

Creation of trust and its requisites under the law of trust in  
Pakistan

**TRUST ACT, 1882**

### Definition of trust:

Black's Law Dictionary defines the term trust as:

"The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary)."<sup>1</sup>

### Law of trust in Pakistan:

On 13<sup>th</sup> January 1882, by enactment of Act No. 2 of 1882, an Act was promulgated to define and amend the law relating to Private Trusts and Trustees. The Act was called as Trust Act, 1882, which came into force on the first day of March 1882.

The Act extends to the whole of Pakistan. but the preamble of the same clarifies that nothing contained in the Act would affect the rules of Muslim law as to *waqf*, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors. The Act is to effect prospectively.

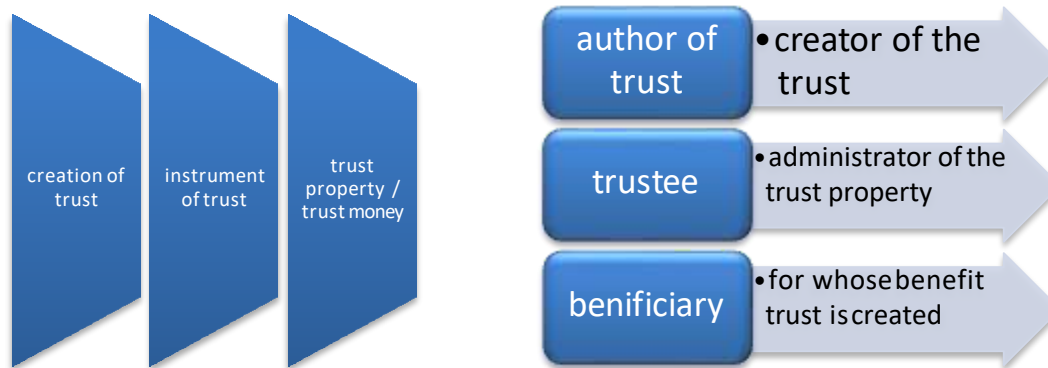
### Trust act, 1882

### Interpretation clause:

Section 3 of the Trust act 1882, defines in its interpretation clause the definitions of trust, author of trust, trustee, beneficiary, trust property, beneficial interest, instrument of trust and breach of trust along with few other terminologies. Some of the definitions are reiterated below.

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<sup>1</sup> BRYANA. GARNER, EDITOR IN CHIEF, *BLACK'S LAW DICTIONARY* (USA: WEST PUBLISHING CO. 9<sup>th</sup> Edition)



1. Trust:

A **trust** is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.

2. Author of the trust:

The person who reposes or declares the confidence is called the “**author of the trust**”.

3. Trustee:

The person who accepts the confidence is called the “**trustee**” of the trust.

4. Beneficiary:

The person whose benefit the confidence is accepted is called the “**beneficiary**” of the trust.

5. Trust property/ money:

The subject-matter of the trust is called “**trust property**” or “**trust money**”.

6. Beneficial interest/interest:

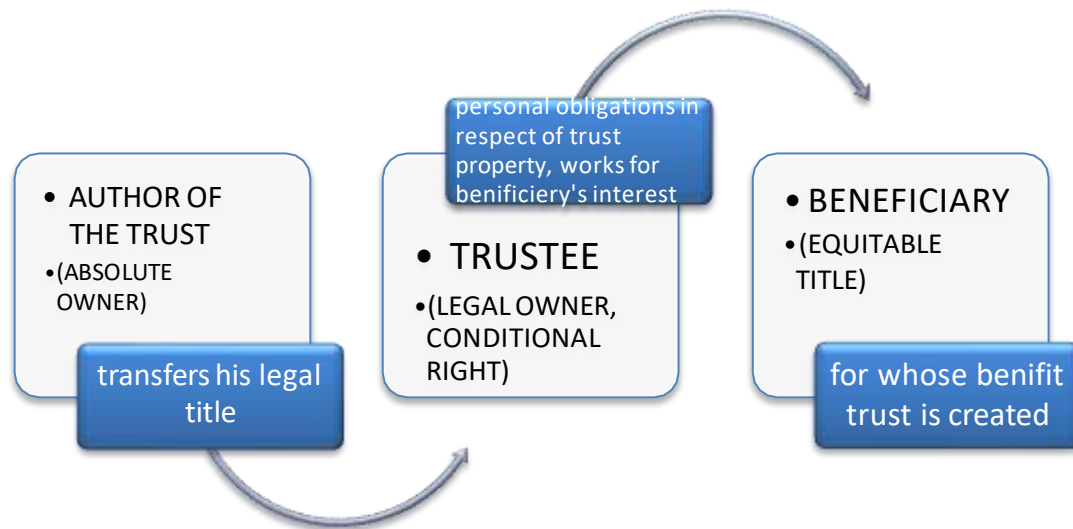
The “**beneficial interest**” or “**interest**” of the beneficiary is his right against the trustee as owner of the trust- property.

7. Instrument of the trust:

The instrument, if any, by which the trust is declared is called the “**instrument of the trust**”.

8. Breach of trust:

A breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a "breach of trust".



### *Object of the trust*

The Trust Act 1882 clearly defines the objects for which the trust can be created. Section 4 of the Trust Act elaborates the purposes for which the trust can be created along with the legal restraints which bars the creation of a trust. According to section 4 trust act:

1. Lawful purpose.

A trust can only be created for any lawful purpose.

2. When the purpose is considered to be unlawful

The purpose of a trust would be considered as unlawful under the following situations:

- (a) When it is forbidden by law,
- (b) When it is of such a nature that, if permitted, it would defeat the provisions of any law,
- (c) When it is fraudulent,
- (d) When it involves or implies injury to the person or property of another,
- (e) When the Court regards it as immoral or opposed to public policy.

3. Status of unlawful trust

Every trust of which the purpose is unlawful is void.

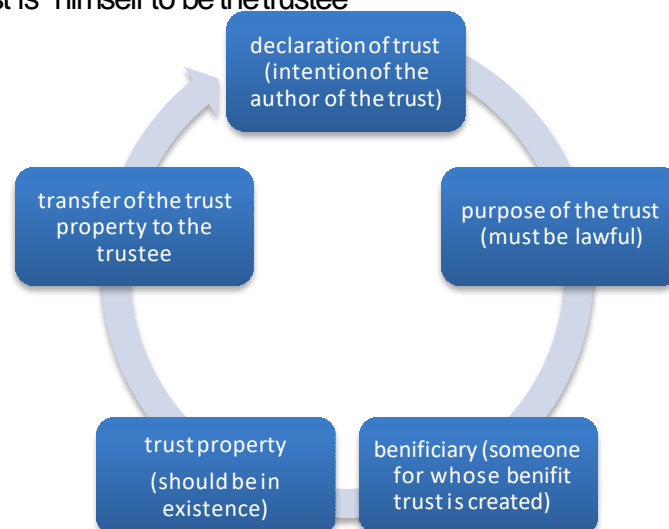
4. If trust is created for more than one purposes

Where a trust is created for two purposes, of which one is lawful and the other unlawful and the two purposes cannot be separated, the whole trust is void.

*Prerequisites of Creation of Trust*

Section 6 provides the prerequisites to be fulfilled for the creation of a trust. According to section 6 a trust is created when the author of the trust indicates with reasonable certainty by any words or acts

- a) An intention on his part to create thereby a trust,
- b) The purpose of the trust,
- c) The beneficiary,
- d) The trust-property,
- e) Transfers the trust-property to the trustee except where the trust is declared by will or the author of the trust is himself to be the trustee



*Rights and liabilities of the author of the trust*

### Requisites of author of the trust

Following are the persons competent to create a trust.

- a. A trust may be created by every person competent to contract
- b. By any person authorized/ permitted by a principal Civil Court of original jurisdiction, by or on behalf of a minor.

### Responsibility towards the subject matter

Section 8 of the Trust Act, indicates the responsibility of the author towards the subject matter of the trust. According to which the Subject-matter of a trust must be property transferable to the beneficiary. It must not be merely beneficial interest under a subsisting trust.

### Rights and liabilities of the trustee

#### Capacity of the trustee

Section 10 of the Trust Act, defines the capacity of the trustee, according to which, every person capable of holding property may be a trustee but where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract. No one is bound to accept a trust.

As mentioned in article 3 of the Act the trustee is a person who accepts the confidence reposed by the author of the trust. Similarly article 10 defines that no one is bound to accept a trust. The intended trustee may instead of accepting the trust, disclaim it within a reasonable period and his disclaimer will prevent the trust-property from vesting in him.

In case of acceptance of the trust by the trustee he may accept the trust by any words or acts indicating with reasonable certainty his acceptance.

#### Responsibilities of the trustee

- a. Section 11 states the foremost duty of the trustee is the **accomplishment of the purpose of the trust**, and **obedience to the directions of the author of the trust** given at the time of its creation. The trustee is not bound to obey any direction when doing of the same is impracticable, illegal or manifestly injurious to the beneficiaries.
- b. Section 12 states that a trustee is bound **to acquaint himself of, with the nature and circumstances of the trust-property, transfer of the trust-property to himself** and (subject to the provisions of the instrument of trust) **to get in trust moneys invested** or insufficient or hazardous security.
- c. It is the responsibility of the trustee **to protect title to trust-property**. He is bound to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regards being had to the nature and amount or value to the trust-property, may be reasonably requisite for the preservation of the trust-property and the assertion or protection of the title thereto.
- d. Trustee is under duty to **not to set up title adverse to beneficiary**- The trustee must not for himself or another set up or aid any title to the trust-property adverse to the interest of the beneficiary.
- e. A trustee is bound to **deal with the trust-property as carefully as a man of ordinary prudence** would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust-property.
- f. Where the trust is created for the benefit of several persons in succession and the trust-property is of a wasting nature or a future or reversionary interest, the trustee is bound unless an intention to the contrary may be inferred from the instrument of trust, **to convert the property into property of a permanent and immediately profitable character**.
- g. Where there are more beneficiaries than one, the trustee is **bound to be impartial**, and must not execute the trust for the advantage of one at the expense of another.
- h. Where the trust is created for the benefit to several persons in succession and one of them is in possession of the trust-property, if he commits, or threatens to commit, any act, which is destructive, or permanently injurious thereto, the trustee is **bound to take measures to prevent such act**.
  - i. A trustee is bound **to keep clear and accurate accounts of the trust-property** and **to furnish the beneficiary** with full and accurate information as to the amount and state of the trust-property, as and when requested by him.
- j. Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound **to invest the money only on the securities mentioned in the Act**, and not anywhere else.



Liabilities of the trustee:

- a. Section 22 of Trust Act declares that if instrument of trust directed the trustee to sale out the property within certain specified time and he extends such time, the burden of proving that the beneficiary is not prejudiced by this extension lies upon the trustee, unless the extension has been authorized by a principal Civil Court of original jurisdiction.
- b. Section 23 mentions where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained, unless the beneficiary, has by fraud induced the trustee to commit the breach, or the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, concurred in the breach, or subsequently acquiesced therein, with full knowledge of facts of the case and of his rights as against the trustee. In case



of making this loss good the trustee would not be liable to pay interest generally but the underhand are the cases in which he would be liable to pay.

- i. Where he has actually received interest;
- ii. Where the breach consists in unreasonable delay in paying trust-money to the beneficiary;
- iii. Where the trustee ought to have received interest, but has not done so;
- iv. Where he may be fairly presumed to have received interest.  
He is liable, in case (a), to account for the interest actually received, and, in cases (b), (c) and (d), to account for simple interest at the rate of six per cent per annum, unless the Court otherwise directs.
- v. Where the breach consists in failure to invest trust-money and to accumulate the interest or dividends  
thereon, he is liable to account for compound interest (with half-yearly rests) at the same rate;
- vi. Where the breach consists in the employment of trust-property or the proceeds thereof in trade or business, he is liable to account, at the option of the beneficiary, either for compound interest (with half-yearly rests) at the same rate, or for the net profits made by such employment.

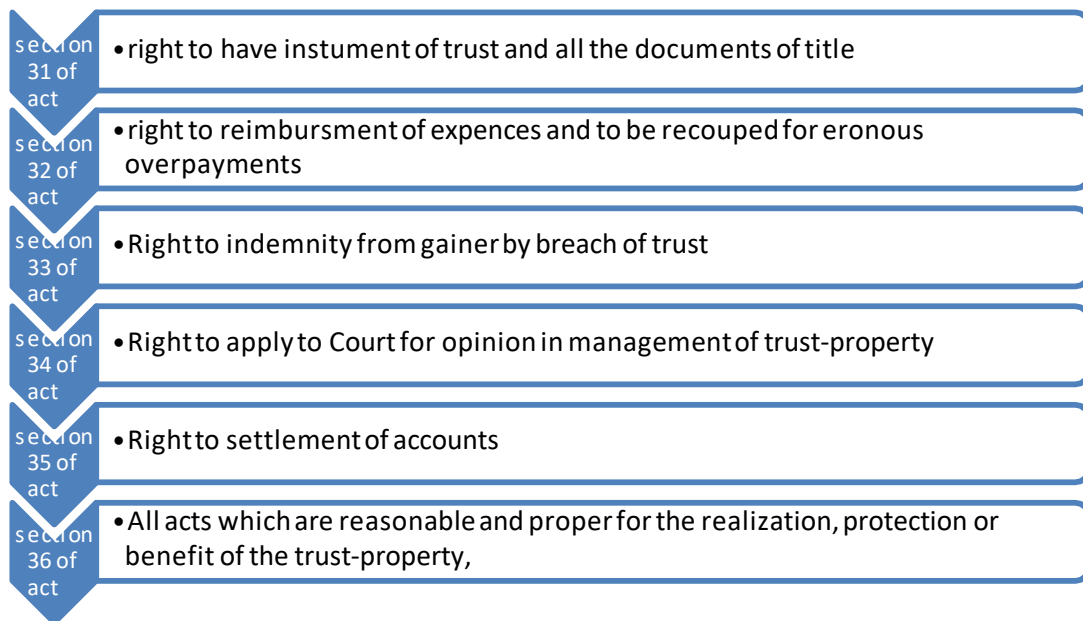
Situations where trustee would be exempted from liability

- a. Section 25 of Trust Act provides Non-liability for predecessor's default - Where a trustee succeeds another, he is not, as such, liable for the acts or defaults of his predecessor.
- b. Section 26 situates the non-liability for co-trustee's default - Subject to the provisions of Section 13, and 15, one trustee is not, as such, liable for a breach of trust committed by his co-trustee except for the reasons mentioned in the section.
- c. A co-trustee who joins in signing a receipt for trust-property and proves that he has not received the same is not answerable, by reason of such signature only, for loss or misapplication of the property by his co-trustee is also exempted from liability.
- d. Section 28 defines that when any beneficiary's interest becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust-property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered.

Rights of the trustee

- a. Section 31 of the Act states that trustee has a **Right to title deed**- A trustee is entitled to have in his possession the instrument of trust and all the documents of title (if any) relating solely to the trust- property.
- b. Trustee also has a **Right to reimbursement of expenses** as mentioned in Article 32 of the Act – according to it every trustee may reimburse himself, or pay or discharge out of the trust- property, all expenses property incurred in or about the execution of the trust, or the realization, preservation or benefit of the trust-property, or the protection or support of the beneficiary.
- c. If the trustee has paid such expenses out of his own pocket, he has a first charge upon the trust- property for such expenses and interest thereon; but such charge (unless the expenses have been incurred with the sanction of a principal Civil Court of original jurisdiction) shall be enforced only by prohibiting any disposition of the trust-property without previous payment of such expenses and interest.
- d. If the trust-property fail, the trustee is entitled to recover from the beneficiary personally on whose behalf he acted, and at whose request, expressed or implied, he made the payment, the amount of such expenses.
- e. Trustee also reserves the **Right to be recouped for erroneous over-payment** - Where a trustee has by mistake made an over-payment to the beneficiary; he may reimburse the trust- property out of the beneficiary's interest. If such interest fails, the trustee is entitled to recover from the beneficiary personally the amount of such over-payment.
- f. Section 33 of the Act provides trustee a **Right to indemnity from gainer by breach of trust** - A person other than a trustee who has gained an advantage from a breach of trust must indemnify the trustee to the extent of the amount actually received by such person under the breach; and where he is beneficiary the trustee has a charge on his interest for such amount.
- g. Trustee has a **Right to apply to Court for opinion in management of trust-property** under section 34 of the Act - Any trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust-property other than questions of detail, difficulty or importance, not proper in the opinion of the Court for summary disposal.
- h. Section ~~35~~ of the Act gives **Right to settlement of accounts** to the trustee according to which when the duties of a trustee, as such, are completed, he is entitled to have the accounts of his administration of the trust-property examined and settled; and, where nothing is

- i. Trust Act also recognizes some **General authority of trustee** under section 36 of the Act. According to which in addition to the powers expressly conferred by this Act and by the instrument of trust, a trustee may do all acts which are reasonable and proper for the realization, protection or benefit of the trust-property, and for the protection or support of a beneficiary who is not competent to contract.



#### *Disabilities of the trustee*

There also exist some disabilities of the trustee. Some of which are mentioned below.

- a According to section 46 of the Act, **Trustees cannot renounce after acceptance** - A trustee who has accepted the trust cannot afterwards renounce it. There are two exceptions to the rule. First is trustee can renounce with the permission of a principal Civil Court of original jurisdiction. Secondly, he can renounce with the consent of the beneficiary if he is competent to contract and finally by virtue of a special power in the instrument of trust, trustee can renounce.
- b Section 47 of the Act states that a **Trustee cannot delegate** - A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless the instrument of trust so provides,
- ii. the delegation is in the regular course of business,

iii. the delegation is necessary,

iv. the beneficiary, being competent to contract, consents to the

delegation.  
It is important to mention here that the appointment of an attorney or proxy to do an act merely ministerial and involving no independent discretion is not a delegation within the meaning of this section.

c Section 48 of the act states that **Cotrustees cannot act singly** - When there are  
· more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.

d According to section 50 of the Act, **Trustee may not charge for services** - In the  
· absence of express directions to the contrary contained in the instrument of trust or of a contract to the  
contrary entered into with the beneficiary or the Court at the time of accepting the trust, a trustee has no right to remuneration for his trouble, skill and loss of time in executing the trust.

e Trust Act provides under section 51 that **Trustee may not use trust-property for his  
· own profit** - A trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust.

f Section 52 of the Act states that **Trustee for sale or his agent may not buy the trust  
property**- No trustee whose duty it is to sell trust-property, and no agent employed by such trustee for the purpose of the sale, may, directly or indirectly, buy the same or any interest therein, on his own account or as agent for a third person.

g As per section 53 of the enactment **Trustee may not buy beneficiary's interest without  
· permission** - No trustee, and no person who has recently ceased to be a trustee, may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust-property or any part thereof; and such permission shall not be given unless the proposed purchase, mortgage or lease is manifestly for the advantage of the beneficiary.

h Section 54 of the Act states that **Cotrustee may not lend to one of themselves** - A  
· trustee or co-trustee whose duty it is to invest trust-money on mortgage or personal security must not invest it on a mortgage by, or on the personal security of him or one of his co-trustees.  
Rights and liabilities of the beneficiary

## Rights of the beneficiary:

There are several rights of the beneficiary mentioned in the act some of which are expressed here.

- a. Beneficiary has **Right to rents and profits** under section 55 of the Act - The beneficiary has, subject to the provisions of the instrument of trust, a right to the rents and profits of the trust -property.
- b. Beneficiary has a **Right to specific execution** under section 56 of the Act - The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest.
- c. Beneficiary has a **Right to transfer of possession** where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract and all of one mind, he or they may require the trustee to transfer the trust -property to him or them, or to such person as he or they may direct.
- d. Beneficiary has a **Right to inspect and take copies of instrument of trust accounts, etc.** as mentioned in section 57 of the Act- The beneficiary has a right, as against the trustee and all persons claiming under him with notice of the trust, to inspect and take copies of the instrument of trust, the documents of title relating solely to the trust-property, the accounts of the trust-property and the vouchers (if any) by which they are supported, and the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty.
- e. Section 58 of the Act provides a **Right to transfer beneficial interest** - The beneficiary, if competent to contract, may transfer his interest, but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest.
- f. Section 59 of the Act states that beneficiary has a **Right to sue for execution of trust** - Where no trustees are appointed or all the trustees die, disclaim, or are discharged, or where for any other reason the execution of a trust by the trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or new trustee.

Liabilities of the beneficiary:

Following are the liabilities of beneficiary.

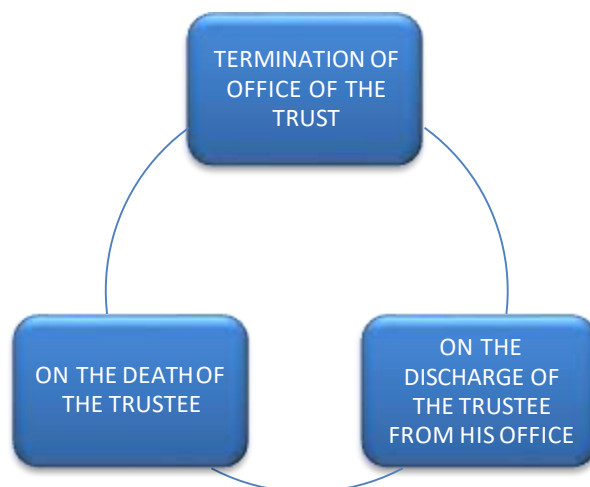
Section 68 of the Trust Act provides **Liability of beneficiary joining in breach of trust**- according to it where one of several beneficiaries –

- a. Joins in committing breach of trust, or
- b. Knowingly obtains any advantage therefrom, without the consent of the other beneficiaries, or
- c. Becomes aware of a breach of trust committed or intended to be committed, and either actually conceals it, or does not within a reasonable time take proper steps to protect the interests of the other beneficiaries, or
- d. Has deceived the trustee and thereby induced him to commit a breach of trust,

the other beneficiaries are entitled to have all his beneficial interest impounded as against him and all who claim under him (otherwise than as transferees for consideration without notice of the breach) until the loss caused by the breach has been compensated.

Termination of office of the trustee

Section 70 of the Act, states that the Office of the trustee is terminated either **by the death or by discharge** from the office of the trustee.



Discharge of trustee –

According to the section 71 of the Trust Act, The trustee may be discharged from his office only as follows:-

- a. By the extinction of the trust;
- b. By the completion of his duties under the trust; THE TRUST ACT 1882
- c. By such means as may be prescribed by the instrument of trust;
- d. By appointment under this Act of a new trustee in his place;
- e. By consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the beneficiaries being competent to contract; or
- f. By the Court to which a petition for his discharge is presented under this Act.

#### Procedure for discharge.

Section 72 of the Act provides the procedure for the trustee to discharge from his office. According to which every trustee may apply by petition to a principal Civil Court of original jurisdiction to be discharged from his office; and, if the Court finds that there is sufficient reason for such discharge, it may discharge him accordingly, and direct his costs to be paid out of the trust-property. But where there is no such reason, the Court shall not discharge him, unless a proper person can be found to take his place.

#### *Appointment of new trustee*

#### Appointment of new trustees on death, etc.

Section 73 of the Act provides that whenever any person appointed a trustee disclaims, of any trustee, either original or substituted, dies, or is for a continuous period of six months absent from Pakistan, or leaves Pakistan for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes, in the opinion of a principal civil court of original jurisdiction, unfit or personally incapable to act in the trust, or accepts an inconsistent trust, a new trustee may be appointed in his place by -

- a. The person nominated for that purpose by the instrument or trust (if any), or
- b. If there be no such person, or no such person able and willing to act, the author of the trust if he be alive and competent to contract, or the surviving or continuing trustee or trustee for the time being, or  
legal representative of the last surviving and continuing trustee, or (with the consent of the Court) the retiring trustee, if they all retire simultaneously, or (with the like consent) the last retiring trustee .

### Appointment by Court –

As section 74 states whenever any such vacancy or disqualification occurs and it is found impracticable to appoint a new trustee under section 73, the beneficiary may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee, and the Court may appoint a trustee or a new trustee accordingly.

### THE EXTINCTION OF TRUSTS

Section 77 of the Act defines the situations in which a trust is extinguished. According to which following are the cases when a trust extinguishes.

- a. When its purpose is completely fulfilled; or
- b. When its purpose becomes unlawful; or
- C. When the fulfillment of its purpose becomes impossible by destruction of the trust - property or otherwise; or
- d. When the trust, being revocable, is expressly revoked.

### Revocation of trust

Section 78 of the Act defines how a trust may be revoked.

- a. A trust created by will, may be revoked at the pleasure of the testator.
- b. A trust otherwise created can be revoked only –
  - i. Where all the beneficiaries are competent to contract- by their consents;
  - ii. Where the trust has been declared by non-testamentary instrument or by word of mouth- in exercise of a power of revocation expressly reserved to the author of the trust; or
  - iii. Where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors at the pleasure of the author of the trust.