

# Trustees, Personal Representatives and Incapacity



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# TRUSTEES



# Trustees

- A trustee does not cease to hold office as trustee because he ceases to have mental capacity.
- A trustee, who ceases to have mental capacity, will continue in office until they die, are replaced, retires or is removed as a trustee (unless the terms of the trust provide for automatic termination of trusteeship on the ground of lack of mental capacity).

# Trustees

- If a trustee loses capacity there are, in general terms, two possible courses of action to consider.
  1. Can the functions of the trustee be exercised by their agent?
  2. If not how can the trustee be retired, replaced or removed?

# Trustees

- A deputy cannot exercise any power, including a power to consent, vested in P whether beneficially or a trustee.
- A person lacking capacity to exercise his trustee functions may have delegated those functions to an attorney in a manner which survives his incapacity. If this is the case, then the assistance of the court is unlikely to be required.

# Trustees

- Section 3(3) of Enduring Power of Attorney Act 1985, which gave attorneys the power to execute or exercise trustee powers vested in P, ceased to apply to any unregistered EPA created before 28 February 2001.
- A donee of an LPA/EPA can, in limited circumstances, exercise trustee functions on behalf of the donor.
- Section 1(1) of the Trustee Delegation Act 1999 permits a donee to act in relation to land, capital proceeds of a conveyance of land or income from land if P has a beneficial interest in land, capital or income.

# Trustees

- Section 8 of the Trustee Delegation Act 1999 permits a donee under EPA/LPA to appoint a new trustee under section 36(6) of the Trustee Act 1925 if the attorney intends to exercise the right conferred by section 1 of the 1999 Act (NB section 7 of the 1999 Act).

# Trustees

- Applications to the COP to remove P as a trustee can be categorised as follows:
  - Section 18(1)(j), MCA 2005 applications
  - Application pursuant to section 36(9) of the Trustee Act 1925;
  - Application pursuant to section 54 of the Trustee Act 1925;
  - Application pursuant to section 20 of the Trusts of Lands and Appointment of Trustees Act 1996.

# Trustees

## Section 18 applications:

- Section 18(1)(j) of the 2005 grants the COP the *‘exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise’*

# Trustees

- COP has this power regardless of whether or not P has a beneficial interest in the trust.
- Generally, however, section 18 applications are only made to the COP when P has a beneficial interest in the trust.
- If P does not have a beneficial interest you will need to consider whether it is more appropriate to apply to the business and property court using, for example, section 41 of the Trustee Act 1925.

# Trustees

- Section 18 application to exercise P's power of retirement:
  - Section 39 of the Trustee Act 1925 permits a trustee to retire without the appointment of a new trustee in their place
  - The COP prefers that a new trustee should be appointed in P's place.
  - Schedule 2 paragraph 5 of the MCA 2005 enables the COP to make any consequential vesting orders that are required.

# Trustees

- Section 18 application for authority to exercise P's power of appointment:
  - If P is nominated for the purpose of appointing new or additional trustees by the trust instrument COP can authorise exercise of this power;
  - The COP can exercise P's right to appoint a new trustee under section 36(1) of the Trustee Act 1925 if P is the sole surviving trustee
  - N.B. – apply to the business and property court under section 41 of the Trustee Act 1925 if P does not have a beneficial interest in the trust and is not the sole surviving trustee.

# Trustees

- The procedure for a Section 18 application:
  - COP1/annex COP 1D
  - No permission required
  - Deputy is usually the applicant.
  - Co-trustees should be parties
  - Practice direction 9F
  - Capacity evidence on the relevant decision
  - Notify P.

# Trustees

- Section 36(9) Trustee Act 1925 application by continuing trustee for leave to appoint a new trustee.
- This application is made where:
  - P has a beneficial interest in the trust; and
  - There is at least one continuing trustee not under a disability; and
  - No order has been made for administration of the trust by the high court.

# Trustees

- Section 54 of the Trustee Act 1925 application for appointment of substitute trustee.
- This application is made where:
  - The trustee being replaced lacks capacity to exercise their trustee functions and has a beneficial interest in the trust; and
  - A deputy has already been appointed or an application for the appointment of a deputy for P is pending; and
  - No order has been made for the administration of the trust by the high court.

# Trustees

- The COP cannot make an order replacing any trustee other than P under section 54.
- A section 54 (rather than 36(9) application) application should be made where vesting orders are required to transfer title to trust assets to the new trustees.
- Section 54 does not give the COP jurisdiction to appoint a new executor/administrator.

# Trustees

- Section 20(2) of TOLATA 1996 application to authorise a person to receive written instructions for the appointment of a new trustee in place of P.
- Where the beneficiaries of the trust are of full age and capacity and are absolutely entitled to the trust property they can give a written direction to appoint a person as trustee in place of P.

# Trustees

- The COP will consider an application where:
  - The trustee to be replaced is P; and
  - P has no beneficial interest in the trust; and
  - There is no person entitled and willing and able to appoint a trustee in place of P under section 36(1) of the Trustee Act 1925.

# Personal Representatives

# Personal Representatives

- An individual, who is appointed as executor or who is entitled to take out letters of administration and lacks capacity to act as a PR, should not act.
- Steps may be taken to:
  - Obtain a grant for the use and benefit of P;
  - For their right to be passed over in favour of a substitute; or
  - Effect renunciation.

# Personal Representatives

- In cases where P is one of several executors the usual practice of the Probate Registry is to grant probate to the other executors with power reserved to the person who lacks capacity.
- If there is a person entitled to a grant of letters of administration in the same degree as P, that person should, wherever possible, apply for a grant.

# Personal Representatives

- If P is the primary person entitled to a grant of administration classes of individuals set out in Rule 35 of the NCPR 87 can apply for grant:
  - Person authorised by COP to apply for a grant; or
  - An attorney under EPA/LPA; or
  - Person entitled to residuary estate of deceased.
- The first class must make application to COP under Part 9 of the 2017 rules and in accordance with PD 9D.
- Classes two and three should give notice to the COP, R 35(5) NCPR 87.

# Personal Representatives

- Incapacity arising after a grant was issued:
  - Where one of two or more executors loses capacity to continue acting, the original grant will be revoked and a new grant will be made to the capable executor, power being reserved to the person who lacks capacity to take again on his recovery.
  - Where one of two administrators becomes incapable of managing their affairs then, provided the original administrators were equally entitled to a grant of administration, a general grant will be issued to the person who has an equal right to that of the incapable grantee to administer the estate.

# Personal Representatives

- If, however, the incapable administrator is in a higher category to those applying for a grant, the new grant will be in accordance with R.35, and limited for the use and benefit of the incapable person.
- Where the sole, or sole surviving, executor or administrator loses capacity to continue acting and there is no living person to whom power was reserved by the original grant, the original grant is not revoked, but a new grant of the unadministered estate, for the use and benefit of the person who lacks capacity, may be made to the property and affairs deputy.

# Personal Representatives

- What if P regains capacity?
- If the grant to a person is limited during another's incapacity it ceases to operate as soon as P regains capacity.
- A cessate grant will be made to P once a COP order is produced or doctor's affidavit.

THE END

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