

*These notes refer to the Trustee Act (Northern Ireland)
2001 (c.14) which received Royal Assent on 20 July 2001*

Trustee Act (Northern Ireland) 2001

EXPLANATORY NOTES

COMMENTARY ON CLAUSES

Part VI: Appointment and Retirement of Trustees

The next group of sections – *sections 34* to *36* - relates to appointment and retirement of trustees in certain circumstances, specifically where there is no one eligible to appoint a new trustee and where a trustee has become incapable of acting because of mental disorder. Under the present law beneficiaries are not entitled to control the appointment of trustees even if they are together as a group absolutely entitled to the trust property and therefore in a position to bring the trust to an end. These reforms now introduce for Northern Ireland provisions corresponding to Part II of the Trusts of Land and Appointment of Trustees Act 1996 which applies to England and Wales.

Section 34: Appointment or retirement of trustee at instance of beneficiaries

Section 34(1) sets out the circumstances in which the beneficiaries are to have this new power. The power is available where there is no person nominated in the trust instrument to appoint new trustees and the trustees are of full age and capacity and, taken together as a group, are absolutely entitled to the trust assets. By *section 34(2)* such beneficiaries have power to direct any trustee to retire from the trust, or to arrange the appointment of a new, named, trustee. In those circumstances, the trustee is required to retire as directed, subject to three conditions being satisfied. Firstly, reasonable arrangements must be made to protect his interests. Secondly, after his retirement there must be a trust corporation or at least two persons left to act as trustees. And thirdly, either the full complement of trustees is to be maintained by the appointment of another person in his place or the continuing trustees consent to his retirement. By *section 34(4)* trustees are required to do whatever is necessary to vest the trust property in the continuing or new trustees following a retirement.

Section 35: Appointment of substitute for incapable trustee

The problem addressed by *section 35* arises where a trustee has become incapable of carrying out his role because of mental disorder but there is no one entitled and willing to appoint a trustee in his place under *section 35(1)* of the Trustee Act (Northern Ireland) 1958. In that situation the beneficiaries are given power by *section 35(1)* to direct the appointment of a specified person as

a new trustee in place of the incapable trustee. They may only do so, however, if they are all over 18 years of age and have full legal capacity and, taken together as a group, they are absolutely entitled to the trust property. The direction of the beneficiaries must be in writing and must be given to the appropriate authority, as described in [section 35\(2\)](#): that means, to a controller appointed for the incapable trustee under Article 101 of the Mental Health (Northern Ireland) Order 1986, or an attorney acting for him under a power of attorney created by an instrument registered under article 8 of the Enduring Powers of Attorney (Northern Ireland) Order 1987, or a person authorised for the purpose by the High Court under Part VIII of the Mental Health Order.

Section 36: Provisions supplementary to sections 34 and 35

Supplementary provisions for the effective operation of these powers of direction are contained in [section 36](#). The beneficiaries may act separately or with other trustees in directing the appointment or retirement of a trustee. The direction may take the form of a single, joint direction by all the beneficiaries. Alternatively, subject to [section 36\(2\)](#), a direction may be given by each beneficiary individually or jointly with some of the others. A direction may be withdrawn by writing up until the time it has been complied with, but if any beneficiary withdraws, then the necessary unanimity is lost and the direction falls. If there is more than one direction, then they must all specify the same person or persons for appointment or retirement ([section 36\(2\)](#)).

It is provided in [section 36\(3\)](#) that subsection (7) of section 35 of the Trustee Act (Northern Ireland) 1958 applies to a trustee appointed under these powers as if he were appointed under that section. The effect of subsection (7) is that newly-appointed trustees are to have the same powers, authorities and discretions and may act in all respects as if they had been originally appointed by the instrument creating the trust. Similarly, trustees appointed under these new provisions are to be treated in the same way.

As far as applicability of the new powers is concerned, they apply to existing trusts as well as trusts to be set up in the future, unless they are excluded by expression of contrary intention. To further that policy, there is an opportunity given by [section 36\(5\)](#) for persons who have already created trusts to exclude the new powers of direction by executing a deed to that effect. Where the trust was created by one person and he is of full capacity, he may execute the necessary deed himself. In a case where the trust was created by a number of persons, then those still alive and of full capacity may execute the requisite deed to exclude the new powers of direction. A deed executed for the purpose of excluding the new powers is irrevocable. The deed does not affect anything done before its execution to comply with a direction given by beneficiaries, but if a direction has not yet been complied with, then it shall cease to have effect once the deed is executed. The result is that a settlor may stop or prevent a direction becoming effective but may not affect an appointment or retirement which has already become effective.