

Prepared for ILM by Wilsons

---

When administering trusts and estates, trustees and personal representatives (PRs) are subject to a number of duties under both statute and common law.

### **Overriding Duties (PRs and Trustees)**

These duties apply to both PRs and trustees and everything done by them should be guided by these. In addition, PRs and trustees each have particular duties which are set out below.

#### **1 To exercise reasonable care and skill**

1.1. Section 1 of the Trustee Act 2000 provides a general duty of care that is applicable to both trustees and PRs. The duty applies to specific situations defined in the Act, such as investing trust funds or acquiring land. Where the duty applies, a trustee must use such care and skill as is reasonable in the circumstances.

For trustees with professional knowledge or trustees acting in the course of business, i.e. professional trustees, a higher standard of care will be expected, in line with their additional knowledge.

1.2. Where the statutory duty of care under the Trustee Act 2000 does not apply there is still a common law duty of care to act in the best interests of the beneficiaries even if this conflicts with the trustee's personal beliefs. The standard of care applicable is that expected of a prudent businessman managing affairs for someone he felt morally bound to provide for and depends on the individual's particular skills and expertise.

1.3. The Will or trust instrument may exclude the duty of care and may exclude trustees' liability for breach of duty.

#### **2 To act in the best interests of the beneficiaries as a whole**

2.1. Trustees should not favour one beneficiary over the others. This means that they should maintain a balance between the beneficiaries. For example, trustees of a life interest trust should not prefer the interests of the remainderman over those of the life tenant or vice versa.

2.2. Authority: *Lloyds Bank plc v Duker* [1987] 1 WLR 1324 where it was held that shares in a private company should not be divided between the beneficiaries as this would give one beneficiary control of the company and therefore favour him beyond what the testator had intended.

2.3. Where the testator or settlor had a personal connection to the life tenant but not to the remainderman, the PRs or trustees can prefer the interests of the beneficiary known to the testator or settlor to a certain extent. This does not, however, allow them to exclude the interests of the remainderman entirely (*Nestlé v. National Westminster Bank plc* [1993] 1 WLR 1260). Duties and Responsibilities of Trustees and Personal Representatives

2.4. Not to be remunerated for services provided unless authorised

2.4.1. It is common now for a Will or trust instrument to provide for PRs and trustees, particularly professionals, to be paid.

2.4.2. A professional PR or trustee can be paid if all his fellow PRs or trustees agree in writing, even if the Will or trust instrument does not specify this (s.29(2) Trustee Act 2000). This provision does not apply to sole PRs or trustees or to charity trustees. A sole PR or trustee of a non-charitable trust will therefore need to appoint a co-trustee in order to receive remuneration if this is not expressly authorised by the Will or Trust Instrument.

2.5. Not to use trust property for private advantage

2.5.1. A trustee may not sell trust property to himself nor make a secret profit from the trust as there is a conflict between the trustee's fiduciary duty and his personal interest.

2.5.2. Authority: Re Thompson's Settlement [1986] Ch 99 where it was held that a transaction involving two trustees could not stand once it had been called into question by a beneficiary.

### **Particular Duties - Personal Representatives (PRs)**

Generally speaking, any type of PR has the same duties. However, one area where there is a difference between executors and administrators is where there are minor beneficiaries or a life interest under the Will. In this case a sole executor can act as trustee but at least two administrators or a trust corporation are required.

#### **The main duties of a PR are as follows:**

#### **3 To collect and get in the deceased's estate in good time**

3.1. S.25 of the Administration of Estates Act 1925 provides that the personal representative of a deceased person shall be under a duty to—

(a) collect and get in the real and personal estate of the deceased and administer it according to law;

(b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court;

(c) when required to do so by the High Court, deliver up the grant of probate or administration to that court.

3.2. This includes ascertaining whether there are any debts owed to the estate and recovering these, calling in

all assets owned by the deceased and converting these to money.

3.3. If a PR is slow in calling in any debt and this results in a loss to the estate then the PR may be personally liable (Carney v Bond (1843)).

4 To pay the debts and liabilities of the estate (including inheritance tax)

4.1. If a PR does not pay debts and liabilities promptly then he can be personally liable for any costs incurred by the estate as a result of overdue payments (Re Tankard [1942] Ch 69).

4.2. A PR can also be personally liable for any debts of the deceased that are discovered after the estate has been distributed if he has not taken the proper steps to ascertain them. In order to be protected a PR must have placed an advertisement in the London Gazette and a local newspaper and placed any other advertisement appropriate for the deceased, e.g. in a trade magazine.

4.3. There is also a duty to protect the estate once the assets have been collected, which must be exercised with due diligence (Re Tankard [1942] Ch 69).

4.4. A PR will be personally liable for any unpaid inheritance tax due (IRC v Stannard [1984] 1 WLR 1039).

4.5. A PR is entitled to incur certain expenses on behalf of the estate and deduct these from the estate before it is distributed.

These include:

#### 4.5.1. Funeral costs

Reasonable funeral costs can be deducted from the estate. In deciding whether the funeral costs are reasonable the deceased's position in life, their religious beliefs and any expressed wishes should be taken into account. Any excess expenses will be the responsibility of the person who incurred them.

#### 4.5.2. Solicitors' fees

4.5.2.1. Solicitors acting in the administration of the estate may only charge a sum that is "fair and reasonable" having regard to all the circumstances.

4.5.2.2. The case of *Jemma Trust Co Ltd v (1) Liptrott (2) Forrester (3) Lewis* [2004] 1 WLR 646 held that solicitors may make a charge based on the value of the estate as well as charging fees for time spent, provided that the overall cost of administering the estate remains fair and reasonable. For high value estates the value element charged should be on a regressive scale.

4.5.2.3. In *Jemma Trust* the Court of Appeal approved the use of the Law Society's guidance publication, *Non-Contentious Costs*. The most recent version of this was published in October 2007 and can be accessed from the Law Society's website:

<http://www.lawsociety.org.uk/>.

### 5 To prepare estate accounts

5.1. A PR is under a duty to account to the court under s.25(b) of the Administration of Estates Act 1925. However, in practice it is unlikely that the court would refuse an application for an account by a residuary legatee and therefore it is usual for a PR to supply a residuary legatee with estate accounts as a matter of course.

5.2. If a PR fails to supply estate accounts the beneficiaries can apply to the Probate Registry for an inventory of the estate's assets and liabilities and for estate accounts to be produced.

### **6 To distribute the estate**

#### 6.1. The executor's year

6.1.1. S.44 of the Administration of Estates Act 1925 effectively gives a PR one year to administer an estate (the executor's year).

6.1.2. If a PR pays the pecuniary legacies after the end of the executor's year, statutory interest of 4% will become due under s.15 of the Administration of Justice Act 1982. Statutory interest is not technically payable unless the Court orders payment of the legacy but, in practice, PRs will pay statutory interest if they distribute legacies after the end of the executor's year.

### **Particular Duties – Trustees**

NB: The duties below can affect PRs who have completed the administration save for distribution, who may then be held to be trustees of the estate property (Re King's Will Trusts [1964] Ch 542).

#### **1 To obey the terms of the trust**

1.1. In the case of a Will trust, the terms will normally be found in the Will.

1.2. If trustees act outside the terms they will be in breach of trust.

This information is intended as guidance only and is correct at the time of publication. There may be subsequent changes in the law and we advise that you seek professional legal advice on specific problems.

1.3. Authority: Target Holdings Ltd v Redfern [1996] AC 421 at 434 where it was held that a solicitor who was holding a lender's money on trust for completion of a purchase but paid the money out 10 days beforehand was in breach of trust.

#### **2 To invest trust funds properly**

2.1. Trustees have a duty to preserve the trust fund which implies a duty to invest any money not required for current use. This includes a duty to convert any improper funds into sensible assets, e.g. to convert investments in a life interest trust which only produce capital to income producing investments. Trustees should obtain the best rate of return available, subject to 2.3 and 2.4 below.

2.2. The Trustee Act 2000 provides trustees with a general power of investment to invest as if they were absolutely entitled to the assets of the trust.

2.3. Before exercising their powers of investment, trustees must obtain and consider proper advice on the suitability of the proposed investment unless they reasonably conclude that in all the circumstances it is unnecessary or inappropriate to do so. Trustees must also review

their investments from time to time to consider whether they should be varied in light of the standard investment criteria (see 2.4 below).

2.4. Trustees should have regard to the standard investment criteria:

2.4.1. the suitability to the trust of the investment; and

2.4.2. the need (to the extent that is appropriate in the circumstances) for diversification of the trust's investments.

2.5. Trustees may delegate the management of the trust's investments to a portfolio manager.

2.6. The duty to invest and to convert improper assets can be excluded by the trust instrument.

### **3 To inform beneficiaries of their interests**

3.1. Executors do not have a duty to inform beneficiaries of their interests, the distinction being that a Will is a public document. However, in the case of a Will establishing a trust, assuming the executors and trustees are the same people, once the administration of the estate is complete the executors will become trustees and will then have a duty to inform beneficiaries of their interests.

### **4 To keep accounts**

4.1. A trustee must keep clear and accurate accounts (*Springett v Dashwood* (1860) 2 Giff 521).

4.2. A beneficiary arguably has the right to see the accounts (*Armitage v Nurse* [1998] Ch 241).

4.3. A beneficiary does not have the right to be given other information about the trust but may apply to the Court for an Order requiring the trustees to produce this information. He or she is likely to be granted access to the information if his or her request is reasonable (*Schmidt v. Rosewood Trust* [2003] UKPC 26).

4.4. A trustee is not obliged to supply accounts to a beneficiary if he refuses to pay for them, as it would not be fair for the cost to come out of the trust. This is because a beneficiary's entitlement is limited to inspecting the accounts, rather than being supplied with them.

### **5 Other duties**

5.1. Not to delegate duties unless authorised

5.1.1. The Trustee Act 2000 (s.11) allows trustees to appoint agents to exercise any of their delegable functions. The functions that trustees are not allowed to delegate include:

5.1.1.1. any function relating to whether or in what way any assets of the trust should be distributed,

# ILM Factsheet

## Duties and Responsibilities of Trustees and Personal Representatives

5.1.1.2. any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital, and

5.1.1.3. any power to appoint a person to be a trustee of the trust.

5.2. To act unanimously at all times

5.2.1. Authority: *Luke v South Kensington Hotel Co* (1879) L.R. 11 Ch D 121 where it was held that the act of a majority of trustees was not binding on the minority of trustee who did not agree, nor was it binding on the trust.

Charlotte Watts and Sarah Mott  
Wilson's Solicitors LLP  
February 2008  
E-mail: [charlotte.watts@wilsonslaw.com](mailto:charlotte.watts@wilsonslaw.com)  
Tel: 01722 427728

This material has been prepared for the benefit of members of ILM. The information contained in this fact sheet does not necessarily stand on its own and no responsibility for loss occasioned by any person acting or not acting as a result of this material is accepted by the Wilsons, by ILM or any of their respective employees.

This information is intended as guidance only and is correct at the time of publication.

There may be subsequent changes in the law and

we advise that you seek professional legal advice on specific problems. © Wilson's Solicitors LLP 2008. Wilson's is regulated by the Solicitors Regulation Authority and The Law Society and a list of members can be obtained from Wilson's head office. [www.wilsonslaw.com](http://www.wilsonslaw.com)