

TRUSTS AND SUCCESSION (SCOTLAND) BILL
AMENDMENTS TO BE MOVED AT STAGE 2

In Section 1, page 1, line 12

leave out <expedient> and insert <necessary>

Effect

This amendment provides that the court may appoint an additional trustee under section 1(1)(a) only if the court considers it necessary to do so.

Reason

Allowing a court to appoint an additional trustee where it considers it expedient to do so represents a weakening of the common law position, which refers to 'necessary'. This amendment would reinstate the position as at common law.

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In Section 5, page 3, line 6

after <sole trustee> insert <who has accepted office in writing or who, after intimation of their appointment, has acted in a way which indicates that they have accepted office>

Effect

This amendment clarifies that mere nomination of a sole trustee does not make that individual a trustee unless they have accepted the office in writing or, after intimation of their appointment, have acted in a fashion which indicates that they had accepted office as trustee.

Reason

The office of trustee should not be forced on a sole nominee who has not accepted that office and who does not wish to do so.

TRUSTS AND SUCCESSION (SCOTLAND) BILL
AMENDMENTS TO BE MOVED AT STAGE 2

In Section 30, page 19, line 3

leave out <a particular transaction, or a particular class of transactions> and insert <any action or decision>

Effect

This amendment would extend the effect of protective clauses in the trust deed to all actions and decisions of the trustees.

Reason

A trust deed may contain a provision purporting to limit liability for, or indemnity for, breach of fiduciary duty. This is most likely to be relevant where a trustee is also a beneficiary, where a trustee's fiduciary duty would be likely to put their personal interests in a conflict of interest with their fiduciary duty as a trustee. This is often expressly permitted (sometimes with qualifications) within a trust deed. It seems that such protection will continue to be effective because of section 30(2), but such protection is usually seen to be wider than "transactions". It may be more appropriate to allow protective clauses to extend to all actions or decisions of the trustees.

TRUSTS AND SUCCESSION (SCOTLAND) BILL
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In Section 35, page 21, line 23

leave out < –

- (a) Partly from the trust property, and
- (b) To the extent of the trustee's failure, partly from the trustee's personal property.>

and insert <, in whole or in part, from the trustee's personal property (to the extent of the trustee's failure) and the balance (if any) from the trust property>

Effect

This amendment would allow the court to determine that the trust property should bear none of the damages, where this is appropriate.

Reason

The purpose of this provision is that where a trustee fails to exercise reasonable care and skill and that causes loss, the court can order damages be paid by the failing trustee personally. There may be circumstances where a trustee's failings would be so great that the just outcome is that the trust estate bears none of the damage.

TRUSTS AND SUCCESSION (SCOTLAND) BILL
AMENDMENTS TO BE MOVED AT STAGE 2

In Section 39, page 23, line 7

add at end <whether the power derives from the trust deed or is implied by those sections>

Effect

This amendment clarifies that the provisions on validity of certain transactions entered into by trustees extends to transactions in exercise of the powers in the trust deed as well as those powers implied by sections 13(1) and 16(1) of the Bill.

Reason

This amendment will ensure that second parties transacting with trustees benefit from the provisions of section 39(2).

TRUSTS AND SUCCESSION (SCOTLAND) BILL
AMENDMENTS TO BE MOVED AT STAGE 2

In Section 41, page 24, line 17

after <force> insert <unless specifically
anticipated in such trusts>

Effect

This amendment would bring existing trusts within the scope of section 41 where the truster has expressly provided for anticipated changes in the law in the trust deed.

Reason

Changes to the law on accumulation periods has been in anticipation for some time. Granters of existing trusts may have expressly provided for such changes in the trust deed, and should be able to benefit from these new provisions.

TRUSTS AND SUCCESSION (SCOTLAND) BILL
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In Section 41, page 24, line 18

after <is> insert <not>

Effect

This amendment would bring charitable trusts within the scope of section 41 but would retain restrictions on accumulation of income for public trusts which are not charitable trusts.

Reason

The Bill as introduced excludes public trusts which are charitable trusts from the abolition of restrictions on accumulation of income with the result that such charitable trusts will remain subject to existing accumulation of income rules. In our view this is not appropriate, and the scope of the section should be extended to include charitable trusts. Trustees of charitable trusts are subject to other rights and duties under charity law and tax law to manage funds appropriately and are subject to oversight from OSCR and HMRC. These rights and duties apply to all charities, whatever their legal form, and empower OSCR and HMRC to control inappropriate accumulation of income by charities without reference to the express restrictions on accumulation of trust law, which apply only to charities constituted as trusts.

There may be reasons, consistent with a charity's purposes, for income to be accumulated, for example to generate funds for the next cycle of charity work or for a specific project, and retaining the prohibition on accumulation of income for charitable trusts may inhibit appropriate accumulations and would serve little practical purpose when inappropriate accumulation is sufficiently controlled by charity and tax law. Removal of the existing trust law restrictions on accumulation would bring the trust into line with the other legal forms available for the constitution of charities, whereas retention of the restrictions may make the trust less attractive as a vehicle for constituting a charity in circumstances in which a trust would otherwise be the most appropriate form.

Non-charity public trusts are not subject to the same charity and tax law controls as charitable trusts and there is a case for retaining the existing trust law restrictions on accumulation for public trusts which are not charities. This would guard against excessive long-term accumulations in non-charity public trusts set up to pursue grandiose schemes which might take decades to materialise.

TRUSTS AND SUCCESSION (SCOTLAND) BILL
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In Section 55, page 30, line 10

after <it> insert <and having powers relating to
the matter>

Effect

This amendment clarifies that any person authorised under the Adults with Incapacity (Scotland) Act 2000 or the law of any country other than Scotland must have relevant powers which allow them to give approval on behalf of the incapable adult.

Reason

Appointments under the Adults with Incapacity (Scotland) Act 2000 extend only so far as the specific powers conferred on the person appointed under that Act.

TRUSTS AND SUCCESSION (SCOTLAND) BILL
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In Section 56, page 31, line 6

leave out <an unascertained person> and insert
< a potential beneficiary who cannot be
ascertained>

Effect

This amendment would clarify the reference to paragraph (c) of section 55(5), which provides for potential beneficiaries rather than unascertained persons specifically.

Reason

We would suggest that this wording is clearer.