

CYPRUS FIDUCIARY ASSOCIATION



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N. XENOFONTOS LLC

ADVOCATES | LEGAL ADVISORS

CYFA 2023 Seminar #8: “Trusts In Practice: An Essential Guide”

**Thursday, 21st September & Tuesday 26th
September 2023**
**Speaker: Mrs. Nicky Xenofontos,
Advocate - TEP**

When a potential or current client asks you “why should I set up a trust?”

01 Avoid Probate Procedures – Easier Passage of Title to Assets

By placing your property in a trust, you can avoid lengthy proceedings in probate court because the trustee distributes assets according to the trust instrument and in consideration of the settlor’s wishes, without the need for any court intervention. This way, the rules of forced heirship are overcome and the settlor is at liberty to assign assets to nominated beneficiaries, even if not within the family bloodline.

Time and costs are saved.

02 Retain Privacy

The trust instrument is a private document, and is not filed with any authority.

Although information on the trust structure is disclosed with the UBO Trusts Registry, nevertheless, information is not open to public inspection and nor can one simply request disclosure of such information unless he can prove a legitimate interest and that there is some suspicion of ML/TF.

03 Maintain Control over your Assets

A trust allows you to maintain a certain level of control over your assets which a Will on the other hand does not.

The structure of the trust allows you to freely decide who will benefit, in what proportion, when and which assets. If you have young children, this can be a great way to ensure they do not receive their inheritances in one lump sum. Trusts can be created with certain life milestones in mind, allowing children to receive funds after graduation high school or college or even after marriage.

04 Plan For Worst Case Scenarios

While no one wants to think about the worst case scenario, life can sometimes get in the way. Estate planning is a crucial step in protecting yourself and your loved ones in the event you were unable to make decisions near the end of your life. Trusts can help ensure your loved ones are taken care of in the event you became incapacitated.

There's no telling what will happen in the future...

05 Divide Assets Fairly

As you begin estate planning, you may realise that certain assets are more difficult than others to split up among your beneficiaries. Trusts are one way to designate how more complex assets will be distributed after your death. For example, if you have a family business that needs to be split up or a vacation home that you don't want to leave to one person trusts can be a good way to do that.

06 Creditor & Asset Protection

Trusts make for a great way to protect from lawsuits and creditors. Assets in the trust can be arranged in such a way that these cannot be used to pay off debts in case you become subject to predatory lawsuits and creditors. Spendthrift provisions in the trust also can protect the assets from creditors (or overreaching family members) of a beneficiary until they are actually distributed.

Section 3(3) CIT law: 2 year limitation of action period to file any claim against a trust from the date of transfer or disposal of assets

07 No Tax

Income, gains and profits from non-Cyprus sources are exempt from income tax, capital gains tax, special defence contribution or any other taxes in Cyprus.

Worldwide income, profit and gains are taxable in Cyprus only where the beneficiary is a Cyprus tax resident; beneficiaries who are non-residents of Cyprus are taxed only on Cyprus sourced income in accordance with the Cyprus income tax laws. Dividends received by a CIT are not taxable and not subject to any withholding tax in Cyprus.

There is no estate duty or inheritance tax in Cyprus.

08 Gathering Together And Organising Your Assets

A trust helps you get your assets organised and under one manager as trustee. Having all the assets gathered into the trust makes it so much easier for those left behind to distribute your property on your death rather than having to try to hunt everything down.

09 Protecting beneficiaries from themselves

If a beneficiary has a drug addiction, is a spendthrift or just makes poor choices, having a trustee limits their access to the trust funds.

10 Divorce happens

If a beneficiary goes through a divorce, a trust could prevent their divorcing spouse from obtaining all or a portion of their monies in a settlement.

A lot of HNWI families prefer to protect the family's wealth accumulated throughout the settlor's life to remain within the family bloodline and so for spouses or partners of beneficiaries are excluded from benefitting from trust assets.

Strict provisions and drafting in the trust instrument can attain this.

Before drafting the trust instrument, be clear on the below:

- The **purpose** and **nature** of the trust (i.e. what is the overriding aim of the trust, what type of trust will be used to attain this aim, revocable or irrevocable)
- Identification of the **assets, location**, approximate **value**
- That the **3 certainties** for a valid trust have been fulfilled (i.e. certainty of intention, certainty of objects and certainty of subject matter)
- For a CIT, that neither the settlor nor the beneficiaries are (tax) residents of Cyprus for the **year preceding** the creation of the trust
- At least **1 trustee** for the duration of the trust period is a resident of Cyprus
- The **trust period**, and how it may come to an end
- The **governing law** and **place of administration**

The 3 Certainties

1. Certainty of intention

Key test:

Whether the requisite **intention** is present is to consider whether the settlor of the trust wanted someone to be under a duty to hold property for the benefit of another person and to this end, honestly wanted to relinquish title to ownership of the assets.

In *Re Gulbenkian* [1970] AC 508, Lord Upjohn said that in cases of ambiguity the court must use ‘innate common sense and desire to make sense of the settlor’s... expressed intentions, however obscure and ambiguous the language that may have been used, to give a reasonable meaning to that language’.

If there is an absence of certainty of intent to create a trust, there will be no valid declaration of a trust.

The 3 Certainties

2. Certainty of Objects

Depend on the type of express trust in question.

For **fixed trusts**, it must be possible to identify exactly who all of the beneficiaries are in order for the trustees to distribute the property correctly. This is known as the 'complete list test.

For **discretionary trusts**, things get a bit more complicated as beneficiaries are deemed to be 'potential' until they have actually become 'vested' and such type of trust can also include a class of beneficiaries, e.g. all the born and unborn biological children of the settlor and grandchildren.

3. Certainty of Subject – Matter

A trust creates rights and duties at the moment of its creation, and must therefore be certain at the moment of its creation. For a gift however, it only needs to be certain at the moment legal title is transferred. Simply put, the trust property must be clearly identifiable and ascertainable.

These 3 certainties are **cumulative** and unless they are all satisfied no effective trust can come into being.

- The “three certainties” have to coincide, and, they all have to be present for a trust to be valid. If one of the certainties is missing the trust will be **void ab initio** and the person intended to act as trustee may be given the assets personally.
- The three certainties function as a guarantee that trusts are instilled with clarity and thus enforceability.
- It is therefore necessary to ensure that trust property can be specified with precision and dealt with according to the intentions of the settlor. If there is ambiguity, the courts would rather allow a trust to fail than take the chance of permitting the inappropriate use of the supposed settlor’s property.
- Furthermore the certainties are an important safeguard against the risk of fraud, which is ever present in substantial property transfers.



Use familiar words instead of farfetched words

Use short words instead of extended, long words

Use active voice instead of passive voice

Avoid repetition

Know the precise meaning of the words and sentences you're using

Know what each clause means, and most importantly how and when such clause becomes operative when the trustee decides to exercise such power under any clause

Put yourself in the place of the reader, read the document from a layman's view and understand it



Do not COPY PASTE! Different clients have different needs. A trust template does not fit all, adapt it and customise to the needs and circumstances of the client.

Standard templates may contain clauses, powers, restrictions that are unnecessary for the purpose of the trust and in the end, may just complicate your job as a trustee when having to administer it in construing unnecessary clauses.

Key ingredients



Variation/Amendment

a **broad power of amendment** permitting the trustee to vary, revoke or amend any of the trusts, powers and provisions of the trust deed (unless there is a specific planning situation requiring the narrowing of the power).

This allows the trustee to have flexibility to adapt to changes circumstances of the settlor, his business, the personal circumstances of the beneficiaries.

Example clause (simple):

The present Trust Deed may be amended by written instrument by (i) the Trustees and (ii) the Protector(s) (if a Protector(s) exists).

The instrument amending this Trust Deed shall be annexed to the original deed.

Key ingredients



Income and capital

a definition of trust income this is the income the trustee can distribute to beneficiaries. But trust income is not the only definition of income relevant to a trust. There is also net income. Net income is the trust's taxable income. The trustee should be able to define income to be on the right track when the time for distribution arrives.

Example clause:

Trust Income. Unless otherwise qualified, as used in this Deed, the term “trust income” shall refer to distributable net income which includes the sum of all items of ordinary income, dividends and recognised capital gains and tax-exempt income, less all deductions (except for the deduction for distributions), losses, credits and exemptions allowable to reduce the total of taxable trust income.



Beneficiaries

power to add and remove beneficiaries

It is not uncommon to see common law trusts with clauses giving power to add or remove beneficiaries, most often exercisable by the trustees either freely as they decide, or only with the consent of another, e.g. a protector.

default beneficiary mechanisms – this can be particularly relevant in restructuring scenarios. A determination as to whether or not a client should decide to appoint default beneficiaries requires a case-by-case assessment.

exclusion of the trustee as a beneficiary – can be important to avoid conflicts of interests and misunderstandings in case of any aggrieved beneficiary in the future.



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Governing Law & Place of Administration

A trust deed will often nominate a jurisdiction through an exclusive or non-exclusive jurisdiction clause, although a hybrid of the two is possible.

It is important to know which jurisdiction applies to your trust because different jurisdictions treat trusts differently. If you incorrectly identify the trust's jurisdiction, then any trust administration and trust disputes may be incorrectly addressed.

For CITs:

Exclusive jurisdiction of Cyprus law as to the validity of CITs and other matters.

Any matters in relation to the validity, interpretation, amendments, revocation, powers of trustees, protectors, or trust enforcement supervisors and inter alia administration of a CIT are determined in accordance to the law in force in Cyprus without reference to the applicable law of any other jurisdiction. The list of matters which are exclusively determined by Cyprus law are identified in Section 3(1A) of the CIT law.



General

wide ranging, practical trustee powers contemplating most commercial scenarios

adequate succession mechanisms for the role of trustee and protector

Any structure, must be fit for the client's purpose.

And although it is possible to achieve this with a 'one size fits all' deed, a client may need many subsequent reviews and amendments to get the deed to where it needs to be.

I would argue, therefore, that key ingredient in any modern trust deed is a clear, expansive power of amendment that will permit the trustee to validly adjust the parameters of the trust relationship as their circumstances or the law evolves.



- Various definitions as to the parties involved and the meaning of various notions used in the trust deed;
- Clarifications as to the trust property, income and capital;
- The duration of the Trust, if any;
- Statement as to who the beneficiary(ies) are
- The powers and duties of the trustee, protector and trust enforcement supervisor;
- A provision as to the reserved powers of the settlor, if any;
- A provision as to the applicable law governing the trust;
- A provision as to the way the trust may be amended;
- A provision as to the ultimate default trusts;
- Provisions as to the liabilities of the trustee, the retirement of the trustee, the appointment of new or additional trustee, the indemnity of retiring trustee and protector, withdrawal, retirement and appointment of protector and remuneration for the trustee and other officers;
- A provision for the preparation of accounting records; and
- Confidentiality and non-disclosure issues.

Missing trustee charging clause

- In the absence of this provision, the trustee cannot automatically have its fees paid from the trust fund.

No trustee exoneration provision

- Without a trustee exoneration provision the trustee will be at greater risk of personal liability than is market standard and could be held liable for all losses to the trust fund; not just those losses which have arisen due to the trustee's gross negligence or fraud.

Missing anti-Barlett clause

- An anti-Bartlett provision excludes the duty of a trustee to supervise or intervene in the business of underlying companies in which the trustee holds shares. Without such a clause the trustee's duties are much more onerous (and its potential liability much more extensive).

Limited or obscurely worded appointment provisions

- Poorly drafted appointment provisions can also make it difficult to restructure the trust and, in particularly problematic cases, the assistance of the courts may be required in order to clarify the powers conferred by the trust deed.

Insufficient administrative and investment powers

- If the trust deed does not expressly provide for sufficient administrative and investment powers, the trustee may be restricted in its administration of the trust and it may not be possible to hold certain assets (i.e. wasting or speculative assets).

Outdated definitions of the beneficial class

- Due to scientific advances, as well as societal and legal changes, certain definitions may no longer be fit for purpose and may have unintended consequences (e.g. surrogacy can cause issues, as the child will be treated for legal purposes at birth as the child of the surrogate mother and may therefore fall outside of the beneficial class of the trust).

Missing amendment provisions

- Without these provisions the trustee cannot easily amend the trust and may require the assistance of the courts

Missing governing law clause

- Commonly overlooked, the absence of a governing law clause can cause a variety of issues. Without such a clause in a trust deed with assets or family members located in multiple countries it can be difficult to determine with certainty which jurisdiction's laws apply. A detailed analysis of conflict of laws principles and specialist legal advice from multiple jurisdictions may be required to resolve the point.

The Essential Trustee

What you need to know, what you need to do



Don't take chances!


The Essential Trustee

What you need to know, what you need to do

Acting as a professional trustee can be something of a balancing act. Like any other business, a trust company needs to generate profits and to offer professional trustee services competitively to attract and retain clients.



BUT, the trustee role brings with it great exposure to **risk**, which has only increased over recent years as a result of ever-growing **regulatory burdens** and the increasingly complex problems faced by globally mobile and fast-evolving families.

At the  of the trustee role is the trustee's duty to act in the **interests of their beneficiaries**, regardless of the trustee's personal interests – failure to do so could potentially expose the trust company to personal liability (sometimes even where losses have been occasioned by innocent error).

The Essential Trustee

What you need to know, what you need to do

Recommendations

Recommendation 1: Maintain active oversight of the administration of trusts through effective governance

Active oversight is essential to ensure the effective administration of the trust in line with the trust deed. This necessitates appropriate levels of engagement from all key stakeholders in the trust company and the proper implementation of and adherence to policies, procedures and controls. How is this successfully achieved?

Be a real trustee, not just on paper.

Meet with the settlor, the beneficiaries and protector (if any) at least once a year to discuss concerns, update them on the administration of the trust. Hold board meetings to discuss any conflicts that may have arisen, take decisions, inform the client.

Pay attention to the terms of the trust.



The Essential Trustee

What you need to know, what you need to do

Typical examples of issues arising during the ongoing administration of a trust include:

- Excessive settlor control: serious problems (including potential challenges to the validity of the trust) can arise when a trustee slavishly follows the directions of a settlor in the absence of relevant reserved powers (or, worse yet, when decisions are taken by the settlor in relation to trust assets without the trustee's knowledge).
- Ineffective investment advisor provisions: investment advisor provisions can (if properly drafted) provide a legitimate mechanism for the reservation of investment powers, thus providing a degree of protection to the trustee. However, these provisions are not worth the paper that they are written on if no investment advisor is appointed following the settlement of the trust, or if carefully drafted investment directions are not received.
- Use of trust property: issues often arise where individuals occupy property held by the trustee and there is no proper documentation (i.e. a lease or licence or a suitable property management agreement) in place. The position regarding undocumented loans can cause similar difficulties.
- Excessive protector control: deeming the protector to be running the trust and not the trustee.

Recommendation 2: Exercise the trustee's custodial function with due care and skill, including by keeping proper records

Safeguard any important documentation concerning the trust and its assets.

A proper document management and retention policy is therefore of vital importance to professional trustees.

The trustee should be very careful to ensure that appropriate records are maintained and properly filed and if there are any rearrangements within its business (for example, a merger with another trust company), the trustee should complete a thorough audit of the trust documentation to ensure its records are complete.

Recommendation 3: Obtain appropriate expert advice

Particular issues can arise where trustees fail to obtain legal advice in all relevant jurisdictions with regard to the formation of trusts, where beneficiaries are resident, location of assets.

Trustee Risks and How to Avoid Common Pitfalls

Before accepting trusteeship, ask yourself the following questions and if you can answer them in the affirmative bearing in mind all the elements, you're ready to be a professional trustee!

- ? Should I accept appointment as successor trustee of a trust? Trustees take on a fiduciary duty, the highest standard of care to which you can legally be held.
- ? What am I legally obligated to do as a trustee?
- ? What can't I do as trustee?
- ? Am I legally liable as trustee?
- ? What rights do the heirs and beneficiaries have vs. trustees?
- ? Are there risks in being a trustee? What common mistakes do trustees make?

Trap #1: Knowing You Are the Trustee, but Failing to Understand What that Means

Actually sit down and read the trust instrument thoroughly and fully investigate your responsibilities before they take them on.

When in doubt, seek professional advice from a qualified trust estate practitioner as deeds are written most oftently in legalese. E.g. a word like “issue” has a very specific meaning: the surviving descendants of a deceased person. That’s the only meaning that applies. “Per stirpes” has a very specific meaning regarding what happens if a beneficiary has died.

Don’t guess about what the trust deed and other documents mean and what you have to do. You could end up in court or in jail. Consult a professional to gain a better understanding of what is expected of you. That way, you can follow best practices and conduct yourself within the legal obligations required of you.

The Essential Trustee

What you need to know, what you need to do

Trap #2: Trustees Failing to Take Action in a Timely Way

As you serve in the role of trustee, you have to *take action* and take it in a timely way.

You can't just sit back. Too often, there are things you just didn't know you had to do: file UBO information, locate a sibling/beneficiary, seek protector consent, pay a tax, document a property value at the time of death, petition to include something in the trust that wasn't properly retitled, or prudently relocate an asset. These are just a few situations you may deal with while serving your duties as trustee.

Indeed, *inaction, not a bad action, is frequently the cause of problems*, resulting in income tax or property tax penalties, and civil liability.

Why? Because trustees are always personally liable for both their actions and inactions.

Trap #3: Trustees Failing to Communicate with Beneficiaries (where and when appropriate)

Good communication is an essential part of a trustee's job and to some extent, a legal requirement. Fail to communicate and you create not just problems but *perceived problems* as the other beneficiaries become impatient and concerned.

Without clear and consistent communication early on, a trustee risks creating completely new (and totally unnecessary) problems in the future.

Trap #4: Trustees Ignoring a Beneficiary's Rights

Let me repeat: trustees have *obligations*, while beneficiaries have *rights*. Trustees are frequently punished for breaching their duties.

Beneficiaries are rarely if ever punished for exercising their rights. That's why it's absolutely crucial that you understand trustee responsibilities to beneficiaries.

The Essential Trustee

What you need to know, what you need to do

How to be an effective trustee



Assemble a team

No one person can be adept at all required to be an effective trustee. Most of us offer our trustee services via our fiduciary companies, yet we still seek outside help and advice on all sorts of matters: Assemble a team of primary advisors providing expertise and advice that should include trust lawyers, tax advisors and investment advisors.



Understand the key trust terms

Upon becoming a trustee, a best practice is to read the entire trust document and go through the document with an attorney and have them explain the key terms. Some of these key terms may involve (a) the distribution standards, (b) special provisions relating to investing, particularly direction to sell or not to sell certain assets, (c) provisions that the trustee should act upon, like the power to appoint a successor, and (d) knowing whether the beneficiary's age will trigger distributions or any other actions.

The Essential Trustee

What you need to know, what you need to do

How to be an effective trustee



Work productively with beneficiaries

To mitigate potential issues with beneficiaries and facilitate a productive relationship, trustees should be mindful of the following:

- **Communication and Transparency.** Most issues with beneficiaries can be avoided by frequent and transparent communication. Having regular meetings (2-4 meetings per year), providing account statements, investment reporting, annual accountings, and periodic phone calls are all best practices.
- **Beneficiary Education.** Education about the trust at the beginning of a trustee-beneficiary relationship is an excellent way to manage expectations. The trustee and members of the advisor team should educate the beneficiary about the settlor's intent regarding important aspects of the trust as well as the primary trust terms, especially the distribution standards.

How to be an effective trustee

- **Distribution Clarity.** The trustee should understand the beneficiary's financial situation and distribution needs. A good way to do this is to assist the beneficiary in creating a budget and determining what regular distributions are appropriate given the amount of trust assets and the distribution terms.
- **Provide Required Information.** A primary trustee duty is to keep beneficiaries reasonably informed about the trust, including what the assets are, fees and expenses paid (including trustee compensation), and the amount of distributions. To limit their liability, the trustee must provide such information to beneficiaries.

Note section 11 of the CIT law provides for confidentiality BUT, provided that where a request is made by a beneficiary to the trustee for the disclosure of the accounts of an international trust or any documents or information relating to proceeds and payments made by the trustees forming part of the said accounts, the trustee shall have the power to disclose those accounts, documents or information to the beneficiary *only if in his opinion such disclosure is necessary and secures the lawful interests of the trust.*

How to be an effective trustee

- **Documentation is Crucial**

Although trustees cannot guarantee perfect results, they must act with care, skill, and impartiality.

Trustees need to have rational reasons for their decisions, and documentation of them is critical because it substantiates the trustee's careful, rational, skilful, and impartial decision-making. Without it, decisions that seemed perfectly reasonable at the time of action may have lacked judgment in retrospect. A trustee will rarely regret documenting a decision or communication but may regret a lack of documentation.

Examples of decisions that should be thoroughly documented include: (a) distribution decisions; (b) decisions that set investment policy; (c) initiation or termination of investments and the hiring and firing of investment managers/funds; (d) principal and income allocations; (e) verbal communications with beneficiaries; and (f) decisions to hire experts or agents (investment managers, lawyers, accountants).

General Duties

1. To be Prudent

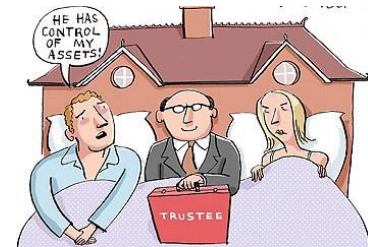
Act reasonably and competently in *all* matters of the trust. This is a *conduct*, not a *performance*, standard when applied to investments.

For example, if the trustee invests the assets in the trust in a prudent manner but there is a stock market crash, the trustee is not liable for the loss, but if the trustee invested all of the assets in cryptocurrencies, the trustee would be liable for the loss.

2. Duty to Carry Out Terms of the Trust

Must carry out the *intent* of the settlor as laid out in the trust document. The beneficiary's desires are subordinate to the settlor's intent, in effect the trustee is the settlor's agent.

This means that if the settlor restricts access to income or principal otherwise due to the beneficiary because the beneficiary has an addiction or a mental health or physical condition that qualified the beneficiary for medical aid, the beneficiary can't force payments from the trustee.



5 General Duties

3. Duty to Be Loyal to the Trust

The trustee must have an undivided loyalty to the trust in all matters that directly or indirectly effect the trust and its beneficiaries.

Loyalty to the trust must be diligently pursued by the trustee because self-benefiting acts by the trustee are inherently fraudulent, the court can set aside such acts at the beneficiary's option.

 Strict application of this standard by the courts where the trustee is in conflict with the trust.

In effect, the Trustee is **personally** liable for any loss to the trust, or gain to the trustee, arising from transactions in which that trustee received personal benefit, even if the transactions were otherwise reasonable. Trustee fees, a divided loyalty, are permitted but are limited to those that are “reasonable.”

Key Role & Responsibilities

5 General Duties

4. Duty to Give Personal Attention

The trustee may not delegate (unless a power of delegation is provided in the trust deed) the administration of the trust, though the trustee may hire competent legal, financial, and accounting expertise, but may not delegate the trust administration or any matters of discretion.

The Trustee may engage an asset manager or advisor, provided that the Trustee supervises that manager or advisor and sets an investment policy.

5. Duty to Account to the Beneficiary

The trustee must account for his or her conduct in fulfilling the intent of the settlor as expressed in the trust. This includes keeping records and preparing a written accounting of the trust assets showing the nature, amount, and handling of the trust assets, along with a written summarisation of the receipts of principal, payments from principal, remaining principal on hand, income received, payments of income, and income on hand.

Key Role & Responsibilities

5 General Duties

6. Act Impartially

Usual duty to ensure that one beneficiary shouldn't suffer at the expense of another. It's common for a trust deed to require that trustees balance potentially competing interests for income and capital.

7. To act Unanimously

Act unanimously unless the trust deed says otherwise. Good to have a deadlock clause in the deed to deal with any issues, e.g.

“Unless otherwise provided for in this deed, in the event of any disagreements arising between the Trustees at any time, the view of the majority shall prevail and be of the same force and effect as if it were a unanimous decision of all the Trustees. Should there be an equality of votes, the chairperson shall have a second or casting vote”.

Trust Practitioner's Handbook

[Trust Practitioner's Handbook.pdf](#)

[Checklists.docx](#)



Adobe Acrobat
Document



Microsoft Word
Document



Common trust drafting mistakes and how to avoid them

Two categories of mistake:

1. The drafting mistake that has a direct (adverse) consequence for the client, beneficiaries or trustee. This is the type of mistake that gets a lawyer sued, and consequently, are the ones that advisers tend to be on the lookout for.

This is common where the drafting of a trust is not fit for purpose such that it prevents the client from achieving their goal. An example may be failing to ensure that the client is even a beneficiary of the trust, or omitting a key power of the trustee.

2. The other category of drafting mistake is more nebulous. They may not have a direct legal consequence, but make the life of the client, advisers, trustee, or beneficiaries more difficult. For example, confusing or ambiguously defined terms makes the job of the trustee – which is to administer the trust according to the words of the trust deed – much harder and usually more costly.

Case Study A

Facts Consider this definition of beneficiary taken from a testamentary discretionary trust:

“1.1 Beneficiaries

The beneficiaries of the trust will be:

- (a) any person who is a descendent of a grandparent of either the primary beneficiary of the trust or a spouse of the primary beneficiary;
- (b) the spouse and children of any of the persons specific in the precede paragraph...”

Who is the (primary) beneficiary?

The primary beneficiary is the son of the deceased.

Was this definition clear to you?

Common trust drafting mistakes and how to avoid them

Case Study B

Facts Consider these definitions:

*“**Child** means any Child of the Appointor.*

***Grandchild** means and Child (whether adopted or exnuptial) of a Child.*

***Great Grandchild** means any Child (whether adopted or ex-nuptial) of a Grandchild”*

Case Study B is another example of **unnecessarily complex drafting**, even if it does not look like it.

The definition of Child is circular, because it uses the defined term “Child” within the definition of “Child”. The drafting of Grandchild and Great Grandchild is also counterintuitive.

Why not just define them to be the Grandchildren and Great Grandchildren of the Appointor? Does this include step-children?

Common trust drafting mistakes and how to avoid them

Case Study C

Facts

Mr Keppler is the sole trustee and appointor of the Europa Trust, a discretionary trust.

Mr Keppler is married and has two adult sons from an earlier marriage. His new wife Mrs Tycho has a daughter from an earlier marriage with a severe disability. Mr Keppler adores Mrs Tycho's daughter and wishes to ensure his considerable wealth can be used to ensure Mrs Tycho and her daughter can live comfortably and manage the daughter's disability.

Mr Keppler has given considerable amounts of money to his two sons, who are now independently wealthy, so he is happy to use his wealth to support his new wife and step-daughter.

Mr Keppler's will and letter of wishes set out his desire that his sons help his new wife by supporting her in terms of managing the Europa Trust's assets and makes it clear that he intends the income and assets of the Europa Trust to be applied to the purpose of the care and maintenance of Mrs Tycho and her daughter. The terms of the trust deed set out that on the death of the trustee or appointor, the new trustee and appointor are the legal personal representative(s) of the original trustee/appointor.

Common trust drafting mistakes and how to avoid them

Case Study C

The default beneficiaries of the Keppler Trust are Mr Keppler, or if he is dead, his children. The Keppler Trust is a “bloodline” trust and includes this definition of Child: “Child means biological or lawfully adopted children. It does not include step-children unless the Trustee resolves otherwise.” Mr Keppler dies suddenly leaving a will that appoints Mrs Tycho and his two adult sons as his executors. Mr Keppler’s sons are incensed at seeing the family wealth go to Mrs Tycho, and their relationship immediately breaks down irrecoverably.

Consequences

Although Mrs Tycho is a trustee and appointor of the Europa Trust following her husband’s death, she shares the role with his two adult children. The decision making of the trust is now utterly paralysed because trustee and appointor decisions must be made jointly.

Mr Keppler’s sons are presumably quite happy not to cooperate, because the income of the Europa Trust will default to themselves each year, leaving no income for Mrs Tycho to care for her disabled daughter. They are not bound to follow Mr Keppler’s will and letter of wishes in relation to the Europa Trust because Mr Keppler was not legally able to bind the behaviour of the trustee(s) of the Europa Trust in that manner. Mrs Tycho would likely be forced to undertake expense litigation to have Mr Keppler’s sons removed as trustee of the Europa Trust in order to see Mr Keppler’s wishes met

Case Study C

What could have been done?

This problem was also solvable provided Mr Keppler's advisers had realised that the trust deed had the potential to result in a scenario contrary to Mr Keppler's testamentary desires.

The obvious drafting fix that could have been implemented is the automatic succession of trustee and appointor could have been removed and replaced with a succession by choice of Mr Keppler. Mr Keppler could then have made a binding nomination of Mrs Tycho to succeed him as trustee and appointor.

What happens when there is no succession mechanism?

A more extreme example of when trustee/appointor succession clauses fail is where there is simply no succession mechanism at all, e.g. where the trustee of a trust died and no mechanism existed in the trust deed to replace him.

Common trust drafting mistakes and how to avoid them

So what is “good” trust deed drafting?

This results in a trust deed that:

- (a) suits the client’s goals in establishing a trust;
- (b) is as concise as possible;
- (c) is precise in its terminology;
- (d) is as comprehensible to the layperson as possible; and
- (e) is unambiguous in terms of the powers and duties of the trustee.

Most of these go to the same issue – that the trust must be understandable because this makes the administration of the trust as easy as possible.

Trustees do not want to, and often cannot afford to, seek legal advice on a frequent basis to give legal sign off on every action the trustee wishes to take. With this in mind, you can see why I consider the definition of Beneficiaries in Case Study A and B are an example of bad drafting.

The answer to bad drafting is normally to amend the trust deed to rejig or replace the offending sections.

There are a number of processes by which variations to trusts can be made. The simplest and most common is the trustee exercising a **power to vary** the terms of the trust. Provided the variation power allows for the changes – a variation can be as simple as a deed or resolution by the trustee to replace the problematic drafting.

The process of exercising the variation power must be followed to the letter.

If the trust deed requires “prior written consent” of the settlor or protector, you need to have such consent in writing, before the deed of variation is executed, in a separate document.

The other options to vary the terms of a trust deed can be beneficiary consent and court action.

Transparency vs. Confidentiality

Where do we draw the line?

When it comes to disclosure to outsiders, the general position is that by virtue of the nature of the information they hold and their fiduciary function, the **law of confidence** requires trustees to keep trust information and documents confidential.

Principles of **transparency and confidentiality** often conflict when third parties unconnected to the trust or related company seek disclosure from the court of beneficial ownership information through disclosure applications.

So what are you, as a professional trustee allowed to (or not) disclose?



Where do we draw the line?

Section 11 of the CIT law explicitly states:

- 1) Subject to the terms of the instrument creating an international trust and if the court does not issue an order for disclosure according to the provisions of subsection (2), the trustee, protector, enforcer or any other person, cannot disclose to any person who has no right by law to know documents or information:
 - a) by which it is disclosed the name of the settlor or of any beneficiaries;
 - b) by which it is disclosed the trustee's deliberations as to the manner in which a power or discretion was exercised or a duty conferred or imposed by the law or by the terms of the international trust was performed;
 - c) by which it is disclosed the reason for any particular exercise of such power or discretion or – performance of duty or the material upon which such reason has been or might have been based
 - d) by which it relates to the exercise or proposed exercise of such powers or discretions or the performance or proposed performance of such duty;
 - e) which relate to or form part of the accounts of the international trust

Where do we draw the line?

BUT

Provided that where a request is made by a beneficiary to the trustee for the disclosure of the accounts of an international trust or any documents or information relating to proceeds and payments made by the trustees forming part of the said accounts, ***the trustee shall have the power to disclose those accounts, documents or information to the beneficiary only if in his opinion such disclosure is necessary and secures the lawful interests of the trust.***

From the wording of section 11, it is clear that unless a beneficiary seeks disclosure relating only to trust accounts/financial information, the trustee has discretion as to whether or not to disclose. There is no absolute obligation.

If a court orders disclosure, the trustees must comply, otherwise the trustee will be in breach of the court order

Disclose or Withhold?

Hypothetical scenario

I am one of the beneficiaries. Please can you let me have the reasons for your decision?

How should the trustee respond to this question and other similar inquiries relating to the trust's documents and information?

Checklist of considerations when tackling beneficiary requests:

Accountability is the starting point. A beneficiary must be able to hold a trustee accountable for their custodianship of the trust's assets. 'Does the beneficiary need this information in order to hold me accountable?' is often a useful first question, although responding to that question in the negative should not automatically be an end to the matter.

Schmidt v Rosewood Trust Ltd [2003] UKPC 26 remains the key case offering guidance to trustees on this issue. An important point emerging from Schmidt is that the beneficiary's right to inspect trust documents is not founded on any equitable proprietary right but rather on the trustee's fiduciary duty to keep beneficiaries informed and to render accounts.

Key Points

- ✓ Beneficiaries do not have an entitlement as of right to disclosure of trust documents; the court may have to balance competing interests.
- ✓ It is neither sufficient nor necessary to have a proprietary interest under a trust in order to be entitled to disclosure of trust documents.

Disclose or Withhold?

Checklist and guidelines

Below are some guidelines and practical tips deriving from Schmidt that can act as a checklist for trustees who are facing requests for disclosure

Remoteness

The more remote the interest of the beneficiary, the harder they will have to work to persuade the trustee that they are entitled to see what they are asking for.

Fiduciary duty and accountability

A trustee has a fiduciary duty to keep a beneficiary informed and a beneficiary must be able to hold a trustee accountable.

No automatic right

However, a beneficiary is not entitled as of right to disclosure of trust information.

Confidentiality

Some documents may be confidential and should therefore not be disclosed.

Disclose or Withhold?

Interests

Disclosure might not be in the interests of some or all of the other beneficiaries.

Safeguards

There are several practical safeguards a trustee could consider adopting when facing a request for disclosure (the list is not exhaustive):

Redaction: a trustee can consider whether parts of documents that are confidential and/or not relevant to the particular requesting beneficiary can be redacted prior to disclosure.

Consent: a trustee can consider whether, prior to disclosure, it would be appropriate to obtain the consents of the other non-requesting beneficiaries, whose interests may be most affected by the disclosure or the protector if required by the deed.

Undertakings: a trustee can consider, prior to disclosure, whether it would be appropriate to request undertakings (as to the preservation of confidentiality and/or the use of the disclosed information) from the requesting beneficiary or their professional advisors.

Court directions: when really undecided, a trustee can consider seeking directions from, and, therefore, the sanction of, the court, but, before spending the trust's money in making such an application, they should ensure that they have given proper consideration to the Schmidt guidelines.

Disclose or Withhold?

Generally, the below documents are exempt from disclosure (remember section 11 of the CIT law):

- agendas of trustees' meetings;
- minutes of trustees' meetings;
- correspondence passing between the trustees themselves and between the trustees and particular beneficiaries and
- information that relate to or form part of the accounts of the international trust.

What about legal advice obtained and paid for from the trust fund and letters of wishes:

Legal advice obtained by the trustees and paid for by the trust as to the mechanics and/or construction of any of the trust documents, or the nature and implementation of their statutory duties, should generally be disclosed because, in essence, it is advice obtained and held for the benefit of the beneficiaries in whom the privilege in any such advice would belong.

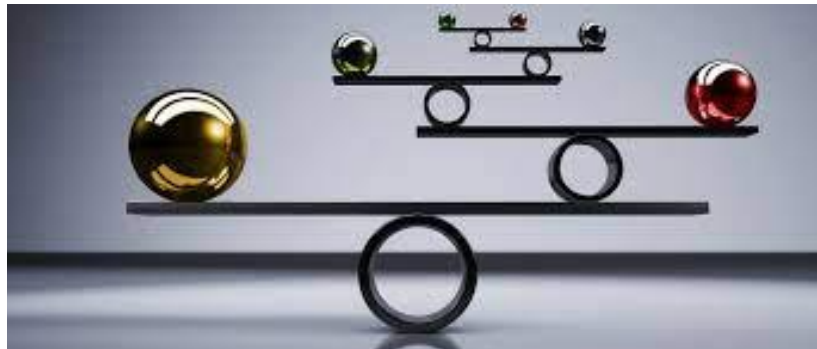


What about legal privilege?

Data security incidents at offshore law firms and at offshore trust and corporate service providers (notably the “Panama” and “Paradise” papers) have reopened the debate about the appropriate level of transparency of private wealth holding structures, such as trusts.

Concerns have been raised about the level of disclosure now required under various transparency regimes on the basis of the fundamental right to respect for private and family life and the protection of personal data.

It remains to be seen whether a balance can be struck.



Summary of the key transparency initiatives:

Tax Information Exchange Agreements

OECD has been pushing for greater tax transparency, in particular by tax “havens”. The OECD launched the Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum) in 2000, which developed a mechanism for greater exchange of information through the implementation of a model form of Tax Information Exchange Agreements (TIEAs). A TIEA is an agreement between countries under which they commit to share information on taxes, usually in response to a civil or criminal tax investigation.

The EU Savings Directive

The EU created the first multi-jurisdictional programme with automatic exchange of information. In 2003, the EU Savings Directive was launched to counter cross-border tax evasion within the EU. It allowed tax administrations better access to information on individuals who were resident in one EU country with savings accounts in another EU country.

FATCA

Arguably, the US has had the greatest impact as far as automatic exchange of information is concerned. In 2010, the US enacted the Foreign Account Tax Compliance Act (FATCA).

What was new and effective about FATCA was that it ensured that responsibility for compliance rested with financial institutions. Financial institutions must now report either directly or via their local revenue authority to the Internal Revenue Service certain information relating to financial accounts, which are held by or for US taxpayers, and that information must be provided automatically.

The Common Reporting Standard (CRS)

The OECD developed the Common Reporting Standard. CRS is a global initiative for countries to obtain information from their financial institutions and to automatically exchange that information with other jurisdictions on an annual basis. CRS draws heavily on the FATCA methodology.

Registers of beneficial ownership for companies, trusts, similar legal arrangements and other entities

The 4th EU AMLD obliges member states to keep a central register of information of the ultimate beneficial owners of corporate and other entities such as trusts and foundations.

Making the UBO register public was subsequently made obligatory under the 5th EU AMLD. **Note: Registers of ultimate beneficial owners of companies can no longer be accessed by the general public, according to a decision issued by the Court of Justice of the European Union (Court) on November 22, 2022.**

The EU DAC6

A wider EU initiative that would implement the BEPS Action Point 12 more broadly was adopted by the European Commission which will require intermediaries (and in some cases, taxpayers) to disclose information about cross-border tax planning arrangements that exhibit certain “hallmarks” to local tax authorities. The tax authorities would then exchange that information with other EU authorities.

How do these apply in practice? By way of example:

Mr A (a US citizen who is now resident in Cyprus) created a discretionary trust many years ago for succession planning purposes (the Trust). The trustee of the Trust is a professional trust company resident in Cyprus (the Trustee).

The Trustee wholly owns: (1) significant financial investments (including Cypriot investments) that are managed by a professional bank on a discretionary basis; and (2) a Dutch holding company (DutchCo), the sole asset of which is a UK incorporated trading business (UKCo).

The beneficiaries of the trust are Mr A, his wife (who is also resident in Cyprus) and their adult son (who is resident in France). No distributions have been made to any of the beneficiaries, although they all expect to receive a distribution during the 2018 calendar year.

The protector of the trust is a partner at a law firm who Mr A has known for many years. Although the protector has never had to exercise the powers conferred on him by the trust deed, he has the power to hire and fire the Trustee.

How will this information be disclosed?

The way in which the relevant information will be disclosed depends on the transparency regime in question. Some information will become publicly available whilst other information will be available to law enforcement agencies only on request.

Other information will be exchanged automatically on a global basis. For example: CRS and FATCA requires the Trustee to report certain details to the Cyprus tax authorities for onwards exchange to the tax authorities in the other countries within the structure.

The CyTBOR requires the Trustee to maintain internal up-to-date records of beneficial owners, and to register certain details with it, disclosing the trust structure, nature, extent of ownership, details of the parties to the trust and so forth.

Likewise, similar information will have to be disclosed with the companies' UBO Registers in the countries of registration.

What will happen with this data?

Although the confidentiality of the information disclosed is said to be safeguarded, this is an area that is giving rise to significant concerns, particularly in light of recent large scale hacks and leaks, which appear to be the new norm.

There is a clear tension between the move towards greater transparency and the far reaching privacy and data protection implications.

Tax authorities will have access to unprecedented volumes of data. In practice, this data will be cross checked with information filed on local tax returns and any mismatches may trigger tax enquiries.

What information will be disclosed?

In one way or another, the following information will need be disclosed in relation to this structure:

Financial data relating to the Trustee, Mr A (as the settlor), the partner at the law firm (as the protector) and Mr A's family members (as beneficiaries).

This will be the total value of their respective "account" (which broadly will be the value or balance of the trust fund and any funds they have extracted from the Trust).

Identifying personal data for those individuals, such as their name, account number, service address, usual residential address, jurisdiction of residence, nationality, tax identification number, and date and place of birth.

The nature of control over the Trust (such as the power to appoint and remove the Trustee) and details of the Trust assets (including their value) and the Trustee's advisers.

What should trustees and private clients do?

Important for individuals, trustees and other service providers to understand the existing regulatory framework and to consider how future proposals may affect them and their structures.

- ✓ Undertake an independent audit of structures to ensure that information is being disclosed correctly, consistently and on time, and which will also assist to pick up on errors and omissions that should be reported to any relevant tax authority.



Practical points

- The GDPR applies on a trust-by-trust and estate-by-estate basis
- Generally, trustees and personal representatives will be data controllers unless the purely personal or household activity exemption applies to them (explained below)
- All of the trustees or personal representatives (as appropriate) of a given trust or estate are treated as a single data controller (rather than each being a separate data controller)
- References to the “number of staff” that a data controller has should be read as references to the number of trustees or personal representatives whilst references to a data controller’s “turnover” should be read as references to the relevant trust’s or estate’s gross annual income and gains

The circumstances in which trustees or personal representatives will be exempt from the GDPR

A trustee or personal representative is likely to be within the scope of the “purely personal or household activity” exemption set out in Article 2(2)(c) of the GDPR if:

- they are acting in their personal capacity (rather than as a professional); and
- they are unpaid (expenses would be allowed).

If there are multiple trustees or personal representatives and some benefit from the exemption whilst the others do not, the non-exempt trustees/personal representatives are caught by the GDPR whilst the exempt trustees/personal representatives are not. Entities (such as trust companies) can never benefit from the exemption.

Processing special category data

Trustees can process special category data to the extent that doing so is necessary for them to perform their fiduciary duties (relying on Article 9(2)(f) of the GDPR - *processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity*).

Disclosure obligations in relation to beneficiaries

Trustees will be obliged to provide privacy notices to any beneficiaries who provide personal data about themselves (Article 13, GDPR).

However, trustees will not be obliged to provide privacy notices to beneficiaries if the personal data is obtained from another source (such as from the settlor or testator) (Article 14, GDPR).

When responding to data access requests (also known as “subject access requests”), trustees are not obliged to provide copies of any documents or information which they would be entitled to withhold under established trust law or estate law principles (Article 15, GDPR).

STEP Guidance Paper: <https://www.step.org/sites/default/files/Policy/Data-Protection-Guidance-updated-01-05-2020.pdf#>

Sharing Personal Data

Trustees should be mindful of the GDPR principles of integrity, confidentiality, and purpose limitation in relation to their processing activities and should only share personal data where there is a legitimate reason to do so.

In practice, data controllers should review the nature of their relationship with any third party with whom they share data and establish whether the recipient is a data controller in their own right, a joint controller with the trustees or simply processes personal data on their behalf (a data ‘processor’).

Professional advisers of the trustees are likely to be data controllers in their own right, or possibly joint controllers with the trustees. A family office providing services to trustees may be in either of those categories, or could be a data processor.

Transfers of personal data to third countries or international organisations

Prohibited unless data controllers comply with the requirements of Chapter V of the GDPR.

Such transfers are permitted if the relevant authority (currently the European Commission) has confirmed the recipient country has an adequate level of protection, or if the data controller ensures appropriate safeguards are met and on condition that enforceable data subject rights and effective legal remedies for data subjects are available. In the absence of an adequacy provision or appropriate safeguards, transfers to third countries or international organisations are also permitted where a derogation such as the following applies:

- with the explicit, informed consent of the data subject;
- where the transfer is necessary for the performance of a contract;
- to establish, exercise, or defend legal claims; or
- for the controller's compelling legitimate interests which are not overridden by the data subject's interests.

Action points

- conducting an audit of what data is held and why;
- who it is shared with;
- how long it will be kept;
- arrangements for keeping it secure and up to date;
- procedures to identify and report breaches as well as complying with subject access requests;
- reviewing contracts with others to whom the information is disclosed to ensure they too are GDPR compliant;
- taking care when sending information to a third party and implementing further checks and safeguards when sending to those outside the EEA;
- developing a policy and complying with the record-keeping requirements of their processing activities, where required;
- issuing privacy notices to relevant beneficiaries and other data subjects and
- document destruction after the data retention period expires (e.g. 5 years for AML purposes)





Retiring from a trusteeship?

Key legal and practical consideration on transfer of information when there is a change of trustee

Where we are concerned is when information is provided to the successor trustee before the appointment is effected.

How then does an outgoing trustee deal with disclosure requests from a potential successor trustee which is in the process of *considering whether or not to accept the trusteeship of the trust*?

What can you do? Enter into a confidentiality agreement, data sharing agreement.

- ! Be mindful of these issues especially in circumstances where a change of trustee is *anticipated* and they may be asked to disclose personal data to, what in effect is a third party or stranger to the trust.



1. As per the requirements of the ASP Law section 25A the obligation of the CBA **is to simply keep a registry** of the trusts.
2. The CBA is not responsible for the accuracy of the details kept on its registry as the responsibility lies with the trustee (lawyer) to update the records kept by the CBA through his account on the CBA portal within 15 days of any change (section 25A (8)). The CBA has no responsibility to verify or approve any changes submitted. Thus when certificates are being requested, the CBA cannot be held responsible for the inaccuracies.
3. The obligation to inform the CBA per the ASP law section 25A is irrelevant to the amendment of the AML law article 61Γ(4)(α). CBA members have a problem registering that they are obliged under these laws to inform both the CBA and CySec.
4. There is a circular issued by the CBA although admittedly old but still valid - <http://www.cyprusbarassociation.org/index.php/en/aml-cft/circulars/trusts/127-directions-for-registering-trusts>. It would be advisable for lawyers to revisit this. It is important for the CBA to be informed of any changes made, especially when trusts are terminated or when the trustee changes.

- ! To Regulators (i.e. CBA, ICPAC, CySec) by way of an internally held notification in the prescribed form

CyTBOR (UBO Registry of Trusts and other Similar Legal Arrangements)

FATCA

Under FATCA a trustee and or a trust may be classified as a Foreign Financial Institution (FFI) requiring registration with the IRS and disclosure of results on a yearly basis. Trusts here are usually identified as “Trustee Documented Trusts” when managed by professionals.

<https://www.irs.gov/businesses/international-businesses/foreign-trust-reporting-requirements-and-tax-consequences>

CRS

Under the Common Reporting Standard decree, a trust would in most cases classify as either a Reporting Financial Institution (FI) or a Passive Non-Financial Entity (Passive NFE). If the trust is an FI the trust or the trustee will have an obligation to report to its local tax authority in Cyprus in respect to the reportable accounts.

More detailed guidance is given in “The CRS Implementation Handbook”, published by the OECD with a view to assisting in the understanding and implementation of the standard

<https://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf>

that's all folks!



Thank you for joining us!



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Trust Practitioner's Handbook



Trustee Duties

As a trustee you are responsible for managing the trust as well as being the legal owner of the assets. It is your responsibility to put the interests of the beneficiaries above your own at all times in the management of the trust. There are many duties, and these can be daunting and overwhelming as well as taking considerable time, especially when you run into any complications.

To effectively manage the trust, you will need to:

- **Administer the Trust according to the Trust Deed**

Learn the terms of the trust and comply strictly with the duties and directions set out in the trust deed so that you do not act ultra vires (over the powers). This duty calls for you to precisely adhere to the terms of the deed and not stray away. If in doubt, seek professional legal advice or even apply to the court for directions when in doubt.

- Understand the intentions of the trust creator to the extent possible.
- Maintain all documents and create proper records and procedures for administering the trust
- Collect all trust assets and properly transfer them into the name of the trust
- Fully understand the terms and provisions of the trust document, including any discretion granted to the trustee, such as discretion regarding investment or distribution decisions
- Make required or discretionary distributions to beneficiaries (always according to the deed or any conditions)
- Hold periodic meetings of the trustees if there are co-trustees or where a corporate trustee
- Distribute final assets to the beneficiaries when the trust terminates.

- **Prudently manage trust assets in alignment with investment objectives and purpose of the trust**

- Discharge duties according to fiduciary standards: – Exercise care, skill and diligence that a prudent person acting in a like capacity and familiar with such matters would use to conduct his or her own affairs.

- Diversify investments in accordance with modern portfolio theory to help minimize risk (where e.g. a trust has an investment portfolio, and consider appointing an experienced and knowledgeable investment advisor to undertake and overview investments).
- Develop and document investment objectives for the management of trust assets, including identifying goals, performance objectives, targeted asset allocation, types of investments permitted (and prohibited), liquidity standards, and roles and responsibilities of any appointed parties.
- Manage any unique assets such as real estate, artwork, movables.
- Conduct a periodic review of all trust assets to determine whether they are being managed according to the terms of the trust and investment objectives.
- **Use and distribute trust assets for the purposes described in the trust**
 - Become familiar with each beneficiary's needs and circumstances
 - Act in the best interests of the trust beneficiaries; balance the needs of all beneficiaries, current and future
 - Regularly communicate with the beneficiaries and provide pertinent information
 - Consult the protector (if any) on significant trust matters
 - Seek professional assistance as needed
 - Monitor trust expenses to make sure they are appropriate and reasonable
 - Account for and report on trust assets; prepare the necessary tax and regulatory filings (where necessary)
 - Keep complete, accurate and detailed records of all income collected, expenses, purchases, sales and other transactions of the trust.

- **Duty of Loyalty**

Administer the trust solely to and for the benefit of the beneficiaries.

- **Duty of Impartiality & Discretion**

Don't allow one beneficiary to suffer at the expense of another; balance potentially competing interests for income and capital and always according to the terms of the deed and considering any letters of wishes from the settlor.

- **Duty to act Unanimously**

Act unanimously unless the trust deed says otherwise in the case where there are co-trustees or a corporate trustee. Ensure that the trust deed has provisions to tackle any deadlock situations.

- **Duty to Account**

Unless otherwise provided by a trust, keep trust accounts and other records such as minutes, resolutions.

Don't just be a trustee on paper; be active, be available, be prudent, be a real trustee!

Trustee's Administration Checklist

Do I have all the information on the trust?
Do I know the beneficiaries, their personal circumstances, where they can be located?
Are there primary, secondary beneficiaries or a class? What do I need to do in each case?
Do I keep accurate trust accounts? Can I account for the trust assets at any point in time?
Do I have evidence of decisions taken, reasoning why and which power was exercised in doing so?
Have I performed an annual trust review for the last year?
Do I understand the purpose and nature of the trust?
Do I have letters of wishes from the settlor to guide me during my trusteeship?
Are the trust assets actually owned by me and legal title in my name?
Am I compliant with local laws and regulations or are the trust and beneficiaries exposed?
Should the trust deed be amended due to changes in the law since it was established or any other changing circumstances of the settlor or beneficiaries?

Does the trust deed restrict the range of beneficiaries who can receive income or capital distributions? Is the trustee excluded from receiving distributions?
Can beneficiaries be removed or added? Do I need consent e.g. from the protector?
Does the trust have a protector? What powers the protector have?
Are there any settlor reserved powers?
Is there a default distribution of the income and capital of the trust to particular beneficiaries? Is there an ultimate default clause in the deed?
Is there an internal trust register with copies of all related documents, including deeds of change of trustee, deeds of variation and trustee resolutions?
How are trustees / protectors' appointment, removed or if become incapacitated or retire?

Helpful Checklists



Checklists.docx

Checklist 1

Factors to consider before appointment

Name of Trust:	Notes
1. <u>Who is the settlor?</u>	
2. <u>If there is more than 1 settlor, what happens if the settlors separate or one dies?</u>	
3. <u>Who are the trustees?</u>	
4. <u>Do you have confidence in your skills to manage the trust effectively?</u>	
5. <u>How will you communicate with the beneficiaries?</u>	
6. <u>Why was the trust settled?</u>	
7. <u>What are the trust's assets and liabilities?</u>	
8. <u>Is the trust carrying on a business or active in any investments or purely a family succession planning arrangement?</u>	
9. <u>Are the trustees well informed or have associates that could help with any tax implications regarding distributions to beneficiaries that reside abroad?</u>	
10. <u>Where are the trust's records stored?</u>	
11. <u>Have there been any breaches of trust that require immediate attention?</u>	

Checklist 2

Reviewing the Trust Deed / Settlement

Name of Trust	Notes
1. Do you have the complete deed together with any variations?	
2. What is the trust period?	
3. Have the trustees received any additional assets from the time of establishment or any resettlements? Was the trust period varied to avoid breaching the rule against perpetuities?	
4. Who has the power to appoint and remove trustees / protectors?	
5. Does the deed permit trustees / protectors to retire? What procedure must be followed and are there any limitations on the circumstances in which retirement?	
6. Does the deed indemnify the trustee for loss other than loss caused by the trustees misconduct, dishonesty?	
7. Does the deed permit remuneration of the trustee?	
8. Does the deed require trustee decisions to be recorded in writing?	
9. Does the deed specify a maximum or minimum number of trustees?	<u>Be careful for CITs, this applies as there must be at least one trustee resident in Cyprus for the whole duration of the trust.</u>
10. Does the deed contain a power of variation, amendment, change of governing law and administration?	
11. Do trustees have a power to resettle?	
12. Does the deed clearly identify the beneficiaries for the duration of the trust period and on the final vesting day?	

Checklist 3

Things to do on assuming trusteeship

Name of Trust:	Notes
1. Read and understand the deed	
2. Obtain contact details of all the parties to the trust	
3. Establish who has the power to appointment / remove trustees, protectors	
4. Identify the beneficiaries of the trust and ascertain their current circumstances	
5. Identify all the trust's assets (and liabilities)	
6. Obtain details of the trust's bank account including signatories, how often is the account reconciliated? Have the trustees reviewed the bank statements (or investment portfolios)?	Upon appointment, the bank account must be in your name as trustee, e.g. NX as trustee ofTrust
7. Identify the trust's accountant, lawyer, tax, investment advisors	
8. Identify the vesting date	This is important when trustees have the discretion to appoint beneficiaries prior to the vesting date
9. Has a resolution accepting appointment been issued?	
10. Where will the trust's records be stored and retained?	
11. Does the trust need to be registered with any regulator?	
12. Do you know the law?	

Checklist 4

Initial Decisions & Actions

Trust Name:	Notes:
1. Organise first trustee meeting when a corporate trustee has been appointed or co-trustees	
2. Identify administrative tasks	
3. Do any other independent professional advisors need to be appointed?	
4. What are the actions needed to be taken for the administration of the trust?	
5. Arrange for the legal title of the assts to be transferred to the trustees	
6. Determine the frequency of trustee meetings and reviews	

Checklist 5

Factors to consider when making decisions

Name of Trust:	Notes:
1. What is the nature of the decision?	
2. Determine what facts or information is needed to make the decision	
3. Refer to the trust deed and letter of wishes if necessary	
4. Is a deed or other instrument required to be issued?	
5. Has the decision been carried out?	

Checklist 6

Beneficiary Distributions

<u>Name of Trust:</u>	<u>Notes:</u>
1. Have you considered the current circumstances and position of the beneficiary?	
2. Have you reviewed or considered the letter of wishes?	
3. Do you need any consent power from the protector (if any)	
4. Prepare a trustee resolution justifying the distribution	
5. Advise the trust's accountant to update records	