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Practical considerations for outgoing trustees

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Whether at the request of beneficiaries, or through their own choice, trustees will often know when the time is right to pass the baton. This guide highlights a few practical considerations to which a trustee ought to have regard upon their retirement as trustee.

The rules on retirement

The trust instrument will always be the starting point for trustee decision-making. Trustees planning an exit should carefully review the terms of the trust instrument for any express powers concerning changes of trustees. A failure to comply with terms of the trust instrument relating to such powers might invalidate a deed or instrument of retirement, appointment and indemnity (commonly known as a DORA or IORA).

It may be that retirement is not entirely within the current trustee's gift. For example, it may be necessary for a settlor or protector to first appoint or elect a replacement trustee. It is not uncommon for the trust instrument to restrict a trustee's power to retire where it would leave fewer than a minimum number of trustees in office.

It goes without saying that trustees should be familiar with the governing law of any trust they administer. The Trusts (Guernsey) Law, 2007 (**Trusts Law**) sets out the statutory rights and duties of retiring trustees of a Guernsey-law trust. Trustees of foreign-law trusts in Guernsey must ensure that they refer to the correct governing law for their rights and duties upon retirement.

Identifying a prospective successor trustee

Regardless of who has the power to appoint a successor trustee, the outgoing trustee has a duty to properly consider the suitability and appropriateness of any proposed successors.

The Jersey case of *Jasmine Trustees Limited* sets out that a fiduciary in such a position has a duty:[1]

> *"(i) to act in good faith and in the interests of the beneficiaries as a whole;*
>
> *(ii) to reach a decision open to a reasonable appointor;*
>
> *(iii) to take into account relevant matters and only those matters; and*
>
> *(iv) not to act for an ulterior purpose."*

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Where an appointment of a new trustee is outside of the decisions that the Court would expect a reasonable appointer exercising its fiduciary duties to take, it may be set aside as effectively void (as it was in the *Jasmine Trustees* case).

Disclosure to prospective successor trustees

In the build-up to retirement, the prospective successor trustees will typically require the outgoing trustees to provide certain information before deciding whether or not to accept their appointment as trustees.

Trustees should consider carefully their duty of confidentiality and their responsibilities under the Data Protection (Bailiwick of Guernsey) Law, 2017, especially when considering handing over personal or sensitive data to prospective successor trustees.

Generally speaking, disclosure of confidential trust information to a third party can only be justified in cases where such disclosure is authorised (i.e., where trustees have obtained the express or implied consent of the beneficiaries) or reasonably necessary for the protection of the trustee's own interests and made to protect the legitimate interests of the beneficiaries.[2]

Plainly, it will be in the best interests of beneficiaries that trustees wishing to retire are able to disclose information necessary to procure the appointment of a successor. In any case of disclosure to prospective successor trustees, the disclosing party must ensure that the confidentiality of the information stays protected (e.g., by way of a confidentiality agreement).

Transfer of information to successor trustees

Upon their retirement, outgoing trustees are obliged to surrender and transfer all information held by or vested in them to their successor trustees.

Section 43(1) of the Trusts Law provides as follows:

> *"When a trustee resigns or is removed –*
>
> *(a) he shall, subject to paragraph (b), duly surrender all trust property held by or vested in him or otherwise under this control, and*
>
> *(b) he may require that he be provided with reasonable security for liabilities (existing, future, contingent or otherwise) before surrendering the trust property."*

Section 20(5) of the Trusts Law, meanwhile, provides that "a person who ceases to be a trustee under this section shall do everything necessary to vest the trust property in the new or continuing trustees".

Ancillary to the obligation to transfer information, outgoing trustees are also obliged to assist with requests from their successor trustees for information and explanations not apparent from the information transferred.

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Such requests by successor trustees must be reasonable and outgoing trustees cannot be expected to reply to extensive, repetitive or unnecessary demands for information or explanations.[3]

For larger, older and more complex trusts, outgoing trustees should consider using electronic discovery services which, depending on the volume of information held by the outgoing trustee, may significantly reduce the time and costs of transferring that information.

During the transfer process, outgoing trustees should keep proper records of their decision-making process. Should any decision to include or omit certain information from disclosure to incoming trustees be brought before the Court down the line, this will ensure that outgoing trustees are able to recall and defend their decisions.

Outgoing trustees may be required to retain certain trust information (which may include personal or sensitive information) in accordance with its data retention obligations. In such situations, trustees must continue to consider and observe their duties of confidentiality and data protection obligations.

Transfer of trust assets

Unlike other jurisdictions, Guernsey's trust law does not provide for the automatic vesting of trust property from outgoing to incoming trustees. Steps must be taken by outgoing trustees to ensure all assets are properly vested in replacement trustees (see paragraph regarding section 20(5), above). Detailed and careful record keeping will ensure that trust assets can be quickly and easily identified in preparation for being transferred to an incoming trustee.

There will also be pragmatic considerations to take into account when it comes to transferring the trust assets. For example, how will the transfer of bank accounts be effected where the trust is moving from a corporate to an individual trustee, or to a trustee based in a different jurisdiction? It may be necessary to consult with service providers to establish the potential hurdles in transferring particular trust assets. These considerations may also form part of assessing whether a prospective successor trustee is a suitable candidate. Advice should be sought in any relevant jurisdictions where foreign assets need to be transferred.

Health check

Before taking any steps towards retirement, trustees should conduct a full review of the trust, including (but not limited to):

- the trust instrument and any supplemental documents;
- any contractual arrangements (e.g., loans, service contracts, property agreements, investment management appointments);
- accounts and ledgers;
- tax and regulatory filings; and

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- any powers of attorney.

In addition to assessing the state and shape of the trust structure, outgoing trustees should conduct a thorough check for any circumstances, actions or omissions that might give rise to disputes or litigation. This includes identifying potential claims that could be brought against the trustees and which the trustees might be obliged to pursue on behalf of the trust.

Some questions to consider might be:

- Are there any ongoing disputes between beneficiaries?
- Is there any ongoing litigation that the trustees might be drawn into?
- Are there any problematic trust assets (e.g., cryptocurrency, assets potentially subject to sanctions or situate in high-risk jurisdictions)?
- Are there any tax complications (e.g., a beneficiary wishing to relocate to the US)?

Indemnities and "reasonable security"

Having retired as trustees of a trust, former trustees will no longer have access to the trust assets to meet any liabilities that may arise in respect of their trusteeship. Section 43(1)(b) of the Trusts Law provides that outgoing trustees shall be entitled to require that they be provided with "*reasonable security*" for liabilities (existing, future, contingent or otherwise) before transferring any assets to incoming trustees.

Typically, outgoing trustees are provided with "reasonable security" via the incorporation of contractual indemnities within the DORA or IORA. However, such indemnities will need to be negotiated carefully by outgoing trustees to ensure they provide suitable protection whilst minimising the administrative burden on their successors. It would aid such negotiations for outgoing trustees to take advice in respect of their exposure to liability.

In some circumstances, a contractual indemnity alone may not be sufficient protection for an outgoing trustee. If there are known or reasonably foreseeable liabilities that may fall to the outgoing trustee, the outgoing trustee might require additional security to cover those. Such additional reasonable security may be a retention of trust assets (e.g., cash) for an agreed period of time, for example.

Section 43 of the Trusts Law can be used to ensure there is sufficient security to cover a known liability on the horizon or where a "health check" (described above) identifies an upcoming liability.

Section 44, meanwhile, grants outgoing trustees a non-possessory lien over the trust assets in respect of expenses and liabilities (existing, future, contingent or otherwise) properly incurred in connection with the trust. The lien may be used to pay any unpaid expenses and liabilities from the trust assets including, if necessary, by following, recovering and appropriating trust assets for that purpose. The Trusts Law confirms that the lien continues after a trustee ceases to be a trustee of the trust and is available in addition to any indemnity or other reasonable security the trustee is entitled to.

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Trustees removed from office

An outgoing trustee is not necessarily one who retires voluntarily; a trustee may be removed from office either under the terms of a trust instrument by a person with the power to do so, or by order of the court.

Trustees under threat of removal must consider their position carefully. If a trustee is asked to resign or face removal, a trustee who unreasonably clings to office may risk an adverse costs order against them (if removal is ultimately by court order) or a future beneficiary claim.

Conversely, a trustee facing removal in favour of an entirely unsuitable replacement must consider the interests of the beneficiaries before handing over to this new trustee. Particularly in any contentious removal, it is important for the trustee to seek advice.

Trustees of Guernsey-law trusts should understand that the statutory entitlement to "reasonable security" under the Trusts Law applies equally to trustees whether they resign or are removed. Section 43(1)(b) confirms that the trustee may require that reasonable security *before* handing over trust property, even in a removal situation.

About this guide

This guide gives a general overview of this topic. It is not legal advice and you may not rely on it. If you would like legal advice on this topic, please get in touch with one of the authors or your usual Collas Crill contacts.

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[1] *In the matter of Jasmine Trustees Limited* [2015] JRC 196, at [45]

[2] *In Re B* (Judgment 35/2012) GCA

[3] Lewin on Trusts (20th edn), 21–119 *et seq*

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