

# Appointment of trustees

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Having fulfilled all the conditions that a trust needs to become operative, it is essentially valid and can be given effect. From this point, the duty falls to the trustee to take charge of the trust property and enforce the trust.

In this respect, the trustee is the most important element in the enforcement of the trust as he is the one who has the onus of carrying out the intentions of the settlor. Even if he accepts the appointment, as he must before the trust can take effect, his appointment must still be regular. This section examines the capacity of a trustee and the modes of appointing trustees.

Who can be appointed as a trustee?

Before a trustee can act in relation to a trust, he/she must have capacity to act. In this respect, there are certain categories of persons that are competent to act in relation to trusts. They include the following:

## Individual persons

Generally, any person that has legal capacity to hold property and dispose of same can be appointed as a trustee. So long as the person is competent to deal with the trust property as directed by the trust and has no disability by nature or law.

Dishonest, irresponsible or fraudulent persons cannot be appointed as trustee either. If appointed, the court can set such appointment aside.

### Infants

However, the general position concerning infants is that they cannot be expressly appointed as trustees of legal estates in the states comprising the former western region i.e. Ogun, Oyo, Osun, Ondo, Ekiti, Edo & Delta states. The PCL, in s. 18 particularly, provides that: **The appointment of an infant to be a trustee in relation any settlement or trust shall be void, but without prejudice to the power to appoint a new trustee to fill the vacancy.**

Thus, an infant cannot be appointed as a trustee under the PCL. Exceptions abound though. They include:

- If the infant is appointed, he may be removed but this does not prejudice his right to be trustee in future once he comes of age
- An infant may be appointed on a resulting trust. See RE: VINOGRADOFF (1935) WN 68 where a 4-year old was appointed trustee on a resulting trust
- In parts of Nigeria other than the western region, an infant may be appointed as an express trustee of personalty
- In s. 17(3) and s. 4 PCL, where an infant is appointed as trustee together with other persons of full age, the trust shall operate as if the infant was not named but this shall be without prejudice to any interest in the land intended to be provided for the infant

### Married women

Under the provisions of the Married Women Property Act 1882 and the Married Women Property Law, Western Region 1959, married women are competent to act as trustees. This was not the previous provision though as a restriction was placed on married women, especially in consequence of the rule that a married woman cannot own property independent of her husband.

### Beneficial trustees

Should a beneficiary be appointed as trustee? While there's no law against such appointment, the court generally frowns against it. This is because there may be conflicts of interest inherent in such appointment. It stands to reason that a trustee cannot be expected to be objective where his personal interest is at stake.

## Corporations

Corporate bodies are empowered, under ss. 37 & 38 CAMA, to exercise all the powers of a natural person, including the power to acquire and own movable and immovable property. Thus, they can act as trustees. However, this is subject to their being so authorized by their memorandum or articles of association. They are different from trust corporations though.

### Trust corporation

A trust corporation is an institution, such as a bank or insurance company, that undertakes the business of being executors or trustees for fees. They are exceptions to the general rule that trustees should not be remunerated for their activities except where it is provided in the trust instrument.

They are also subject to their articles and memorandum though and they must have been properly incorporated under the CAMA. The advantage with using these corporations is that they don't generally fail. So they can hold the trust property for as long as is needed.

## Public trustee

A public trustee is a corporation sole and even where he is a sole trustee, there is never need to appoint a new one since he never dies. This is because his office is statutory, as established by the Public Trustee Act 1938. This position only applies to Lagos state now.

If the public trustee acts improperly leading to loss, the state will be liable to make good the loss.

## Custodian trustee

He could be a public trustee. His duty is basically to hold trust property and the documents relating thereto while the general administration of the trust is left to a managing trustee. Thus, the duty of a custodian trustee is simply to take care of the trust.

The advantage of this arrangement is it saves the time of having to vest the trust property anew every time a new managing trustee has to be appointed. See *FOSTER WILLIAMS v DEACON BANK LTD.* (1935) Ch. 758. **Judicial trustee**

He is appointed by the court in consequence of the powers conferred on it by the Judicial Trustees Act 1896. He is appointed when it is found necessary that the administration of the trust be subject to the supervision of the court.

The appointment is made on application to the court on the application of the settlor, an existing trustee or a beneficiary. The appointment may become necessary where the administration of the trust has broken down because of protracted litigation or gross mismanagement.

## Solicitor to the trust/trustee

The solicitor to the trust is also competent to act as a trustee. See the case of *RE: EARL OF STANFORD* (1896) 1 Ch. 288.

## Number of trustee

There is generally no requirement as to the number of trustees. However, the Trustee Laws and Administration of Estates Law, Western Nigeria provides in s. 22 that there shall be a maximum of 4 trustees in cases of trust for sale of land. This would not apply though where the land is held for charitable, ecclesiastical or other public purposes.

Although a single trustee can be appointed, it is desirable that there be a minimum of two trustees so there can be proper administration and avoidance of fraud.

## Modes of appointment of trustees

A trustee can be appointed in any one of several modes. These may be by the settlor/testator through the trust instrument, by the court or in exercise of a statutory power. The appointment may come either at the time the trust is created or at any time during the continuance of the trust. In this wise, trustees may be original (if appointed at the beginning of the trust) or new (if appointed in continuation of the trust).

### By the settlor/testator

The testator or settlor may appoint the trustees either expressly, by naming the particular persons to be trustees or impliedly, by delivering trust property to a person, on the understanding that they will hold the property for the benefit of another. He may also appoint one person as a trustee, with power to appoint additional trustees. If he intends to be a trustee, he can also appoint himself by declaring a trust.

The trustee may, instead of expressly appointing an individual as trustee, he may confer the power of appointment on an individual or institution. Where he does so, the one conferred with the power to appoint cannot appoint himself as trustee except in limited circumstances provided by s. 24(1) Trustee Law Western Nigeria.

While it is advisable that the appointment be done in writing, it is better if it is done by deed especially as it can be used to vest trust property in the trustee directly without a further conveyance, if it has a vesting clause.

If the settlor fails to appoint a trustee, the court can appoint the original trustees, in consequence of the maxim: Equity will not allow a trust to fail for want of trustees. On failure to so appoint though, or even after exhausting his power of appointment, the trustee has no further power to appoint trustees to the trust. See s. 10(1) Trustee Act 1893. However, this would not be the case where he has reserved the power to appoint additional trustees under the trust instrument.

### In exercise of statutory power

As provided under s. 10(1) Trustee Act 1893 and s. 24(1) Trustee Law, a new trustee may be appointed in the following order:

- By persons nominated in the trust instrument. This power of appointment may be all encompassing or limited to the occurrence of special circumstances. In special circumstances, there may be a problem with determining if

those circumstances truly exist. In RE: WHEELER (1896) 1 Ch. 315, the existing trustees were empowered to appoint new trustees but only where any of the existing trustees was incapable of acting. When one of the trustees became bankrupt and the donee of the power to appoint sought to exercise his power, the court held that the donee could not act in those circumstances.

- In the absence of a person nominated, the surviving or continuing trustees can exercise a power to appoint new trustees. In RE: SHEPPERD (1886) We. 234, the two donees of the power to appoint could not agree on the selection of a new trustee. The court held that they were not able and willing to act so the power could be exercised by the surviving trustees.
- Where either of the above cannot act or are unavailable, the personal representatives of the last surviving or continuing trustees will have the power to appoint.

The circumstances that have been held to be proper for appointment in consequence of statutory power are myriad. They include the event of death, refusal to act, discharge of a trustee, where a trustee is unfit to act or where the trustee remains outside Nigeria for an uninterrupted period of 12 months.

## **By the court**

The court may also appoint new trustees. It can do so in consequence of two powers viz. its inherent powers and in consequence of statutory powers.

The court, drawing on its equitable jurisdiction and as established by the court of Chancery, has an established inherent jurisdiction to appoint new trustees where necessary and in the interest and welfare of the beneficiaries. This power may be exercised in myriad circumstances including where the trust instrument provides for no trustees or if a trustee is incapable or disqualified from acting.

The Trustee Act 1893, by its s. 25 and s. 28 of the Trustee Law, Western Nigeria empower the court to appoint new trustees whenever appointment is inexpedient or where it is impracticable to perfect the appointment without the assistance of the court. In exercising this power, the court, as was held in RE: TEMPEST (1866) 35 LJ C. 632, must take into consideration the wishes of the testator, the interest of the beneficiaries and the efficient administration of the trust.

## **Vesting of trust property**

As has been established above, trust property is not properly constituted if it is not fully vested in the trustees. If the trust is incompletely constituted, it must be properly vested before it can take effect. In such situation, the first thing the trustee must do is ensure the property is properly vested.

This can be done by showing that the trust falls under one of the exceptions to the rule against perfection of imperfect gifts or by completing the process of vesting and doing whatever is necessary to vest the trust property.

There would be no need to go through this where the trustee is appointed by deed or by the court. In such situations, a vesting declaration or vesting order (by the court) is used and once used, no conveyance or formality is required to complete the vesting. The trustee takes automatically. See s. 12(1) Trustee Act and s. 27 Trustee Law.

However, under s. 13(13) Trustee Act and s. 27(4) Trustee Law, legal estates of interest in land, leases, mortgage, shares, stock etc. must be vested formally.