

Dermot is one of the trustees to a family trust. Equity gives certain powers and duties to trustees to enable the trust to be implemented in a forthright manner. The trustee's job is to be concerned not only with benefiting the beneficiaries, but also to make sure that the wishes expressed by the testator are carried out correctly.

A trust created by deed of settlement or will, will generally give wide powers of implementation to the trustees and will almost certainly have been drafted with tax purposes in mind. The trustees job involves not only covering their duties within the terms of the trust, but also to show discretion when deciding different situations.

The powers and duties will vary from trust to trust, such as whether the trustees are to accumulate or distribute the income. Most of the powers now available to trustees are laid down under statutory provision in the TIA 1961,¹ these are chiefly concerned with managing the trust, including taking expert advice on certain matters such as law issues or trading advice.

The trustees must stick to the rules of apportionment; this is used to keep the balance between the capital and income. They must consider all kinds of investments, including sale of property and payment of tax. Accounts must be kept and copies given to the beneficiaries, other duties involving the loyalty to the trust are, not taking any personal profit from the trust, keeping trust property safe and investing trust money safely and wisely. Perhaps the most interesting duty is to keep a fair and just balance between the beneficiaries.

Trusts usually require one of the trustees to have a professional knowledge of business, as the job can be very demanding. This can be either a professional establishment such as a bank, or an accountant or lawyer etc. It would seem in this case that Dermot is a professional of some sort. *Turner v Turner* [1984]² illustrates the difficulties, which can appear if there are no professional trustees.

¹ Trustees Investment Act 1961

² *turner v turner* [1984] CH 100.

The duty of care is a trustee's overriding duty to do the best they can for the beneficiaries and is statutory under section 1(1) of TA³ 2000 part 1. The powers given to trustees are subject to the terms of the trust instrument, these apply only to the extent that wider powers are not expressly given, section 69(2) of the TA⁴ 1925. The trustees have the discretion as to whether or not they will exercise that power, after deliberation with the other trustees, if they decide not to use the power the beneficiaries do not have any right to redress. The duty is to undertake consideration where it is appropriate.

The power of maintenance is not implied into the trust instrument, therefore it must be expressly given, or advantage must be taken of the power under section 31 of the TA 1925. Therefore if no contrary intention exists then the statutory powers will apply. The power to maintain under section 31 can only arise where the beneficiary is entitled to receive intermediate income under the trust. Section 31(3) is where maintenance can only be provided where the gift carries the income. A life tenant will normally be entitled to the income, so the existence of such a tenant will mean that the power of maintenance cannot be exercised in favour of those entitled to the remainder. Under section 31, assuming the income to be available, the trustees must show regard to the age of the minor, whether any other income is available for his/her maintenance and consider any other relevant factors. The money may be paid to a parent or guardian for the benefit of the minor.

In this case it would be suggested that Flora aged 24 would not be able to receive the money as she is over the age of majority. It would also be suggested that under section 31 Hotspur could be entitled to the money as it is for the maintenance of his education, however under section 31(3) it would appear that it could be refused. The trustees would have to be unanimous on any decision regardless of whether Geraldine or Paul showed their approval.

The power of advancement allows trustees to pay capital sums to, or on behalf of the beneficiaries, sometime before he is able to claim the fund. This power is given either by the trust instrument or section 32 of the TA 1925. Under advancement the trustees

³ Trustees Act 2000

⁴ Trustees Act 1925

have wide powers of application, up to 1/2 of the beneficiaries share of the trust may be advanced. The trustees must use their discretion when deciding whether or not to advance capital, it must be for the benefit and advancement of the beneficiary, *Re Pauling's ST* (1964)⁵. Therefore advancement is the power to apply capital, unlike maintenance, which deals with income.

Advancement means making a permanent provision for a beneficiary, *Re Williams WT* (1953)⁶. It would be suggested that Paul's son Hotspur, may benefit under advancement, it would appear that Flora would also get the money required to set up her own practice, this is based on the discussion of the trustees who may or may not allow it. Another problem is that Geraldine, who also has life interest, may feel prejudiced, thus not give her written consent.

So advancement is given a wide meaning as it assumes the money will be used to benefit the beneficiary, in Paul's case it would. However the trust upon giving Paul the money must continue to monitor the situation, making sure the money is used for the purpose it was given.

Geraldine who has three children aged six; seven and eight wants to move the family to Spain in order to avoid paying UK⁷ tax. Geraldine is asking Dermot for a variation of the rules of the trust. In *Stephenson v Barclays Bank Trust Co Ltd* [1975]⁸, the court followed the view that if conditions of the trust were allowed to vary, then the beneficiaries could force the trustees to do duties different to those they had originally accepted. In *Re New* [1901]⁹ the court gave the view, to alter the terms of the trust had to be for emergency reasons. This decision was followed by the Court of Appeal in *Chapman v Chapman* [1954]¹⁰.

Under the SLA 1925¹¹ and the TA 1925 section 57(1) there was a possibility to vary trusts for certain reasons. However under section 1 of the VTA 1958,¹² which

⁵ *Re Pauling's Settlement Trusts* [1964] CH 303.

⁶ *Re Williams WT* (1953) 2 WLR 365

⁷ United Kingdom

⁸ [1975] 1 WLR 88

⁹ [1901] 2 CH 534.

¹⁰ [1954] AC 429.

¹¹ Settled Land Act 1925.

overlaps the SLA 1925 and the TA 1925 the courts increased the power, to allow variation of the terms of a trust. In *Re Cohen* [1965]¹³ the court said that a variation must benefit individuals. The court will adopt the test of what a reasonable sui iuris adult benefiting would have done.

In *Re Weston's Settlements* [1969]¹⁴ the court refused to vary the trust for a family to move to Jersey for tax purposes. Lord Denning said,

“The moral and social benefits of an English upbringing were not out weighed by tax savings”¹⁵.

In *Re Seale's Marriage Settlement* [1961]¹⁶ the court allowed the family to resettle in Canada, because their family had lived there for many years. In *Re Windeatt's WT* [1969]¹⁷ the court followed the same principle in *Re Seale's*, the family wanted to move to Jersey, the court took the view that; as they had relatives living on Jersey for nineteen years it would be appropriate to want to settle nearby.

It would therefore be suggested under the *Re Weston's Settlement* [1969] decision that Geraldine would be refused. If Paul and Geraldine both agree in writing it may alter the decision of Dermott and the trustees, the decision however, is left entirely up to the trustees, who do not have to give any reasons why they came to that decision, *Re Beloved Wilkes's Charity* (1851)¹⁸.

The beneficiaries may not be happy with the decision granted by Dermot and the trustees, they may wish to end the trust under the rule in *Saunders v Vautier* (1841),¹⁹ this can be achieved by both the life beneficiaries in the case (Geraldine and Paul) deciding they wish to terminate the trust. Both Paul and Geraldine need to be in

¹² Variation of Trusts Act 1958.

¹³ [1965] 1 WLR 1229.

¹⁴ [1969] 1 CH 223.

¹⁵ Todd, P. Lowrie, S. *Textbook on Trusts*, 5th Ed. (Blackstone Press: London. 2002) at page 402.

¹⁶ [1961] CH 574.

¹⁷ [1969] 1 WLR 692.

¹⁸ (1851) 3 Mac and G440.

¹⁹ (1841) 10 LJ CH 354.

agreement before this rule can be achieved, after dissolving the trust beneficiaries can resettle on any terms they wish.

As we have previously mentioned the trustees must make themselves familiar with the contents and terms of the trust, making sure that the funds are invested properly, *Re Brogan* (1888)²⁰. The TIA 1961, which replaced and repealed section 1 of the TA 1925, gave guidelines for investment by trustees. In May 1996 HMT²¹ issued a consultation document, *Investment Power of Trustees*, this proposed that the TIA 1961 should be replaced with an order under section 1 of the DCOA 1994²². The standard of care was to be found in *Re Whiteley* (1886)²³ where Lindley MR said,

“ It is the case required for that the ordinary prudent man would it take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide”²⁴.

This was approved in *Bartlett v Barclays Bank Trust Co Ltd (No1)* (1980)²⁵.

The old laws on investment have now been repealed and modernised by section 3(1) of the TA 2000. The act modernises investment, acquisition of land, and appointment of agents, nominees and custodians and trustees remuneration. The trustees must manage the trust properly, thus promoting capital and producing income. In *Gowan v Scargill* [1985]²⁶ the court required that the trustees must not refrain from acting in the best interests of the beneficiaries.

As Dermot is a fiduciary, he must have no personal interest and must at all times benefit the trust, not himself. Therefore any investments Dermot makes must be with the thoughts of the beneficiaries and the original wishes of the testator.

²⁰ (1888) 38 Chd 546.

²¹ Her Majesty Treasury.

²² Deregulation and Contracting Out Act 1994.

²³ (1886) 33 ChD 347.

²⁴ *Re Whiteley* (1886) 33 ChD 347

²⁵ (1980) CH 515.

²⁶ [1985] CH 270.

Remuneration is another issue regarding implementation of a trust, under the old laws it was not possible for a trustee to take any profits from the trust. The general rule was that payments should not be made if it affects the manner in which the trustees perform their duty. All money acquired by the trustees acting in their capacity as trustees belongs to the trust. Under old laws it was not possible for a trustee to gain payment by way of salary, even if they had done a job, which was both rewarding to the trustee, benefited the beneficiaries and had no question of mistrust, *Boardman v Phipps* [1967]²⁷.

The court will look to the trustee's gain, not the loss to the trust. Under section 30(2) of the TA 1925 remuneration could be fixed by contract or expressly stated in the terms of the trust, it allowed the reimbursement of expenses if directly concerned with the business of the trust. The court could authorise reimbursement if it felt that it was fitting. Alternatively a trustee could be remunerated under the common law method of quantum meruit, whereby the trustee can claim an allowance, if it can be shown that they have done a good job and put a lot of hours into the work. In *O'Sullivan v Management Agency and Music Ltd* [1985]²⁸ the court looked at the whole situation surrounding the case. The court expressed, that they had to use their discretion when calculating profit made by a trustee where he/ she has put in hard work. The trustee must show that he/ she has acted in good faith and have no causal link between his position and any profit made by him.

Under the Law Commission's (1997) recommendations for reform in *Trustees Power and Duties* (Law Com 146),²⁹ it was recommended that trustees, in the absence of express terms should be entitled to charge, as long as charges are reasonable and do not exceed the amount the trustee would charge in the reasonable course of his/ her business.

Delegation is also an important point to discuss with effect to remuneration, the ability of a trustee to find an agent who can do a professional job is governed by

²⁷ [1967] 2 AC 46.

²⁸ [1985] QB 428.

²⁹ [www. Homeoffice.gov.uk](http://www.Homeoffice.gov.uk)

section 23(1) of the TA 1925. Therefore the trustee can employ and pay an agent, to do the work that a trustee could have done himself, with more benefit to the trust

The TA 2000 has now updated the position of remuneration, section 28 (a) gives provision in the trust instrument, sections 28(5), 29(2) a and b of part five all give reasons for the right to reimbursement and remuneration.

The trustee is also under a duty to make sure there is no conflict of interest between themselves and the trust, *Re Macadam* [1946]³⁰ contrasted with *Re Dover Coalfields Extension* [1908]³¹.

Upon the retirement of the managing director from a small private company, which belongs to the trust, Dermot has undertaken the role for himself. It could be said that there is a conflict of interest. Dermot is a trustee accepting a salary and a share of the profits. However since Dermot has taken over, company profits have risen and his business acumen has greatly improved the value, thus the benefit to the beneficiaries has improved. Dermot has undertaken the job and acted in good faith, there is no question that he has not put the trust first, or that anything underhand has occurred. It would therefore be suggested that Dermot has used his discretion and expertise to enable the trust to increase its profits, therefore benefiting the beneficiaries. Under the TA 2000 it would be assumed that Dermot has acted in good faith and put a lot of time and energy into the business.

As one can see the law relating to a trustee's duties and powers are widespread, the courts prefer to leave the trust to the trustees. It seems the court will use their powers only in cases where there has been a breach. The Law Commission realised the need to re-modernise the old laws with updated ones, the TA 2000 has now replaced the TOLATA 1996³² and other acts mentioned with regard to Investment's, remuneration and delegation.

³⁰ [1946] CH 73.

³¹ [1908] 1 CH 65.

³² Trust of Land and Appointment of Trustees Act 1996.

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