

TRUSTEE ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part IV: Agents, Nominees and Custodians

Section 16: Power to appoint nominees

65. *Sections 16 to 20* govern the powers of trustees to appoint nominees and custodians in cases where the trust instrument contains no, or insufficient, express powers to do so.
66. In this context a nominee is a person appointed by the trustees to hold trust property in his or her own name. Thus, a person may be registered as the owner of certain shares in a company but may in fact hold them as nominee for a trust. A custodian is defined as a person who undertakes the safe custody of some or all of the assets of the trust or of any documents or records concerning the assets (section 17(2)).
67. The powers to appoint nominees and custodians are conferred by sections 16 and 17. These powers are conferred on trustees of all trusts except pension trusts, authorised unit trusts, or funds established under schemes made under sections 24 or 25 of the Charities Act 1993 (see sections 36 - 38). In addition, these powers do not apply to trusts which have a custodian trustee as the trust property will be vested in the custodian trustee (sections 16(3) and 17(4): see section 4(2) of the Public Trustee Act 1906), or where relevant assets are vested in the official custodian for charities. Nor do the powers apply if the trust instrument or legislation provides to the contrary (section 26(b)).
68. Under the present law the ability of trustees of private trusts to employ nominees and custodians is largely governed by two common law principles. The first is that a trustee is under a duty to take such steps as are reasonable to secure control of the trust property and to keep control of it. This prevents trustees from placing assets in the name of nominees or custodians and from using powers of delegation to disguise the appointment of a nominee or custodian. Second, where there are two or more trustees they have a duty to ensure that the title to the trust property is in their joint names so that it can only be transferred with the consent of all. It follows that in the absence of express authority in the trust instrument or statute trustees can neither vest property in nominees nor place trust documents in the custody of a custodian. To do so would result in breach of trust. The Law Commission considered that the present law was unduly restrictive. In particular it did not enable trustees to use nominees (a) to provide an administrative service in relation to investments; (b) to facilitate dealings by a discretionary fund manager; (c) as a method of using CREST; and (d) in relation to overseas investments traded by a computerised clearing system. In short the present law prevented many trustees from participating in the benefits of modern investment management.
69. The duty of care (section 1) will apply to the appointment of a nominee or custodian under sections 16 and 17 or the trust instrument (Schedule 1 paragraph 3(1)(b), (c) and (d)).

*These notes refer to the Trustee Act 2000 (c.29)
which received Royal Assent on 23 November 2000*

70. Notwithstanding the fact that a person appointed to act as a nominee (whether under section 16 or an express power in the trust instrument) may act as a bare trustee, it is not intended that the appointment of a nominee should affect the fiduciary relationship of the trustees to the beneficiaries of the trust.
71. Subject to the provisions of Part IV of the Act (sections 11-27) section 16(1) gives trustees power to appoint a person to act as their nominee and to vest the relevant assets in the nominee provided that the appointment is in writing or evidenced in writing (section 16(2)) and the trust does not have a custodian trustee or relevant assets are not vested in the official custodian for charities (section 16(3)).