

POWERS IN WILLS & TRUSTS

TOPICS

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- III. ADMINISTRATIVE POWERS
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I. ADMINISTRATIVE & DISPOSITIVE POWERS

What is a dispositive power?

- A dispositive power is a power which relates to the distribution of trust property for the benefit of the beneficiaries of the trust.
- They can relate to income or capital:
 - a power to apply income for maintenance of beneficiaries,
 - a power to apply capital for the advancement or benefit of beneficiaries.

What is an administrative power?

- An administrative power relates to the administration of the trust (eg a power of investment). James Kessler describes them as the “*provisions needed to allow trustees to manage the trust fund in the best way; and to find a fair balance between trustees and beneficiaries when their interests conflict*”.
- It is convenient to place all the provisions dealing with the administration of the trust in a schedule.
- Express provisions are invariably wider than powers under the general law and apply in addition to them, unless the will or trust states otherwise. [It is better to have too many powers rather than too few.](#)

Hybrid powers

Some powers such as the power of appropriation and the power to remunerate trustees. may be regarded as ‘hybrid’ or *sui generis*.

- The power of appropriation is used to allocate particular property for a beneficiary or into a discrete fund so is probably best regarded as dispositive.
- The power to charge reduces the amount available to beneficiaries but it is not discretionary so is probably best regarded as administrative. Arguably, it should appear in the body of the trust instrument rather than a separate schedule
- Trustees may have discretion as to whether to charge expenses to income or capital. This really is a hybrid power. [See SSP 4.4 and 19.](#)

Hybrid powers

Such a power has no effect on income tax. Tax is charged on income less any expenses which are '*properly*' chargeable to income.

'*Properly*' means under general legal principles ignoring any express provisions contained in the trust instrument. See *Peter Clay Settlement*.

SSP 4.4 "*Income may be set aside and invested to answer any liabilities, which in the opinion of the Trustees ought to be borne out of income or to meet depreciation of the capital value of any Trust Property*"

Uncontroversial if trust is discretionary, but less so if it's a life interest trust!
a separate schedule

- Trustees may have discretion as to whether to charge expenses to income or capital. This really is a hybrid power. See SSP 4.4 and 19.

II. DISPOSITIVE POWERS IN TRUSTS

All discretionary & most life interest trusts include

- **A power of appointment**
Allows terms of trust to be modified, eg to give a right to income, or change contingencies, and usually has to be exercised by deed.
- **A power to apply income/capital for benefit of beneficiaries**
Allow outright payments and can usually be exercised informally.

It is common to provide expressly that trustees have power to transfer funds to the trustees of other trusts though, arguably the power to apply capital is wide enough.

There may also be a **power of appropriation** which can be used to allocate assets to beneficiaries within the trust.

SSP 19.1 expressly overrides the Trustees' duty to balance the interests of the beneficiaries and authorises trustees to acquire wasting assets and assets which yield little or no income.

SSP 19.2 permits trustees to pay capital expenses, including tax liabilities out of income.

- This requires '*such a survey of the range of objects or possible beneficiaries*' as will enable them to carry out their fiduciary duties.
- They must obey the trust instrument and cannot do anything that is not authorised by it.
- Unless the trust instrument provides otherwise (**SSP19.1**), they must balance the interests of beneficiaries.

Modern LI trusts often include such powers

An IPDI for a spouse/civil partner often includes a clause like this:

“My Trustees may pay or apply the whole or any part of the Residuary Trust Fund in which my [wife] is then entitled to an interest in possession to her or for her advancement or otherwise for her benefit in such manner as my Trustees shall in their discretion think fit, and

in exercising the powers conferred by this sub-clause my Trustees shall be entitled to have regard solely to the interests of my [wife] and to disregard all other interests or potential interests under my Will”

Power of Appointment

- Powers of appointment were originally intended for trustees to use to modify the terms on which property is held within the trust but they can be used to wind up the trust completely by appointing the capital to one or more beneficiaries.
- There is nothing wrong with using a power of appointment to make a one-off payment of capital to a beneficiary although it is not necessary and the more informal power to apply capital is easier.

Power to Apply capital or income

- This allows trustees to apply income or capital for the advancement or benefit of beneficiaries.
- Trustees are likely to use this power when they are giving beneficiaries an absolute entitlement to trust assets, although it is used increasingly to resettle property on different trusts (a '*settled advance*'). This power is based on the statutory power contained in Trustee Act 1925, s 32.
- No specific formalities are laid down for the exercise of the statutory power and express powers do not usually require any. A simple trustee resolution will suffice.

Advancement or benefit?

- "*Advancement*" originally meant the establishment in life of the beneficiary who was the object of the power. It does not necessarily mean that funds are paid to a beneficiary early (though this is often the result). But in some cases, such as settled advances, the advancement will defer absolute entitlement.
- "*Benefit*" is wider. It is not confined to the beneficiary's direct financial situation. It can include the discharge of moral or social obligations particularly in relation to provision for family and dependants. It can be for a person's benefit to have their entitlement to capital deferred where, for example, they are not sufficiently mature to deal with the receipt of a large amount of capital.

Don't forget tax implications

- Giving rights to capital will have CGT and (usually) IHT implications.
- Giving a right to income has a beneficial income tax result (the trust escapes the trust rate of tax).
- Giving a right to income normally has no IHT implications, but watch out for rights created within 2 years of death. The automatic reading back effect of IHTA, s144 will create a retrospective IPDI.

Power to Appropriate

Trustees have no statutory power to Appropriate

- Unlike PRs, they need an express power. See [SSP4.15](#).
- Appropriating assets to separate sub-funds can facilitate accounting.
 - EG, funds are settled on 4 grandchildren contingent on age 25. The trustees will apply income and capital for them at different times.
- A power to ‘re-appropriate’ assets in case circumstances change is useful. See [Cotterell v Ismay](#). STEP Provisions do not include one.
- Appropriating assets does not itself create separate settlements for tax purposes. However, trustees can make a sub-fund election for specified portions of settled property. The sub-fund(s) are treated as separate settlement for CGT/income tax purposes. There is a deemed disposal for CGT but thereafter separate tax returns.

STEP Guidance says:

“Recognising the frequent default practice of incorporating both the Standard and the Special Provisions, it was considered that this provision was less suited to inclusion in a general set of powers addressing commonly arising situations. If required in a particular case it would be better added as a bespoke power in the will or settlement after appropriate explanation to the client when deciding whether or not to include it.”

provisions in the 2nd edition of the STEP Standard Provisions.

- It has been removed from the 3rd edition.

Example of Appropriation from an estate

- Uncle Unwin dies in 2024 and leaves his nephew, Nathan, a nil rate band legacy, residue to a charity. Included in the estate is a house which was worth £300K at the date of death. Nathan wants to take the house in part satisfaction of his legacy. But it is now worth £350K.
- Under the general law Nathan would have to pay £25K. If a clause is included allowing appropriation at death value, the PRs could appropriate the house without payment.
- BUT doing so means the residuary beneficiary loses out.

Example of appropriation from an estate

Despite the potential unfairness, the power offers two potentially significant advantages:

- Administrative convenience: saving of costs of a second current valuation when executors already have a probate valuation; and
- A possible IHT saving: passing value down to the next generation without a transfer of value by appropriating assets which have gone up in value since the death (though this could be achieved with a post-death variation if the residuary beneficiary is willing).

PRs could appropriate the house without payment.

- BUT doing so means the residuary beneficiary loses out.

Issues when exercising powers

Exercising a Power of Appointment

- If giving a right to income, state that it is revocable, Default position is that it is not revocable.
- Trustees must comply with required formalities or the purported appointment is invalid: See *Smith v Stanley*. Trustees wanted to terminate life interest and accelerate remainder interests. They purported to do so informally but the power required a deed and their exercise was informal.
- Sometimes the consent of a named person is required. If including such a requirement, it is important to make provision for loss of capacity on the part of that person.

Exercising a power to Apply capital/income

- This power can normally be exercised informally. However, you need a written record of **when** an application of capital is made, for example in case of changes in tax rates.
 - The best course is for trustees to resolve that “*from this date we are holding [cash/assets] on trust for [Beneficiary] absolutely*”.
- Often there is no evidence as to what, if anything, happened.
 - For example, will of first spouse to die contains a NRB discretionary trust but no assets are ever transferred.
 - Did the trustees use their powers to get rid of the trust or did the survivor die owing funds to the trust?

Two recent cases

Batt v Boswell

- H left estate to W for life, remainder to son and daughter.
- W and son were trustees.
- Trust funds were paid into W's bank account.
- Over the years she made gifts to the children.
- Were they made from:
 - her personal funds, leaving the trust funds intact, or
 - advanced from the trust fund leaving her personal funds intact?

Marks v HMRC

- H left estate to W for life, remainder 3/4 to grandchildren, 1/4 to charity.
- Trustees had power to apply trust funds for W and grandchildren and made substantial payments to W and grandchildren
- On W's death, her PRs wanted to merge her free estate with the trust fund to get the reduced IHT rate on whole estate.
- BUT the payments had reduced the trust fund so much that the amount going to charity was not enough to hit the required 10%.
- Taxpayers argued unsuccessfully that the gifts were made by W '*borrowing*' from the trust fund

Marks v HMRC

Free Estate	Life Interest Trust	Charity
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Free Estate	Life Interest Trust	Charity
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III. ADMINISTRATIVE PROVISIONS

How extensive should powers be?

"One need not pack a wetsuit to cross the Sahara." James Kessler

- All-inclusion is attractive
 - Circumstances may change. Trust property of one sort may be sold and other property acquired.
 - A standard form that can be run off for all trusts and wills is efficient.
- You can put every conceivable power in every trust.
- But possible to use a shorter form of administrative powers if you can be sure that many powers would never be needed.

STEP Standard Provisions?

Using the STEP standard provisions has the following advantages.

- Because they are incorporated by reference, the actual document is shorter.
- It reduces the risk of unfortunate omissions or inclusions.
- Practitioners familiar with the standard form will save time because they will not need to review individual administrative provisions at length when dealing with the trust or will.

On the other hand, if administrative provisions are set out in full, the material is immediately available for the testator and those running the trust. It is not necessary to turn to look elsewhere to discover what powers are available.

What about a power to add powers?

In Chapter 21 of *Drafting Trusts* Kessler says:

“In the precedents in this work such a power is unnecessary. The powers conferred expressly are comprehensive. For good measure the power of appointment can be used to confer additional administrative powers. The power to add powers would do no harm; but the possibility of the power being usefully invoked is so remote that it merits no place in a standard draft.”

Hmmm

Kessler’s power of appointment is unusually wide.

(1) Power of Appointment

- (a) The Trustees may appoint that they shall hold any Trust Proper for the benefit of any Beneficiaries, on such terms as they think fit.
- (b) An appointment may create any provisions and in particular
 - (i) discretionary trusts
 - (ii) dispositive or administrative powers exercisable by the Trustees or any other person.
- (c) An appointment shall be made by deed and may be revocable or irrevocable.

is so remote that it merits no place in a standard draft.”
It’s a useful power to have so worth including.

Hmmm

IV. STEP STANDARD PROVISIONS

Standard Provisions

Preliminary

- All the Standard Provisions apply, unless any particular provision is specifically excluded. In *OH v Craven* Norris J was critical of the practice of including all the provisions as standard when some, such as SSP17 were clearly inappropriate for a Personal Injury trust.
- PI trusts are often bare trusts and are a popular alternative to leaving damage awards invested at the Court Funds office. The standard form declares that "*the Trustees shall hold the capital and income of the Trust Fund upon trust for the beneficiary absolutely*".
- SSP17 is unchanged and removes any obligation to consult beneficiaries (for example as required by TLATA 1996).

Norris J said:

"The STEP Standard Provisions are then simply incorporated, whether truly appropriate to a "*personal injury trust*" or not. O's "*personal injury trust*" thus confers power on his trustees during his minority to invest the money taken out of the Court Funds Office in unsecured loans, or in land anywhere in the world, or to use it to carry on a trade anywhere in the world. His trustees also have the power to move the trust administration beyond the reach of the English courts. Of particular concern where "*personal injury trusts*" are established for capable adults is the standard provision (clause 19) relieving the Trustees of any duty to consult the Beneficiary or to give effect to his wishes, even though it is his or her absolute property. It is true that the Beneficiary can in theory revoke the trust and either assume direct control or resettle on more amenable trustees: but I ask why the provision is routinely incorporated and what advice adult claimants and litigation friends receive in relation to it?"

Minors and those lacking capacity Provision 5

This used to be Provision 6 of the 2nd Edition in relation to income and Special Provision 18 in relation to capital.

- 5.1 provides that trustees may pay capital and income to a parent or guardian (as the law already allows) or to a minor who has reached 16. Query whether PRs and trustees can be compelled to make such payment.
- 5.2 allows trustees to declare that they hold income for a minor absolutely which is useful as it allows income to be taxed at the minor's rates. They can accumulate it or apply it for minor's benefit.
- Where a beneficiary lacks capacity, 5.3 allows trustees to apply income or capital for the benefit of the beneficiary or to the person appearing to the trustees to have the care of and financial responsibility for them.

Conflicts of Interest Provision 8: some changes

- 8.2 allows trustees, as before, to enter into transactions despite a conflict of interests in relation to administrative matters not dispositive ones (eg use of a company owned by a trustee to provide services but not an exercise of a power of appointment). There must be an independent trustee.
- 8.3.3 (new) states that the trustee benefiting cannot be the settlor.
- 8.4 allows powers to be exercised in favour of a trustee provided there is an independent trustee **or the trustee benefiting** is an original trustee appointed under the trust instrument. This relaxes previous editions where **all** the trustees had to be original appointments if the need for an independent trustee was to be avoided.

Special Provisions

Deferring income entitlement to 25: Provision 16

- If Trustee Act 1925, s 31 applies, a minor with a contingent interest in capital becomes entitled to income at the age of 18.
 - This may be undesirable if the income is large.
- Further, in the case of a will trust it may mean that a minor obtains an IPDI on death or a retrospective IPDI as a result of automatic reading back under IHTA 1984, s144.
- Having an IPDI means no holdover relief is available under TCGA 1992, s260 when the minor becomes entitled to capital.
 - An IPDI takes precedence over a bereaved young person's trust.

Example of holdover problem

T leaves her estate to her three sons contingent on reaching 25. When she dies A is 20, B is 17 and C is 15. Trustee Act 1925, s31 is not varied. **It is intended to be a BYP trust.**

- A has an IPDI so no holdover relief when he reaches 25.
- B acquires a retrospective IPDI because he reaches 18 within 2 years of T's death. No holdover relief when he reaches 25.
- C has a bereaved young person's interest. There is holdover relief when he reaches 25.

Possible adverse effect of Provision 16 on RNRB

To benefit from RNRB a grandchild must take absolutely or have an IPDI. Deferring the right to income means the grandchild will not have an IPDI at 18. This is not necessarily a problem:

- The grandchild may have reached the stated age at T's death.
- There may be other children or grandchildren who have reached the stated age and are therefore entitled to part of the residence. Provided their share is worth more than the available RNRB, the estate will benefit from a full RNRB.
- Trustees of a relevant property settlement have power to appoint income and capital. They can give the minor grandchild a right to income or capital within 2 years and retrospectively secure RNRB.

Questions?

And thank you for listening