

SUBSIDIARY LEGISLATION 331.08

**TRUST AND TRUSTEES (PROTECTED
DISABILITY TRUSTS) REGULATIONS**

7th October, 2016

LEGAL NOTICE 324 of 2016.

1. (1) The title of these regulations is the Trusts and Trustees (Protected Disability Trusts) Regulations. Citation and scope.

(2) The purpose of these regulations is to regulate the establishment and administration of trusts formed for the benefit of beneficiaries at least one of whom is a person with disability, where the said person is entitled to benefit under the trust in a manner which is either exclusive or in the manner set out in regulation 6.

(3) Unless otherwise provided, the provisions of the Act shall apply to Protected Disability Trusts and to the trustees thereof, and in cases of conflict between the provisions of these regulations and the provisions of the Act, the provisions of these regulations shall prevail.

(4) The provisions of the Act and these regulations shall apply notwithstanding anything to the contrary contained in the trust instrument or in any other agreement between the settlor and the trustee.

2. (1) In these regulations, unless the context otherwise requires - Interpretation.

"the Act" means the Trusts and Trustees Act; Cap. 331.

"the Authority" shall mean the Malta Financial Services Authority established in terms of the Malta Financial Services Authority Act; Cap. 330.

"family member", in relation to an individual, includes -

- (a) the parents;
- (b) the spouse;
- (c) a partner in civil partnership;
- (d) a son, daughter, brother or sister aged eighteen years or over;
- (e) uncle or aunt;

"parent" includes a step-parent and an adoptive parent;

"person with disability" shall mean:

- (a) a person, being over compulsory school age, who, by reason of injury, disease, congenital deformity or other physical or mental incapacity, is substantially handicapped in obtaining or keeping employment or in undertaking work on his own account, of a kind which

apart from that injury, disease, deformity or incapacity would be suited to his age, experience and qualifications;

- Cap. 413. (b) a qualified person with a disability as defined in the Equal Opportunities (Persons with Disability) Act; or
- Cap. 318. (c) a child certified to be suffering from physical and, or mental disability by the Medical Panel responsible to establish whether a child would be deemed eligible for a Disabled Child Allowance under article 77 of the Social Security Act;

"Protected Disability Trust" means a trust which is established in accordance with regulation 3 and which is notified to the Authority in terms of these regulations;

(2) Words and expressions which are also used in the Act and are not defined herein shall have the same meaning as in the Act.

Protected
Disability Trusts.

3. (1) A trust which -
- (a) is set up by a family member of the person with disability under the terms of these regulations; and
- (b) is for the benefit of a beneficiary who is a person with disability, where the said person is entitled to benefit under the trust in a manner which is either exclusive or in the manner set out in regulation 6; and
- (c) is notified to the Authority in accordance with regulation 8(2),

shall qualify as a Protected Disability Trust for the purposes of these regulations.

(2) The purpose of a Protected Disability Trust and the beneficial interest of the person with disability shall be specified clearly and in writing in the trust instrument.

(3) In the event of the demise of the beneficiary who is a person with disability, the trust shall be terminated in terms of article 17 of the Act.

The trustee.

4. (1) A trust set up under the terms of these regulations shall have as its trustee either of the following, and such trustee shall not also be a beneficiary under the same trust:

- (a) a professional trustee authorised to act as trustee under article 43 of the Act and who is either acting without being remunerated or, if such professional trustee receives or is entitled to receive remuneration, any such fee shall be fixed and agreed upon with the settlor, clearly set out in the trust instrument and shall satisfy the conditions listed in regulation 5; or
- (b) a private trustee in terms of article 43A of the Act.

(2) In the case that the trustee is a private trustee under sub-regulation (1)(b), the following conditions shall be satisfied:

- (a) the private trustee so appointed shall have no

beneficial or any other interest in the trust assets;

- (b) although such trustee would not be a trustee duly authorised to so act in terms of article 43 of the Act, such trustee shall have to adhere to any applicable law that is already or may become so applicable or to any rules or regulations applicable to trustees as established by article 1(2) of the Act;
- (c) a professional trustee as described in sub-regulation (1)(a) shall be appointed co-trustee by the settlor and, in the event of the latter's death, by the protector, and such co-trustees shall act jointly in the performance of their duties and the exercise of their powers and discretions;
- (d) the person so appointed to act as private trustee shall, within one year of being so appointed, undergo adequate training regarding the institute of trust and the legal obligations and powers of the trustee in order that such trustee may execute his duties in adherence to the law and regulations and as a *bonus pater familias*.

(3) The trustee of a trust set up under these regulations shall not be appointed or shall not continue to act as trustee should any circumstance that gives rise to a conflict of interest as defined in article 2 of the Act arise.

5. (1) In the event that the professional trustee so appointed receives or is entitled to receive remuneration, the applicable fee shall be agreed upon with the settlor and clearly set out in the trust instrument, and shall not exceed the amount of four hundred euro (€400) per year, or such other amount, which may reflect changes in the cost of living or in the value of currencies, as may be prescribed in a Notice prescribed by the Minister. Fees.

(2) Any fee imposed by the professional trustee in terms of sub-regulation (1) shall be fixed for a period of three years, and, in any case, any increase shall be proportionate to the increase in the index of inflation.

(3) The limit on the amount of remuneration which may be imposed by the professional trustee as set out in sub-regulation (1) shall only apply in cases where the initial and additional settlements to a Protected Disability Trust do not cumulatively exceed the value of four hundred and fifty thousand euro (€450,000):

Provided that any increase in value of the trust assets, after such settlement to the trust, shall not affect the application or otherwise of this sub-regulation.

6. (1) Beneficiaries of a trust set up in terms of these regulations shall include at least one person with disability as defined in regulation 2. The terms of trust shall provide that: Beneficiaries.

- (a) the person with disability benefits exclusively from the trust assets; or

- (b) the parents of the person with disability be the preferred beneficiary during their lifetime, and following their demise the person with disability shall be the sole beneficiary under the trust.

(2) During the lifetime of the person with disability, the trustee shall act and administer the trust assets in the paramount interest of such person with disability, and where the trust assets include immovable property which constitutes the primary place of residence of the person with disability, such immovable property shall not be disposed of while the person with disability is still alive, except with the prior written consent of the protector together with confirmation from the Court that such disposal is in the interest of such person with disability.

The protector.

7. (1) When setting up a trust in terms of these regulations, a protector having the powers established by article 24A of the Act shall be appointed in all cases, and the protector's powers shall be exercisable and come into effect not later than the date when the disabled person becomes the sole beneficiary.

(2) The person so appointed shall have no actual or potential interest in the present trust assets or any assets that may be settled on trust at any time in the future.

(3) The protector of a trust set up under these regulations shall not be appointed or continue to act as a protector should any circumstance that gives rise to a conflict of interest as defined in article 2 of the Act arise:

Provided that in the case where more than one protector is appointed, it shall be sufficient that at least one of the protectors so appointed continues to comply with the requirements of this sub-regulation.

(4) Where the protector exercises his power to remove a trustee in terms of article 24A of the Act, such removal shall have no effect if it would result in there being no trustee unless, before the removal takes effect, a new trustee is appointed or an application is made to the court for the appointment of a new trustee:

Provided further that a trustee ceasing to be a trustee shall also be responsible to fulfil the obligations set out in article 20(4) of the Act.

(5) The trustee shall obtain the consent of the protector in the following cases:

- (a) prior to the resignation of the trustee and, or co-trustee; and
- (b) subject to the provisions of regulation 6(2), prior to the transfer of assets from the trust:

Provided that the protector shall not give his consent to the transfer of transfer of assets in terms of this sub-regulation unless such transfer is justifiable and will effectively be in the best interests of the person with disability:

Provided further that in case of uncertainty as to whether

such transfer is in the best interests of the person with disability, the protector, trustee or any other person having a lawful interest may apply to the Court for directions, and the Court shall not approve any such transfer unless it is satisfied that such transfer is justifiable as being in the best interests of the person with disability.

(6) The protector appointed in terms of these regulations shall always be consulted in the following circumstances:

- (a) before the trustee exercises discretions and takes decisions relating to distribution of income or capital;
- (b) before the trustee takes decisions relating to the medical and educational needs and the care of the person with disability.

8. (1) The professional trustee shall have the duty to duly notify the Authority by means of the form prescribed by the Authority, and to provide any other information that the Authority may request from time to time.

Notification to the
Authority of
Protected
Disability Trusts.

(2) The notification referred to in sub-regulation (1) shall include all the details of the trust, including the following:

- (a) name of the trust, which shall include the designation 'Protected Disability Trust';
- (b) identification details of the trustee;
- (c) identification details of the co-trustee (if applicable);
- (d) identification details of the beneficiary or beneficiaries;
- (e) identification details of the settlor;
- (f) identification details of the protector;
- (g) a complete and detailed declaration regarding the nature and value of assets held on trust;
- (h) a copy of the signed trust instrument establishing the trust;
- (i) a medical certificate or equivalent document evidencing the disability of the beneficiary.

(3) The trustee shall also notify the Authority in the event that he resigns, has his engagement terminated or is otherwise hindered in performing his duties hereunder, and must also notify the Authority of the identity of the trustee who would consequently be appointed in his stead.

9. (1) A trustee appointed under these regulations shall, in addition to the duties imposed on trustees under the Act and without prejudice to any other duties set out in the trust instrument, have the following duties:

Obligations of
trustee.

- (a) open and maintain bank accounts in the name of the trustee and by reference to the name of the trust, for holding cash relating to the trust, and the trustee shall not be allowed to make use of clients' accounts in

relation to trusts set up in terms of these regulations;

- (b) seek to generate income from assets held on trust by investing monies in accordance with the criteria set out in regulation 11, or leasing property when deemed to be in the interest of the person with disability.

Cap. 16.

(2) In the case where any one of the beneficiaries of a trust set up in terms of these regulations is subject to guardianship as defined in Title VI of the Civil Code, or curatorship, the trustee shall, as the case may be and in the event of any possibility of a situation of conflict of interest, seek directions from the Court in the execution of his duties and shall be obliged to comply with any directions so given by the Court.

Investment
parameters.

10. (1) A trustee appointed under these regulations shall adopt a conservative investment policy in dealing with trust assets, including investment portfolios as well as individual securities that may form part of the trust assets, and shall maintain a balance between the generation of income and the preservation of capital, while generating sufficient proceeds to meet the expenditure requirements of the beneficiaries in accordance with the provisions of the trust instrument.

(2) No part of the trust assets shall be entered into leverage arrangements or utilised for the purchase of securities on margin or geared in any way through the use of financial derivative instruments, either directly or on a see-through basis.

(3) A trust set up in terms of these regulations shall comply with the prudential investment restrictions outlined below:

- (a) If any of the trust assets are invested, these shall be predominantly invested in regulated markets.
- (b) The trustee shall not invest more than ten per cent of the trust assets in securities which are not traded in or dealt on a market which:
 - (i) is regulated, operates regularly, is recognised and is open to the public;
 - (ii) has adequate liquidity and adequate arrangements in respect of the transmission of income and capital.
- (c) The trust assets invested shall be properly diversified in such a way as to avoid excessive exposure to any particular asset, issuer or group of undertakings. In any case, a trustee shall not invest more than ten per cent of trust assets in securities issued by the same entity.
- (d) No more than fifty per cent of the trust property shall be kept on deposit with any one body.
- (e) The trustee in his capacity as trustee of a Protected Disability Trust shall not grant loans or act as guarantor for any person other than the settlors or the person with disability.

11. (1) Without prejudice to the provisions of article 20 of the Act, in the event of the resignation of a trustee, the trustee shall declare his intention and give notice as stipulated in article 20 of the Act to resign while allowing for a notice period of not less than three months.

Resignation of trustee.

(2) The resignation of the trustee shall not have effect unless the consent of the protector is obtained in terms of regulation 7(5) and such resignation is notified to the Authority in terms of regulation 8.

12. The Authority may issue rules in terms of article 52 of the Act, for the better carrying out and to better implement the provisions of these regulations.

Power of the Authority to issue rules.
