



Trust deficit

EMILY STONEHAM ON THE DIFFICULTIES FACED BY TRUSTEES WHEN DEALING WITH DISGRUNTLED BENEFICIARIES IN ENGLAND AND WALES

Beneficiaries who are also the settlor of a trust often find it difficult to understand that by settling their own assets into a trust, they must essentially relinquish control over them (although the extent of that loss of control can vary by jurisdiction). It is not the same, for example, as having assets managed by a fund manager.

The beneficiaries may incorrectly assume that they can just remove and replace a trustee if they are not getting what they want, but this is far from straightforward and rarely in the sole control of the beneficiaries.

TRUST DEED

The first port of call is the trust deed. There may be an express power in the trust deed that confers the power to remove and appoint trustees on a particular individual, such as the settlor or protector. However, such a power will generally be fiduciary, meaning that it must be exercised for the benefit of the beneficiaries as a whole. If the power is not exercised correctly, the removal and subsequent appointment could be invalidated by the court. A trustee should ensure they are fully aware of the terms of the trust deed and the extent to which there is a power of removal.

If there is no mechanism within the trust deed, then the disgruntled beneficiary will need to try to reach a

compromise with the trustee or make an application to court. The court has the jurisdiction to remove trustees where it is 'expedient' to do so under s.41 of the UK *Trustee Act 1925*, although there may be some circumstances where it is appropriate to ask the court to use its inherent jurisdiction instead; for example, where there is a dispute of fact.¹ The principles to be applied under the two jurisdictions are identical.

COURT POWERS TO REMOVE The court will not remove a trustee simply because there has been a disagreement between trustee and beneficiary; there must be another reason, such as a serious breach of trust. However, the court has been willing to remove trustees if it can be shown that the breakdown in the relationship between trustees and beneficiaries is such that it will prevent the running of the trust going forward.² In such circumstances, it will come down to the discretion of the court, but the focus will be on the welfare of the beneficiaries, and the court will be wary of manufactured issues raised by aggressive beneficiaries.

It is worth noting the use of beneficiaries plural. The trustees' primary obligation is to act in the best interests of the trust and the beneficiaries as a whole, including the interests

of minor and unborn beneficiaries. Although the weight they need to give to the interests of individual beneficiaries will depend on the terms of the trust (e.g. if a beneficiary has a fixed entitlement in a trust, such as a life interest), their needs may be given more weight than any discretionary beneficiaries.

DISPUTING REMOVAL

A trustee could be justified in resisting an application for their removal in circumstances where they consider that a proposed replacement would not be in the interests of all beneficiaries. An example of this could be where the disgruntled beneficiary proposes to replace the trustees with a close associate who would simply do the bidding of that beneficiary and favour their interests over those of the beneficiaries. A trustee who resigns in such circumstances would potentially be in breach of their duties to act in the best interests of all beneficiaries.

Contentious trustee removal applications (as with all court applications) can be expensive, time consuming and, in cases where the trustees and beneficiaries are all members of or associated with the same family, highly emotive. Even if a trustee can successfully defend a removal application, administering the trust going forward is likely to be incredibly uncomfortable. As such, it is worth considering from the outset how conflicts can be avoided.

Ensuring that at least one trustee on the board is an independent professional may give comfort and can help in avoiding accusations that the board of trustees is biased. Regular communication between the trustees and beneficiaries, including consultations over major decisions, can also assist, provided the trustees are still actively making decisions rather than allowing individual beneficiaries to dictate how the trust is controlled. If a change of trustee is the only course, it may be best to try to achieve this consensually and be flexible in terms of releases and indemnities.

#CAREER AND PERSONAL DEVELOPMENT
#CONTENTIOUS TRUSTS AND ESTATES
#TRUSTS

1 *Re Henderson* [1940] Ch 764 2 *Letterstedt v Broers* (1884) 9 App Cas 371



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