



**APPOINTMENT AND SUBSTITUTION OF TRUSTEES BY THE PENSIONS
AUTHORITY UNDER SECTION 64 OF
THE PENSIONS ACT, 1990**

GUIDANCE NOTES

Disclaimer

While the Pensions Authority has made every effort to ensure that the information contained within this guidance document is correct and accurate nevertheless it is possible that errors or omissions in the content may occur from time to time.

No liability whatsoever is accepted by the Pensions Authority, its servants or agents for any errors or omissions in the information or data or for any loss or damage occasioned to any person acting or refraining from acting as a result of the information or data contained within this guidance document.

To ensure that you have an up-to-date and unaltered copy of this document, you should download it directly from www.pensionsauthority.ie.

This document has not yet been updated to take account of Pensions Act 2011 transposition

CONTENTS

	PARAGRAPH
General	1
No trustees or trustees cannot be found	2
Authority must be satisfied that it is desirable to appoint new trustee(s)	3–4
Evidence/information required by the Authority	5
Appointment/removal of trustees and vesting of assets	6
New trustee(s)	7
Notice of appointment	8
Appeal to the High Court against the making of an order	9
Operative date of order	10
Ancillary and consequential matters (including fees and expenses)	11
Body corporate	12
Appendix I – Section 10 and 25 of the Trustee Act 1893	
Appendix II – Template affidavit	

This document has not yet been updated to take account of IORP II transposition



Appointment and substitution of Trustees by the Pensions Authority under Section 64 of the Pensions Act, 1990

s.64(1)

General

1. The Pensions Authority (*the “Authority”*) has the power, under section 64 of the Pensions Act, 1990, (the “Pensions Act”) where there are no *trustees* of a *scheme* or the *trustees* cannot be found, if it considers it desirable to do so, to appoint a new *trustee* or *trustees* in substitution, where appropriate, for any existing *trustee* or *trustees*.

s.64(1)

No trustee or trustees cannot be found

2. *The Authority* may exercise its powers under section 64 only in circumstances where there are no *trustees* or the *trustees* cannot be found. This might include, for example, circumstances in which a company, which had been the *trustee*, omitted, before the company’s final dissolution, to appoint a replacement *trustee*.

It is advised to always read the trust deed and rules or other governing documentation to ascertain whether there is a power of appointment clause which can be exercised before initiating the section 64 application process.

s.64(1)

Authority must be satisfied that it is desirable to appoint new trustee(s)

3. *The Authority* must, prior to the exercise by it of its power under section 64, satisfy itself that it is desirable to do so.
4. Generally, this is in circumstances where all reasonable endeavours have been made:
 - firstly, to locate trustees; and
 - secondly, where reasonable, to exhaust all other avenues available to appoint a trustee such as under section 10 or section 25 of the Trustee Act 1893

that *the Authority*, where appropriate, will consider the appointment of new *trustees* under section 64. This reflects the intention of the Pensions Act to supplement rather than replace existing powers under other legislation or the trust deed.

1. Efforts to locate a trustee would include either sending a registered letter to the last known *trustees* at their last known address (proof of this will need to be provided) and confirmation that there has been no contact with the last known *trustees* in the previous twelve months.



2. Section 10 and section 25 of the Trustee Act 1893 are detailed in Appendix I and both options should be considered prior to making an application to *the Authority*.

Evidence/information required by the Authority

5. In order for *the Authority* to appoint a trustee to a scheme in circumstances where there are no *trustees* of a *scheme* or the *trustees* cannot be found, an application must be made to *the Authority*. *The Authority* will require a sworn affidavit with the relevant exhibits from an appropriate person in order that it may satisfy itself that there are no *trustees* or that the *trustees* cannot be found. *The Authority* would expect there to be an appropriate link between the party swearing the affidavit and scheme members. Such persons could include scheme members, providers, registered administrators, intermediaries and brokers.

In addition to proving that all reasonable endeavours have been exhausted as set out in paragraph 4, *the Authority* requires supporting information relating to the *scheme* in order for it to appoint new *trustees*. This will include the documents constituting the *scheme* such as the trust deeds and rules along with any amendments made, annual reports and audited accounts, details of the previous *trustees*, details of remaining membership and *assets* and the company registration and status of the employer and information in relation to proposed fees and how they will be discharged. The Authority may also seek any other relevant information which it considers necessary to assist in determining the application or establishing whether it is desirable to make such an appointment.

A template affidavit is included at Appendix I. This is a guide only and may need to be amended depending on the circumstances of the case.

s.64(1)

Appointment/substitution of trustees and vesting of assets

6. *The Authority*, if it is satisfied that there are no *trustees* or that the *trustees* cannot be found, and considers it desirable to do so, may, by order under its seal:
 - appoint a new *trustee* or *trustees* of the *scheme* in substitution, where appropriate, for any existing *trustee*; and
 - vest, subject to any necessary transfers in the books of any bank, corporation or company, the *assets* of the *scheme* in the new *trustee(s)*.

New trustee(s)

7. The new *trustee(s)* appointed by *the Authority* under section 64 may be:



- such person or persons as may be nominated as part of the application and being, in the opinion of *the Authority*, a fit and proper person to act as a *trustee* or
- such other person or persons as *the Authority* shall decide.

Persons residing outside the State and members and staff of *the Authority* will not be appointed by *the Authority* under section 64.

Where an applicant is proposing a *trustee*, the proposed *trustee* must provide a letter confirming their willingness to act as a *trustee* and of their intention to discharge the trustee duties in accordance with trust law and the Pensions Act. They must confirm that they are a fit and proper person to act as *trustee* in line with the requirements of section 59A(1) of the Pensions Act i.e. they are not an undischarged bankrupt, they have not been convicted of an offence involving fraud or dishonesty, they have made a composition or arrangement with creditors and been unable to discharge the obligations under that composition or arrangement, they are not currently subject to restrictions imposed by section 819 of the Companies Act 2014 and it is not a company of which one of the directors of the company is prohibited from being a *trustee* of a pension scheme.

s64(2)

Notice of appointment

8. Within 21 days of the date of the order *the Authority* will publish a notice, giving details of the order in a daily newspaper published in and circulating throughout the State.

s.64(4)(a)

Appeal to the High Court against the making of an order

s.64(4)(c)

9. A person having an interest may, within 21 days after the publication of the notice referred to in paragraph 8 (or such longer period as the court may allow), appeal to the High Court against the making of the order. (*The Authority*, the *trustees*, the employer and the *members* of the *scheme* can be represented and heard on any such appeal.)

s.64(4)(d)

Operative date of order

10. An order under section 64 will come into operation 21 days after the date of the publication of the notice referred to in paragraph 8 or, if an appeal is brought against the order, after the determination of the appeal or any appeal from that determination or the withdrawal of either such appeal.

s.64(5)

Ancillary and consequential matters (including fees and expenses)

11. An order under section 64 may make provision for such ancillary and consequential matters as *the Authority* considers necessary or expedient, including the making of payments from the resources of the *scheme* or from the employer to the *trustees* appointed by the order in respect of fees, expenses or other matters relating to their duties as *trustees*.



s.64(7)

Body corporate

12. A body corporate appointed under section 64 may act as sole trustee notwithstanding that the rules of the *scheme* provide for or require the appointment of more than one *trustee*.

This document has not yet been updated to take account of IORP II transposition

Appendix I – Section 10 and 25 of the Trustee Act 1893

It should be noted that both of the below options should be considered prior to making an application to the Authority.

<p>Section 10 of the Trustee Act 1893:</p>	<p>This section provides that where a trustee has died, is out of the jurisdiction for longer than 12 months, refuses to act or is incapable of acting as a trustee then the person(s) nominated for the purpose of appointing new trustees by the trust deed, or if none, the personal representative of the last surviving or continuing trustee, may, in writing, appoint another person(s) to be a trustee in the place of the trustee being incapable to act.</p> <p>This may not be possible when the trustee is a corporate entity that has been wound up, as it does not have a personal representative and therefore there is no other person in whom the power to appoint under section 10 rests.</p>
<p>Section 25 of the Trustee Act 1893:</p>	<p>This section provides that the court can appoint a new trustee in cases where it is inexpedient, difficult or impracticable to do so without the assistance of the court.</p> <p>Such applications are often not feasible by virtue of the costs and time involved in making such an application.</p>

This document has not yet been updated

Proposition



Appendix II – Template affidavit

PROMPT (please delete this section after completion) – this template may not be suitable for all cases and should be amended accordingly. Please include exhibits as appropriate.

PENSIONS ACT 1990 AS AMENDED (the “Act”)

**IN RE: APPLICATION TO PENSIONS AUTHORITY FOR APPOINTMENT
OF TRUSTEE TO THE
"[NAME OF SCHEME]" UNDER SECTION 64 OF THE ACT**

AFFIDAVIT OF [NAME]

I, [NAME], [position] "[Company name and address if appropriate]", aged 18 years and upwards **MAKE OATH** and say as follows:

1. I am a [position] of [company] or "[individuals details]" and I make this affidavit on behalf of the scheme members and have their consent to do so. **[If appropriate]** [Insert details of relationship with the scheme].
2. I make this Affidavit from facts within my own knowledge, save where so otherwise appears and whereso appearing I believe the same to be true.
3. The "[Scheme name]" (the “Scheme”) was established with effect from [date] pursuant to "[insert details of governing documentation]". The first trustee(s) of the Scheme was/were "[trustee(s) name and address]". *[Insert details of scheme assets and how they are held]*.
4. [Outline Scheme’s original power of appointment and removal].
5. [Outline why section 10 of Trustee Act 1893 is not appropriate].
6. [Outline why section 25 of Trustee Act 1893 is not appropriate].
7. I say and believe that there is no trustee of the Scheme [or the trustee cannot be found and all reasonable endeavours have been exhausted in attempting to contact the trustee]. (Letters and receipt of postage to be exhibited with the affidavit.)
8. I therefore say that in accordance with paragraph 4 of the Pensions Authority’s Guidance Notes in relation to the appointment and substitution of trustees by the Pensions Authority under section 64 of the Pensions Act 1990 that all other reasonable endeavours have been exhausted.
9. I say and believe that the Authority is being requested to appoint "[Company name or individuals name]" as trustee to the Scheme. *[Detail reasons why and how this appointment is in the best interests of the member(s) of the scheme.*



Provide an outline plan of action for the scheme and details of any charges that will be imposed and who will pay such charges. By letter dated the "[]" of "[month]" "[year]", the said trustee confirmed his/her consent to act as trustee and to comply with all trustee duties following on from their appointment. I beg to refer to a copy of said letter upon which marked with letter "A" I have signed my name prior to the swearing hereof.

10. I say that it is "[Company name or individuals name]" view that the appointment does not prejudice the position of any beneficiary under the Scheme.
11. I therefore request on behalf of "[Company name or individuals name]" the appointment of "[Company name or individuals name]" as a trustee to the Scheme in substitution of [],the existing trustee .
12. I further request that the order of the Pensions Authority under section 64(1) of the Act vests the assets of the scheme in "[Company name or individuals name]" as trustee to the Scheme. ***[Insert any consequential or ancillary matters to be included in the order such as fees and expenses.]***

SWORN by the said [NAME]

on the day of
in the year
at
in the County of
Before me a Commissioner for
Oaths/Practising Solicitor and I know
the Deponent

**COMMISSIONER FOR OATHS/
PRACTISING SOLICITOR**