gains Act 1992, s.69.

3(15) Payment of Tax

In the absence of express power, the trustees are only entitled to pay foreign taxes in limited circumstances.

3(16) Indemnities

Where the trustees grant appropriate indemnities, they can also:

- reimburse themselves out of the Trust Fund if the indemnity is called upon; and
- secure the indemnity on the Trust Fund: see clause 3(17).

3(17) Security

The general law allows trustees to mortgage trust property for certain purposes only; but if trustees are to be trusted with power to borrow, they should also have power to give security for their borrowing.

3(18) Supervision of Company

This requires trustees to take action only if they have knowledge of circumstances which call for enquiry. In the absence of such a provision, it is the duty of trustees to keep a close eye on the running of a trust company.

3(19) Appropriation

This gives trustees power to arrange a rational division of the trust fund, if it is to be shared out between beneficiaries. The power conferred by the general law is more restricted.

3(20) Receipt by Charities

This form solves a possible administrative difficulty where trust property is payable to a charitable trust or an unincorporated charitable association. In such cases trustees would otherwise need to investigate who could give them a valid receipt.

3(21) Release of Powers

This allows trustees to release their powers.

3(22) Ancillary Powers

This fall-back form is intended to prevent a narrow construction of trustees' powers.

Clause 4 Powers of Maintenance and Advancement

This provides two standard amendments to sections 31 and 32 of the Trustee Act 1925. The effect is to increase slightly trustees' powers of maintenance and advancement.

Clause 5 Trust for Sale

This imposes a trust for sale on land. Its purpose was to prevent the application of the Settled Land Act 1925. Now the Trust of Land and Appointment of Trustees Act 1996 has abolished the SLA 1925 for new settlements, this provision is obsolete.

Clause 6 Minors

Where income is to be applied for a child under 18, trustees will often pay the income to a parent on behalf of the child. This clause relieves the trustees of the duty to monitor the parent's use of the money. This will simplify trust administration: the sums involved are usually small. Where the trustees are dealing with trust capital, it remains their duty to ensure that the capital is properly applied.

It might occasionally be convenient to allow an older child to receive funds directly, and this is authorised if the child is 16.

Clause 6(2) allows trustees to retain trust income on behalf of a minor. Instead the income will be paid to the child once his is 18.

Clause 7 Disclaimer

This clause authorises partial disclaimer (which the general law would not allow). This may help to take full advantage of section 93 of the Inheritance Act 1984 (disclaimers).

Clause 8 Apportionment

This clause excludes the operation of the Apportionment Act 1870, which would otherwise require the trustees to make time-consuming calculations over small amounts of income.

Clause 9 Conflicts of Interest

The general rule is that trustees may not enter into any transaction which gives rise to a conflict of interest. This clause relaxes the general rule, but with a safeguard: there must be at least one independent person to watch over the interests of the trust. The qualifications of the independent trustee are set out in clause 9(1)(b). The Fiduciary must disclose the position to the trustees, and the independent trustee must consent: clause 9(2).

Clause 9(3)

This deals with the different problem which may arise where a beneficiary is a trustee, and wishes, say, to appoint property to himself. He may do so if there is an independent trustee.

In the rare case where a settlor is both trustee and the principal beneficiary of a settlement, it may be desired to relax this clause.

Clause 10 Powers of Trustees

Clause 10 contains two general provisions relating to trustees' powers:

- trustees' powers may be exercised at their absolute discretion.
- trustees' powers may be exercised from time to time as occasion requires.

This will apply to the powers conferred in the will or settlement as well as to the powers in the Standard Provisions.

These general provisions make it unnecessary to specify whenever trustees are given powers that they may exercise the powers

"at their absolute discretion;"

"as they shall think fit;"

"as they shall in their absolute discretion think fit;"

"at any time or times;" or

"from time to time;"

so a certain amount of verbiage can be avoided in the rest of the will or settlement.

The clause does not allow trustees to exercise their powers improperly.

Clause 11 Trustee Remuneration

This slightly extends the statutory power. The Trustee remuneration was given priority to dispositions in the will or settlement, so as to prevent the executors' remuneration abating jointly with other legacies, but this is now no longer necessary.

Clause 11(2) authorises trustees to charge for work done for a company held by the trust.

Clause 12 Liability of Trustees

Trustees are not liable for breach of trust when they have acted honestly and reasonably and ought fairly to be excused: Trustee Act 1925 s.61. This clause relieves trustees from liability for breach of trust in two further circumstances:

- Where the trustee is not a professional trustee (defined in clause 1) and is not guilty of negligence.

- Where the trustees are acting on the Opinion of Counsel.

Wider trustee relieving provisions are sometimes found, which purport to exclude trustees' liability for any act except fraud or wilful default. Such forms raise serious difficulties (in particular there are professional conduct implications where the draftsman's firm is acting as trustee); they should only be used in special circumstances.

Clause 13 Appointment and Retirement of Trustees

Clause 13(1) authorises the appointment of foreign trustees: the extent to which this can be done without express authority is unclear.

Clause 13(2) allows a professional trustee (defined in clause 1) to be retired on attaining retirement age. A retirement date is set for virtually every office and employment. However trust law does not impose a retirement date. This clause avoids difficulties which occasionally arise.

Clause 14 Protection for Interest in Possession and Accumulation and Maintenance Settlement

This clause ensures (for the avoidance of doubt only) that none of the Standard Provisions will have undesirable tax effects. Clause 14(2) is now obsolete following the FA 1998, but its retention does no harm.

Michael Bottomley Direct Dial 01707 387884