

9 November 2021

Briefing Note

Termination of Trusts after Final Appointment

We are often asked as trust lawyers to draft deeds of termination for our clients, but are these always necessary? This article considers best practice for effecting or documenting the termination of a trust.

A brief overview of the nature of a trust

A trust is in essence a relationship between the Settlor (the person who creates the trust, the Trustees (the person or people who manage the trust assets and in whom those assets vest, be they individuals or professional entities) and the Purpose or the Beneficiaries (the persons or class of persons) for whose benefit the trust exists. The trust must have assets (the Trust Assets), and when the trust has no assets, the trust will terminate automatically, whether or not this was the trustee's intention at the time.

There are various reasons why a trustee would wish to bring a trust to an end. It may have outlived its usefulness for the beneficiaries or for the purpose it was created to serve. How can this be effected?

How can a trust be terminated?

Trusts drafted prior to the commencement of the Trusts (Guernsey) Law, 2007, will expire by operation of law after 100 years, unless they are terminated sooner. The 2007 Law removed any limitation on the period for which a trust drafted since its commencement can last.

Both old and new trusts can include express provisions for the trust to last as long as the Settlor desires, either by specifying a duration or including a revocation clause whereby the Settlor can revoke the trust during his or her lifetime. Trusts can as a result be terminated by the exercise of the Settlor's retained powers.

Trusts can further be terminated by the exercise of the Trustees' powers to appoint out the assets of the trust, or to advance the trust period.

If a trustee brings forward the termination date of the trust, the trust will terminate, and at that point the trustee must distribute the assets of the trust to the ultimate beneficiaries as set out in the deed.

A trustee can also end a trust through a power of appointment of the assets of the trust contained in the instrument which created the trust. This is commonly done by the trustee entering into a deed of appointment, indemnity and termination, as it is important for the trustee to be indemnified where appropriate.

What does this mean for the termination of trusts where final appointment has already occurred?

If the trust has already been emptied of its assets by way of a final appointment of the remaining assets from the trust, the trust will cease to exist regardless of whether this appointment was formally done by deed or otherwise. Professional trustees would always effect appointments by way of a deed, however those less familiar with the nature of a trust may appoint out assets and be unaware that the trust had terminated at that point.

A deed of final appointment or of advancement of the trust period are in fact deeds of termination, even if not so named. In a situation where a trust has been emptied of its assets, it is unnecessary to formally advance the trust period, as the trust has already been terminated by operation of law at the point at which it is emptied of its assets.

Where all the assets have been appointed out of a trust, and it has terminated, how can this be documented?

It is best practice to note and record the manner in which a trust is terminated. While a deed of termination is commonly used in practice at the end of a trust's lifetime, in the event that the trust no longer holds assets at the time of the deed's execution, this can only operate to note the termination of the trust rather than to bring this about, and it is to some extent a superfluous document in the context of a trust without assets.

A trustee client may understandably wish to have a formal document on file for recording the fact that a trust has terminated. The mechanism by which the trust has been terminated can be recorded in the

trustee's minute, in a legal opinion, or within the deed of appointment itself, which will then be named a deed of appointment and termination.

It is important when terminating a trust that the trustees are indemnified, the correct power is used, the correct consents are obtained, the document is exhaustive, and that the trustees' equitable lien is preserved.

For any advice in this regard, please do get in touch.

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