TRUSTEES and their obligations
Have you been named as an Executor in a Will?
Has a friend asked you to be a Trustee of a family Trust?
Have you set up a trust for the benefit of your family and offered your services as a Trustee?
If you are an accountant, surveyor or Independent Financial Adviser, are you offering your services as a professional Trustee?

If the answer to any of these questions is yes, you will need to be aware of the duties and obligations of the office of trustee and how you can discharge these functions.

WHAT IS A TRUST?
A trust (sometimes referred to as a “Settlement”) is the name used to describe the manner in which a person or persons hold property in a representative capacity. To take a simple example, a married couple hold the legal title to their home “on trust” for themselves. A solicitor holds property “on trust” for his client’s family. The essence of a trust is that the person who owns the property (“the Trustee”) is not able to act solely or at all in his own best interests; he holds property for someone else or a class of people and he has to act in the interests of all of them. Sometimes a trustee must strike an awkward balance between competing interests.

THE TRUSTEES are the legal owners of the trust property. They are under a legally binding obligation to handle the property of the trust in a particular way and for a particular purpose. Trustees administer the trust and make decisions about how the property in the trust is to be used. The trust can continue even though there may be changes in the people who are its Trustees, but there must normally be at least two Trustees.

THE BENEFICIARIES are the people for whom the trust is set up. For example, a solicitor holds property on trust for “John Smith and his children and descendants” who are the Beneficiaries. The Beneficiaries of a trust can be living or as yet unborn.

THE TRUST INSTRUMENT (or “TRUST DEED”) is the document which sets out the terms on which the Trustees hold property for the Beneficiaries. For example, “the Trustees shall hold the portfolio of stocks and shares for such of the children of John Smith who shall attain Twenty-five” or “the Trustees shall have power to release capital to Beneficiaries”.

THE TRUST FUND is the collection of assets held by the Trustees for the Beneficiaries; for example, a house in which a widow lives for life, or a portfolio of stocks and shares.

THE SETTLOR is the person who provided the property which the Trustees hold on trust for the Beneficiaries. A trust can either be set up under a lifetime gift by a Trust Instrument which is a deed; or a trust can be set up under a Will, or by the laws of intestacy where there is no Will, in which case it takes effect on the death of the Settlor, who is referred to as the Testator.

WHAT DO THE TRUSTEES NEED TO DO?
A trustee’s responsibilities depend on the type of trust and the terms under which the trust was created. The Settlor may have instructed the Trustees to carry out various functions, and trust law may impose further obligations. In particular, The Trustee Act 2000 has defined and codified the obligations of Trustees in areas such as investment and delegation of duties. This booklet is designed to explain in simple broad terms what Trustees are expected to do, and how they can demonstrate to their Beneficiaries and to the courts that they have discharged their functions.

WHAT FOLLOWS IS DIVIDED INTO FOUR CATEGORIES:
A. Trustees’ duties with regard to administration of the trust.
B. Trustees’ duties with regard to taxation.
C. Practical issues.
D. Greene & Greene’s Trust and Tax Department.

A. TRUSTEES’ DUTIES WITH REGARD TO ADMINISTRATION OF THE TRUST
Trustees are the legal owners of the Trust Fund and they are under an obligation to manage the fund by investing and growing it for the benefit of the Beneficiaries as a class. Sometimes there are different classes of Beneficiaries. For example, the Trust Instrument may state that grandmother has the right to the income as and when it arises during her life and after her death the fund is to pass to such of the grandchildren who attain Twenty-one. Grandmother wants the highest income possible, but the grandchildren want capital growth. Here
the Trustees have the obligation to invest so that there is a balance between income and capital growth. This is known as a “balanced portfolio”. They must decide what sort of investments will provide the best balanced portfolio, taking advice as to strategy, and then take advice as to which particular investments will do the job best.

The Trustee Act 2000 (“the Act”) which came into force in February 2001 brought with it changes to the way in which trusts have been administered in the past. Many old trusts (and homemade Wills which included trusts) did not include powers necessary to enable the Trustees to meet the challenges of investment management in the modern age.

The Act remedies this by giving Trustees wide powers of investment choice and the power to delegate some of their duties to suitably qualified persons. But with these new powers the Act has also introduced new duties to be imposed on Trustees so that not only must they now apply attention and skill in the exercise of their duties, but they must be able to show that they have done so if called to account by the Beneficiaries or the courts.

Dealing with each key area of obligation in turn:

A.1 POWERS OF INVESTMENT:
The Act confers upon Trustees a wide power of investment to make any kind of investment that a person could make if he were absolutely entitled to the money himself. Previously this could only be done if the Trust Instrument permitted it.

The new statutory freedom to invest brings with it new codified responsibilities and Trustees will need to demonstrate that they have applied the Standard Investment Criteria to their investment decisions both at the outset and regularly reviewed the continued suitability of their choice. So Trustees must keep records of their decisions.

- Is the proposed investment one which the Trustees have power to make?
- Is the proposed purchase an investment at all? In other words, will it generate money for the fund (either by income or capital growth)? This could be relevant where, for example, the Beneficiaries are pressing the Trustees to buy a timeshare, or a speculative purchase.
- Is the type of investment proposed a suitable one having regard to the nature of the trust? For example, UK company dividends attract punitive income tax treatment in discretionary trusts, and investment bonds may be a more tax effective vehicle for discretionary trust.
- If the type of investment is suitable, is the particular investment suitable? If an investment bond is the answer, Trustees will need to take advice from an Independent Financial Adviser as to which particular life office and product is most suitable.
- Is this a trust where it will be appropriate to diversify investments (i.e. not put all your eggs in one basket)? The answer may be “No” where a Testator has left his house on trust for his widow to occupy and after her death to his children. Clearly, he intended that the house (the Trust Fund) should not be sold and the money invested in different securities until his widow no longer needs the house as a home. The position will change, however, if the widow goes into a nursing home and needs income.
- Is it necessary or inappropriate to seek advice in relation to the investment? Some owners of private companies put part of their shareholdings in a trust. No dividends are declared and the intention is that the shares should stay put until the company is sold. Here, the Trustees may have very good reasons not to diversify the investments of the Trust Fund, or seek financial advice as to how to maximise the yield of the Trust Fund.
- If advice needs to be sought, who is best qualified to give it? Is it a stockbroker an Independent Financial Adviser, a Chartered Surveyor, an art dealer or land agent?
A.2. POWERS TO DELEGATE TRUSTEE DUTIES AND POWERS TO EMPLOY NOMINEES AND CUSTODIANS

In a trust where the Trust Fund consists of a portfolio of quoted securities, it is simpler to deal with the above duties and powers together. Before the Act, Trustees could neither allow the title deeds to investments to be held in the nominee company of a stockbroker, nor could they engage a fund manager to manage and invest the fund on a discretionary management basis. This was because of the old rule of law which stated that a Trustee was not able to delegate the duties which had been delegated to him in the first place by the Settlor under the Trust Instrument.

The Act now makes it possible, should the Trustees so wish, for them to instruct (for example) brokers to hold the investments in the name of the nominee company of the stockbrokers. The practical effect of this is that when the stockbroker advises a purchase or a sale, all he needs is the written authority of the Trustees to proceed. The broker does not need to circulate a stock transfer form for signature and retrieve the share certificate from the Trustees’ vaults, all of which takes time and costs money.

Further, the Act makes it possible, where it has not been possible before, for the Trustees to delegate the day to day decisions as to what should be bought and sold, to a fund manager, who is instructed to reach a benchmark position in the portfolio, but otherwise take decisions without reference to the Trustees and exercise his own discretion as to what should be bought and sold.

There are advantages and disadvantages in delegation of investment decisions and to a lesser extent, the use of the broker’s nominee company; the advantages tend to be a saving of time, cost and paperwork, and the disadvantages principally being loss of direct control, the risk of getting out of touch, and the physical risk of a badly chosen manager making off with the Trust Fund in extreme circumstances.

With the newly granted freedom for Trustees to delegate their functions, however, comes a Code of Practice in choosing and circumscribing the terms of engagement of these advisers which must be observed by the Trustees if they are not to lay themselves open to charge of breach of trust of negligence. Advisers must be formally engaged with a written agreement and must be issued with a Policy Statement signed by the Trustees.

Finally, and perhaps most importantly, the terms of engagement of such advisers must be kept under review and in practical terms, this means that the Trustees must meet at least once a year to assess whether the terms of engagement are still appropriate to the circumstances of the Beneficiaries.

A.3 and A.4 POWERS TO INSURE AND PROFESSIONAL CHARGING CLAUSES

Trustees now have the power to insure property as if they were the absolute owners. The Act also does away with the old rule that remuneration of professional Trustees (as distinguished from out of pocket expenses) was a gift under the Settlement. The practical effect of this is that a professional Trustee can now charge for his or his firm’s services provided that the Trust Instrument so permits. This is so even where the professional adviser has witnessed the Will.

A.5 STATUTORY DUTY OF CARE

Although it was possible for Trustees to be negligent in the execution of their duties and obligations in the past, the Act now creates a specific requirement that a Trustee must exercise such a skill as is reasonable in all the circumstances. This means that where a professional Trustee such as a solicitor or accountant is concerned, he must demonstrate the skill commensurate within his profession as a lawyer or a tax adviser or both as the case may be. Accordingly, the judgement of the
court as to whether he has discharged his office with reasonable skill and care will be that much harsher and demanding than for a lay person who looks to his lawyer or accountant for advice and guidance.

B. THE TRUSTEES’ DUTIES WITH REGARD TO TAXATION

B.1 AS THE LEGAL OWNERS OF THE TRUST FUND, TRUSTEES ARE RESPONSIBLE:

- For notifying HM Revenue & Customs that tax is due, within six months of the end of the tax year for which it is due, unless a tax return for the year has been received.
- For keeping records of the income and capital gains of the trust.
- For completing and sending to the Trust Tax Office any tax return issued to them.
- For paying any tax due on the property or income of the trust.
- For supplying certificates to the Beneficiaries to show how much the Beneficiaries have received from the trust in the tax year and the tax paid. The Trust Tax Office can supply a form to use as a certificate.
- The Trustees may appoint a professional adviser such as a solicitor or accountant, to carry out some or all of these tasks. However, if they do, the Trustees are still responsible for ensuring that all tax obligations are carried out satisfactorily and they must now demonstrate that they have observed the Code of Practice set out in the Act as to the appointment of agents and advisers.

B.2 THE MAIN TYPES OF TRUST ARE AS FOLLOWS:

Bare Trust: this is really no more than a nomineeship. The Trustee holds the Trust Fund for the Beneficiary absolutely. The Beneficiary can call for the Trust Fund so long as he is over eighteen. Sometimes the Trustees are given the power to manage the Trust Fund i.e. buy and sell the assets in the Trust, and if so, the Trustee Act 2000 obligations apply. But HMRC will look straight through to the Beneficiary for the purposes of collecting income and capital gains tax and any income and chargeable gains must be reported directly by the Beneficiary on his tax return.

Interest in Possession or Life Interest Trust: a typical Interest in Possession Trust will give an individual the immediate right to the income of the trust or the use of the asset (e.g., a home). The income belongs to the “Life Tenant” and so is reported on his/her tax return and the Trustees are liable for capital gains tax on buying and selling of the assets in the Trust Fund. Since 22 March 2006, the inheritance tax treatment of these trusts changed and this subject is beyond the scope of this booklet. Capital Gains are paid at the Trustee rate.

Discretionary Trust: here, the Trustees have complete discretion over who gets what income or capital and when. No Beneficiary can claim to be entitled to any income or capital unless and until the Trustees exercise their discretion in favour of a Beneficiary.

Income belongs to the Trustees and is taxed on the Trustees at the rate applicable to trusts for the year in question. Capital gains are also taxed on the Trustees.

B.3 INHERITANCE TAX:

As from 22 March 2006 the Finance Act 2006 made sweeping changes to the Inheritance Tax regime applicable to Settlements. It is not possible to encapsulate the IHT regime clearly within the scope of this booklet. However, where Settlements are concerned IHT needs to be considered on the setting up, variation and winding up of a Settlement. It also needs to be considered at each ten year anniversary of the Settlement and on any distribution of the Trust Fund or part thereof.

C. PRACTICAL ISSUES

If you are a Trustee and you engage Greene & Greene to advise the Trustees, part of our duties as solicitors will be to help you formulate and adhere to a system which ensures that you comply with the Trustee Act 2000 as regards administration, and where you so instruct us, comply with your obligations to HMRC so far as tax is concerned. You may prefer to employ an accountant to deal with the taxation issues instead. The most effective way to comply with the legal obligations is to ensure
that at the outset, the Trustees meet face to face and formulate a strategy with regard to investment, appointment of advisers and taxation compliance. Thereafter, it is incumbent on them to meet annually or more frequently to review that strategy and either endorse the previous year’s policy statement or make alterations depending on circumstances.

D. THE TAX AND TRUSTS DEPARTMENT AT GREENE & GREENE
The partners of Greene & Greene, whose names are listed on the firm’s letters, own and are responsible for the firm. Sometimes you may want to employ a solicitor in the firm to be a Trustee with you. That is fine, even where tax and trusts is not the particular speciality of that solicitor. The advice to the Trustees will come from the tax and trusts department in the same way as if you and your family were the Trustees. In general, Suzanne Alston and Jonathan Mathers are the solicitors responsible for trusts and administration matters in the firm. The firm employs professional staff, Assistant Solicitors, Chartered Legal Executives, Qualified Tax Advisers, Trust Managers and Trainees to assist them.

Existing clients will usually regard one of the solicitors or another member of our professional staff as their normal contact. We encourage this relationship. This is the person to contact initially, even though the work might be outside their speciality. They will ensure, in liaison with you, that it is dealt with by the right person for the job and that you are introduced as soon as possible. Trust administration matters are usually handled by either a solicitor (possibly assisted by other professional staff) or by professional staff under the supervision of a solicitor. We will tell you (usually in an initial letter) who is the solicitor and members of staff involved. Any changes are also notified.

Where sensible, a corporate partner will be your Client partner – the individual usually responsible for your matters will be a solicitor and director of that corporate partner or an individual partner as the case may be. If he/she is an Executor with you and the matter is outside his/her field of expertise, another corporate partner will act in liaison with the principal corporate partner.

Assistant Solicitors are fully qualified, employed solicitors. Chartered Legal Executives are Fellows of the Chartered Institute of Legal Executives (CILEX) who, in their specialisations, have passed exams as demanding as the equivalent taken by Solicitors. Executives have varying experience and qualifications. They are not Solicitors or Fellows of CILEX but have other qualifications such as CTA (Chartered Tax Advisor) or long experience.

We allocate staff to a matter on the basis of cost effectiveness, specialisation, availability and previous good relationship with you. The client partner will be happy to discuss staff allocation with you.

If all is going well and the matter is within normal competence you might see little of the client partner in the day to day administration of an estate.

CONCLUSION
This booklet is designed to cover some of your questions. But we should be happy to discuss any further aspect with you if there is anything you would like us to clarify. We hope that your association with Greene & Greene will be a long and happy one.