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2001 (c.14) which received Royal Assent on 20 July 2001*

# Trustee Act (Northern Ireland) 2001

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## EXPLANATORY NOTES

### COMMENTARY ON CLAUSES

#### Part V: Remuneration

*Sections 28* to *33* make up Part V of the Act, relating to payment of fees to professional trustees and reimbursement of expenses incurred by trustees. The general rule at present is that trustees should not be paid for carrying out their obligations under the trust, even when they are using their professional expertise. The principle behind this ban on payment of trustee fees is that trustees should not derive any benefit from the trust and any conflict of interest and duty should be avoided. In certain circumstances, however, even under the current law, payment to trustees is permitted, perhaps by a clause in the trust instrument, or by statute or by court order. In practice today most modern trust instruments contain professional charging clauses; without such express clauses allowing payment, many professional practitioners would not be willing to take on the burden of trusteeship. Of course, such clauses can give rise to problems in interpretation and application. For example, these clauses are strictly construed against the trustee, so, unless stated to the contrary, the charging clause only covers services which could not have been provided by a lay trustee. Another drawback is that remuneration under a professional charging clause can sometimes be regarded as a gift or legacy rather than simply an expense of the administration of the trust or estate. These issues are also addressed in this group of provisions.

#### *Section 28: Trustee's entitlement to payment under trust instrument*

*Section 28* introduces new rules for the construction of express professional charging clauses in favour of trust corporations and trustees acting in a professional capacity. *Section 28(5)* explains that to satisfy the condition that a trustee (other than a trust corporation) is acting in a professional capacity, there must be a close nexus between the profession or business of the trustee and the services actually provided as trustee.

Firstly, a difficulty about remuneration for “ordinary” services that do not demand any special professional expertise is removed. Unless the trust instrument states otherwise, by *section 28(2)*, such a clause is taken to mean that the trustee is entitled to payment even for services that could have been provided by a lay trustee (as defined in *section 28(6)*). This applies also to a trust corporation of a charitable trust but for other charitable trustees to enjoy this

benefit they must not be sole trustees and the majority of their fellow trustees must agree that the right of payment should apply. Secondly, two problems arising in the administration of estates are resolved. Payment to trustees is to be treated as remuneration for services and not as a gift for the purposes of Article 8 of the Wills and Administration Proceedings (Northern Ireland) Order 1994: that means that trustees can be paid for work done in connection with trusts set up in a will even where they witness the will in question, without the risk that it will be said that as a witness is receiving a gift, the purported “gift” is rendered void. The same approach applies to section 30(3) of the Administration of Estates Act (Northern Ireland) 1955, which is concerned with determining the priority of payments due from the deceased’s estate.

### ***Section 29: Remuneration of certain trustees***

*Section 29* creates a new right to reasonable remuneration for certain trustees of non-charitable trusts, in the absence of any provision in the trust instrument or legislation – this is another default provision. In effect, this creates an implied professional charging provision, similar to the express clauses often found in modern trust instruments. This right to remuneration is given automatically to trust corporations, except for charitable trusts (*section 29(1)*). It is also given to any other non-charitable trustee who acts in a professional capacity but is not a sole trustee, provided that all his fellow trustees agree in writing (*section 29(2)*). There may be remuneration even for services that could have been provided by a lay trustee (*section 29(4)*). *Section 29(3)* defines what is meant by “reasonable remuneration”: the amount that is reasonable for the services in the particular circumstances of the case, including relevant bank charges. By *section 29(6)* appointment as an agent, nominee or custodian does not exclude a trustee from this right to remuneration.

### ***Section 30: Remuneration of trustees of charitable trusts***

*Section 30* deals with the remuneration of charitable trustees. In this area, different considerations apply, so the approach of *section 29* is not considered appropriate without further consultation amongst interested parties. Accordingly, *section 30(1)* gives the Department for Social Development the power to make regulations permitting remuneration for charitable trustees in similar circumstances, should they decide to do so in the future.

### ***Section 31: Trustees’ expenses***

*Section 31* provides for the reimbursement out of trust funds of expenses properly incurred by trustees acting on behalf of the trust. This applies equally where the trustee has been appointed as an agent, nominee or custodian.

### ***Section 32: Remuneration and expenses of agents, nominees and custodians***

*Section 32* permits the payment of reasonable remuneration to agents, nominees and custodians who are not trustees where their terms of appointment allow. They may also be reimbursed for proper expenses.

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***Section 33: Application***

*Section 33* states that these provisions on remuneration and reimbursement apply as regards services provided or expenses incurred after the provisions come into force, no matter when the trust was created. However, they are not to affect the operation of Article 8 of the Wills and Administration Proceedings (Northern Ireland) Order 1994 or section 30(3) of the Administration of Estates Act (Northern Ireland) 1955 (described above) in relation to deaths occurring before they came into operation.