

* Trustees: retirement and removal

Every trust must have at least one trustee who holds the trust property for the benefit of the beneficiaries. In a financial context, investments and insurance policies are often written in trust and, as such, also require trustees.

The original trustees are invariably appointed by the deed or other document creating the trust but what happens if a trustee wishes to retire from his position, what if he dies, becomes incapacitated or there is a dispute between a trustee and a beneficiary?

Voluntary retirement of a trustee

It is possible for a trustee to retire from his position. Under the provisions of the Trustee Act 1925 a trustee can retire from his office if (a) there will be at least two trustees remaining (one of whom may be his or her replacement) or a trust corporation, and (b) the other trustees, and anyone nominated by the trust deed to appoint trustees (an appointor), consent to the retirement.

For example, Alan, Beth and Caroline are appointed trustees of a trust. Beth wishes to retire, and can do so, as Alan and Caroline will remain as trustees. Alan and Caroline both need to agree to Beth's retirement but Beth does not need to be replaced.

If Beth's retirement would leave only one trustee then it would be necessary to replace her; this can occur simultaneously in the same deed. Any person who has been given the power to appoint new trustees by the trust deed can appoint a replacement for Beth. If there is no such appointor, the remaining trustees have the power to appoint a replacement for Beth.

Death of a trustee

Following Beth's retirement, Alan dies. As with a voluntary retirement, Caroline, as the remaining trustee, can appoint a replacement for Alan. However, if Caroline also dies before appointing a new trustee, then, as all the trustees have either retired or died, the trust no longer has any trustees.

In those circumstances, as Caroline is the last surviving trustee, her personal representatives can appoint new trustees. There will, however, be a delay whilst a Grant of Representation is obtained to Caroline's estate and in the meantime no meaningful action can be taken with regard to the trust.

Incapacity of a trustee

Following Beth's retirement but before Alan's death, Caroline becomes mentally incapacitated. There is no appointor named in the trust and Caroline has no beneficial interest in the trust. In this case, Alan, as the continuing trustee, can appoint another trustee to replace Caroline. If, however, Caroline is a beneficiary of the trust then the Court of Protection's consent is required to this.

If Caroline becomes incapacitated after Alan's death but before appointing a replacement for him, then there is no capable continuing trustee to make an appointment under the Trustee Act 1925. Now there are two possibilities:

- 1 If all the beneficiaries are over 18, have capacity and are together absolutely entitled to the trust fund, they can give a written direction to Caroline's attorney or deputy directing them to appoint a replacement for Caroline. So if the trust provides that the income is payable to George for life and after his death the capital passes to Emma and Andrew, provided they are all over 18 and have capacity, then together they can make the appropriate direction. If, however, Emma is aged 9 or if Emma and Andrew must survive George before they become entitled then this route is not available and the only option is as set out below.
- 2 If no other option is available, then an application can be made by George and Andrew, as the beneficiaries who are over 18, to the court for the court to order a replacement for Caroline.

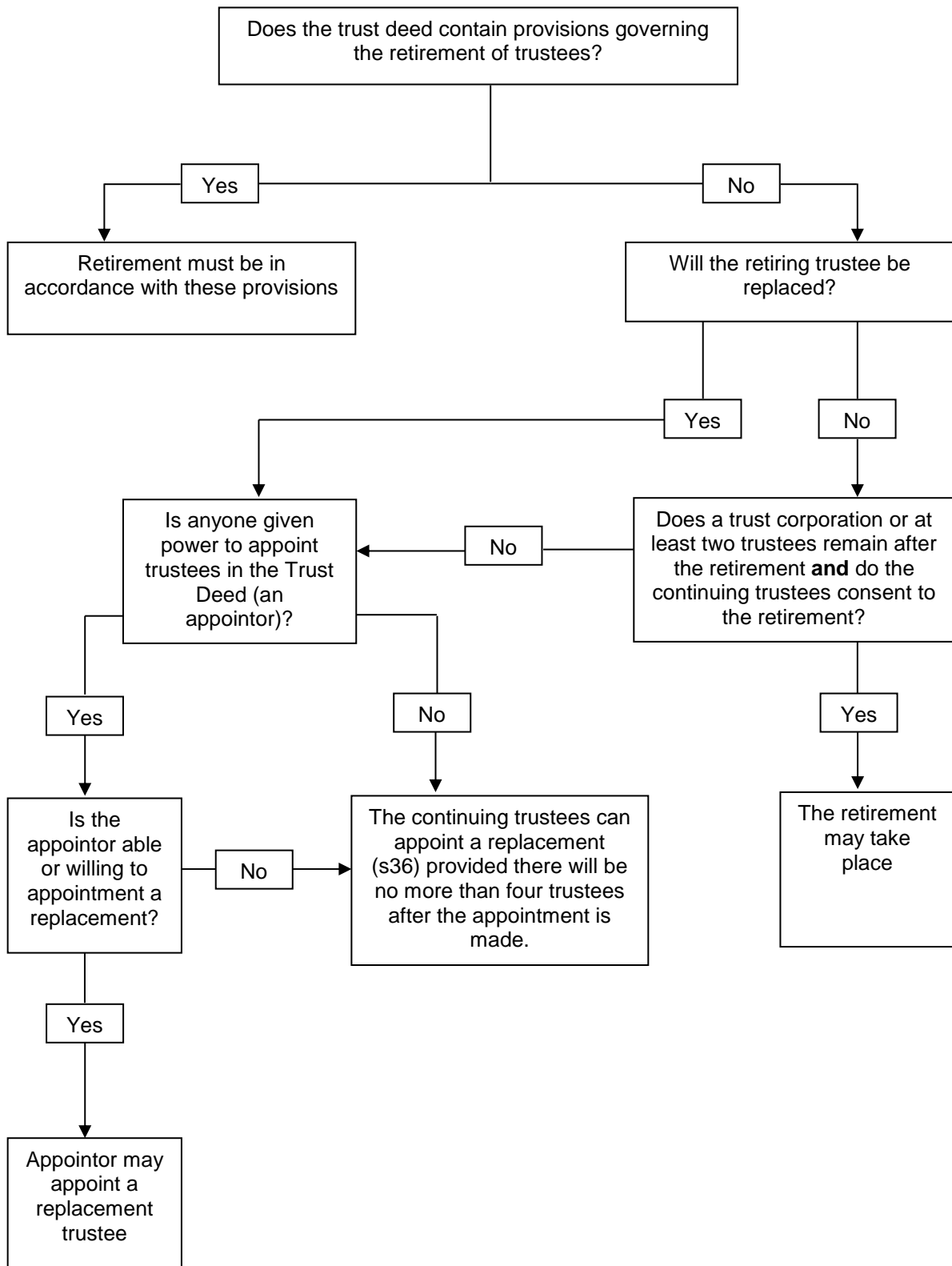
Disputes

Alan and Caroline continue as trustees but a dispute arises between them and the beneficiaries, led by George. George wants both trustees to be removed. As no-one is nominated by the trust deed to remove trustees, then George's only option, if Alan and Caroline refuse to retire, is to ask the court to remove Alan and Caroline pursuant to the court's inherent jurisdiction. Hostility between the beneficiaries and the trustees is not sufficient in itself for the court to exercise its jurisdiction. The court must regard the removal of the trustees as being in the best interests of the beneficiaries.

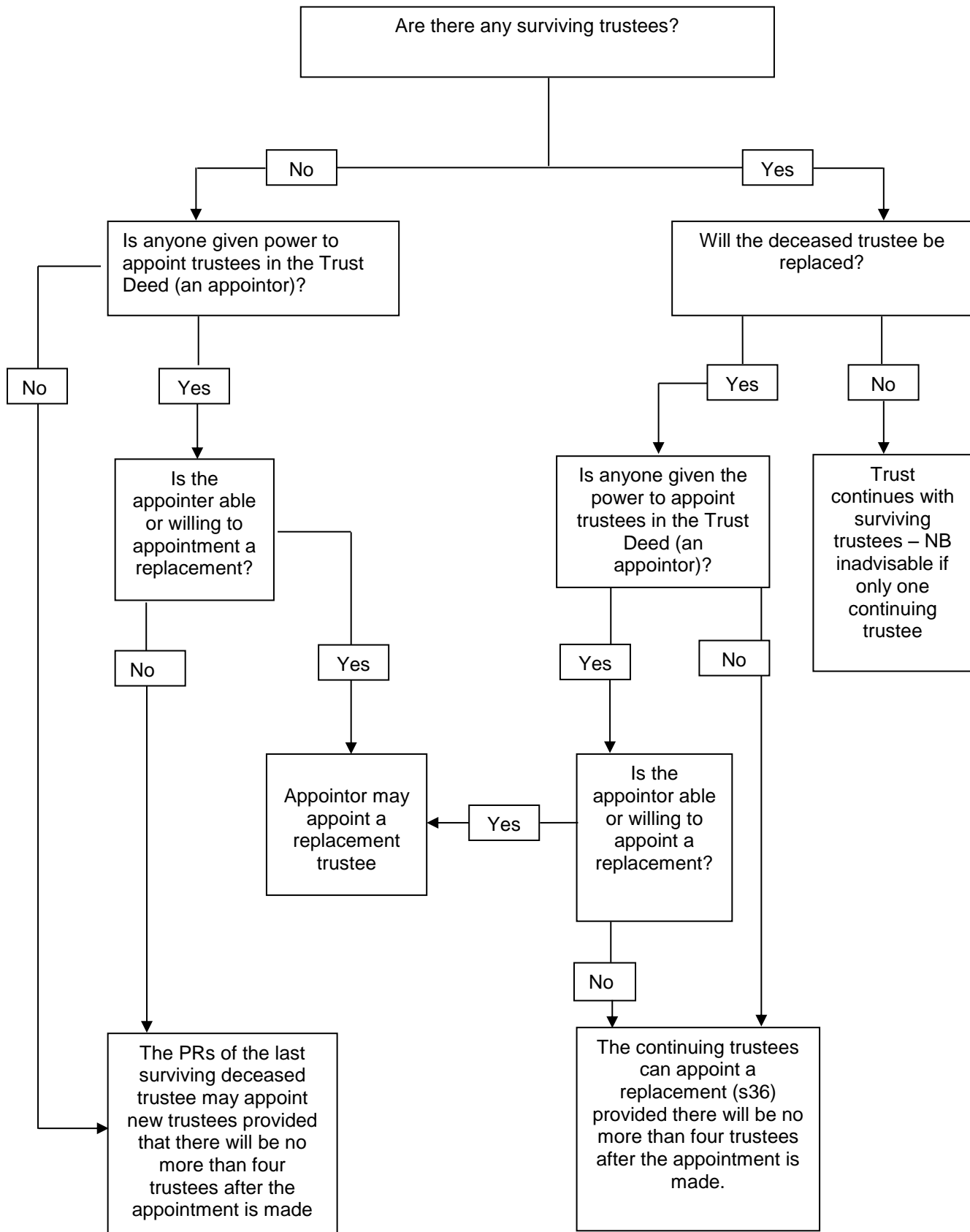
Practical points

- Always check the terms of the trust deed first to see what it provides with regard to the appointment and removal of trustees. This will take precedence over the statutory powers.
- Many trust deeds will provide that certain trust powers cannot be exercised without at least two trustees so this should be the minimum number of trustees at any time. Action should be taken to replace retiring or deceased trustees as soon as possible.
- Many investments or financial products taken out by couples are written in trust. It is always advisable to appoint at least one other trustee so that there is someone to act in the event of the death or incapacity of a couple as they get older.
- Appointments and retirements should be made by deed; there are generally no tax consequences.
- Consider using a trust corporation, such as CW Trust Corporation Limited, to act as a trustee. This can avoid many of the problems which can arise when individuals die, lose capacity or retire.

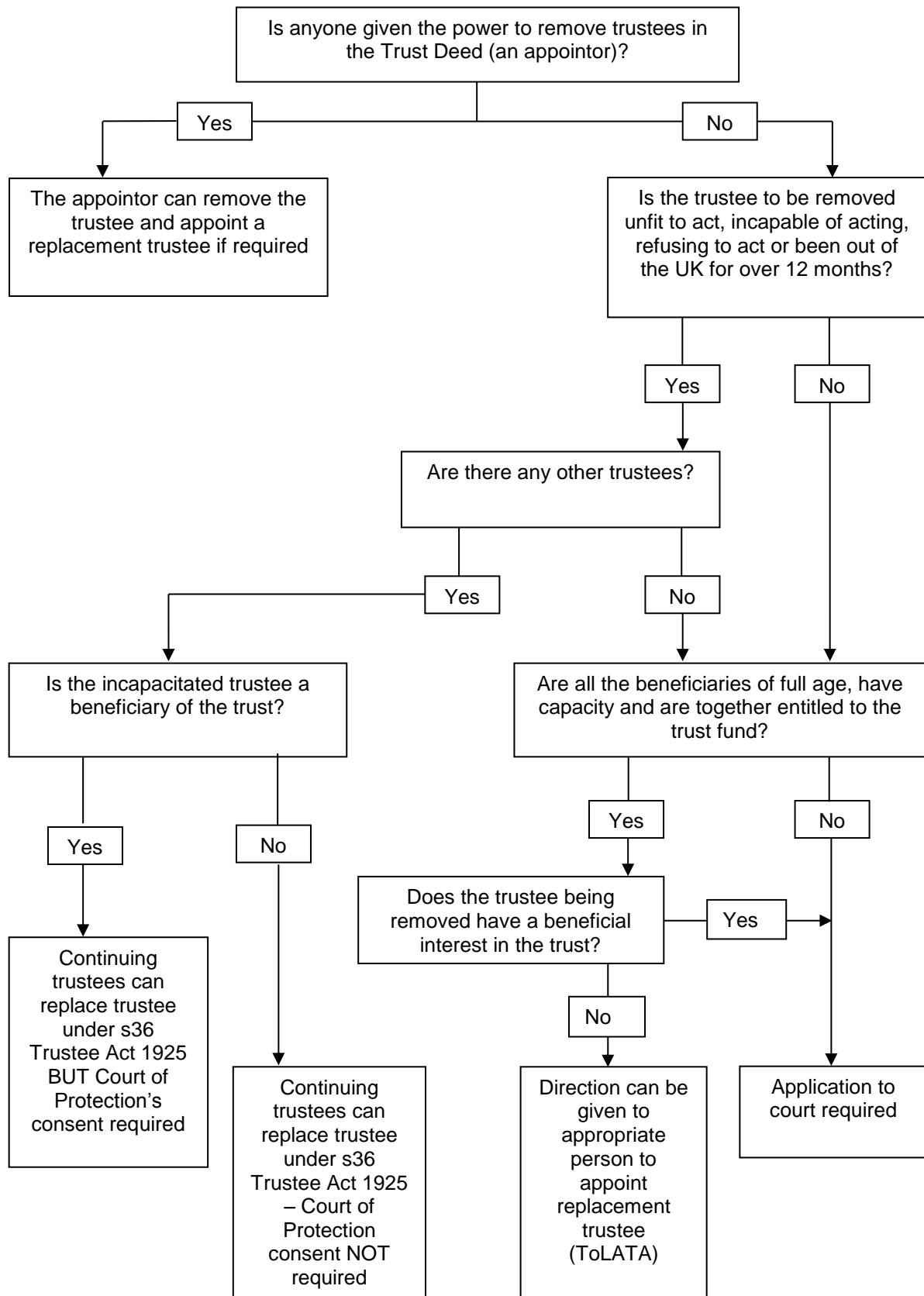
Retirement of Trustees – flow chart



Death of Trustees – flow chart



Removal of a Trustee – Flowchart



Further information

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