



Scottish Law Commission  
*promoting law reform*

| (DISCUSSION PAPER No 126)

# Discussion Paper on Trustees and Trust Administration

discussion  
paper



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*promoting law reform*

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December 2004

DISCUSSION PAPER No 126

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The Honourable Lord Eassie, *Chairman*  
Professor Gerard Maher, QC  
Professor Kenneth G C Reid  
Professor Joseph M Thomson  
Mr Colin J Tyre, QC.

The Chief Executive of the Commission is Miss Jane L McLeod. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

**The Commission would be grateful if comments on this discussion paper were submitted by 31 March 2005.** Comments may be made on all or any of the matters raised in the paper. All correspondence should be addressed to:

Dr David Nichols  
Scottish Law Commission  
140 Causewayside  
Edinburgh EH9 1PR

Tel: 0131 668 2131  
Fax: 0131 662 4900  
Email: [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk)

## NOTES

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<sup>1</sup> Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

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# Abbreviations

Barr *et al*,

A R Barr, J M H Biggar, A M C Dalgleish & H J Stevens, *Drafting Wills in Scotland* (Edinburgh, 1994)

Bell,

G J Bell, *Commentaries on the Law of Scotland and the Principles of Mercantile Jurisprudence*, (Notes by J McLaren) (Edinburgh, 7<sup>th</sup> edn 1870)

Erskine,

J Erskine, *An Institute of the Law of Scotland* (Edinburgh, 1773)

Ford and Lee,

H A J Ford & W A Lee, *Principles of the Law of Trusts*, (Sydney, 3<sup>rd</sup> edn, looseleaf updated to July 2004)

Halsbury's Laws of England,

Halsbury's *Laws of England*, (London, 4<sup>th</sup> edn 2000, Reissue plus updates)

Honoré,

*Honoré's South African Law of Trusts* (5<sup>th</sup> edn 2002 by E Cameron, M de Waal, B Wunsh, P Solomon and E Kahn)

Jacobs,

*Jacobs' Law of Trusts in Australia* (6th edn 1997 by R P Meagher and W M Gummow)

Lewin,

T Lewin, *Trusts* (London, 17<sup>th</sup> edn 2000 (with 2003 supplement) by J Mowbray, L Tucker, N Le Poidevin and E Simpson).

Mackenzie Stuart,

A Mackenzie Stuart, *The Law of Trusts* (Edinburgh, 1932)

Menzies,

A J P Menzies, *The Law of Scotland Affecting Trustees* (Edinburgh, 1913)

Norrie and Scobbie,

K McK Norrie and E M Scobbie, *Trusts* (Edinburgh, 1991)

Ontario Trusts Report,

Ontario Law Reform Commission, Report on *The Law of Trusts* (2 Vols) (1984)

Report on *Trustees' Powers and Duties*,

Law Commission and Scottish Law Commission, Report on *Trustees' Powers and Duties* (Law Com No 260) (Scot Law Com No 172) (1999)

Riddall,

J G Riddall, *The Law of Trusts* (London, 6<sup>th</sup> edn 2002)

Scott,

A W Scott, *Abridgement of the Law of Trusts* (Boston, 8<sup>th</sup> edn 1960)

Stair Memorial Encyclopaedia,

*The Laws of Scotland – Stair Memorial Encyclopaedia* (25 Vols) (Edinburgh, 1986 – 1995 with updates)

Underhill and Hayton,

Underhill and Hayton, *Law Relating to Trusts and Trustees* (London, 16<sup>th</sup> edn 2003 by D J Hayton)

USA Uniform Trust Code,

Draft Uniform Trust Code by the National Conference of Commissioners on Uniform State Laws, approved at St Augustine, Florida 2000.

Wilson and Duncan,

W A Wilson and A G M Duncan, *Trusts, Trustees and Executors* (Edinburgh, 2<sup>nd</sup> edn 1995)



# Part 1 Introduction

## The Trust Law Review

1.1 This discussion paper deals with the assumption, resignation and removal of trustees, their powers to administer the trust estate and the role of the courts. It completes the first phase of our review of trust law.<sup>1</sup> Phase 1 concentrates on trustees and their powers and duties, with the exception of powers of investment on which we have already made recommendations.<sup>2</sup> Discussion papers on breach of trust and on the allocation and apportionment of receipts and outgoings between various classes of beneficiary have already been published.<sup>3</sup>

1.2 The second phase of our review will deal with trusts, in particular their constitution and termination, and the restraints on accumulation of income and on long-term private trusts. It will also look at the liability of trustees to third parties and the ways in which beneficiaries may enforce their rights against the trustees and property subject to the trust in the hands of third parties. However, before starting on the second phase we intend to issue a discussion paper on whether a trust should have legal personality.

## Advisory Group

1.3 To assist us in this project we set up an Advisory Group in 2002 comprising both practitioners and academics. The members are listed in Appendix C. The Group has met to consider preliminary drafts of the three Phase 1 discussion papers and members have subsequently commented on revised drafts. We have received a great many helpful comments and much information about how the law works in current practice. We are very grateful to the group for this input.

## Outline of this Discussion Paper

1.4 In many of the areas covered in this discussion paper the law in Scotland is unclear. Such authority as exists is often case law from the nineteenth and early twentieth centuries when the commercial background and business practices were very different from those of today. The proposals we put forward are, to a large extent, designed to clarify the law and bring it up to date rather than effect fundamental changes to trusteeship and the administration of trusts.

1.5 Our proposals relating to the powers and duties of trustees are default rules, that is they would apply unless the trust deed provided otherwise. Trusters could opt out of the

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<sup>1</sup> See Part I of Discussion Paper No 123 on *Breach of Trust* for further information on this project.

<sup>2</sup> Report on *Trustees' Powers and Duties*.

<sup>3</sup> Discussion Paper No 123 on *Breach of Trust* and Discussion Paper No 124 on *Apportionment of Trust Receipts and Outgoings*, both published in September 2003.

rules. None of them is of so fundamental a character that its exclusion would result in the arrangement set up by the truster being no longer regarded as a trust.<sup>4</sup>

1.6 Part 2 deals with the requirements for trustees to make an effective decision, that is a decision that binds the trustees, present and future, in their capacity as trustees. It looks at the general majority or quorum rule and the main exceptions to it. Part 3 contains proposals for allowing trustees to appoint agents generally and to have trust property held by nominees or custodians. The question of the extent to which a trustee may delegate his or her discretionary and administrative functions is also explored. Another issue is whether trustees should have a statutory power to do any administrative act that is not at variance with the terms and purposes of the trust. The appointment, resignation and removal of trustees forms the subject matter of Part 4. At present, the courts and the existing trustees can appoint new trustees, but views are sought on whether the beneficiaries should be able to appoint new trustees in certain special circumstances. Resignation of a trustee sometimes requires the sanction of the court. Proposals are made for a simpler non-judicial process. Proposals are also made in relation to judicial removal of unsatisfactory trustees and for their removal without having to apply to a court. The next part, Part 5, examines the role of the courts in the area of trusts. We look at judicial scrutiny of the exercise of a discretionary power by trustees, the ways in which the courts can give directions or guidance to trustees and the extent to which they can grant trustees additional powers. The appropriate level in the court structure for various trust applications to be made is considered with a greater role proposed for the sheriff courts. Part 6 deals with the power of trustees to make payments from the trust estate to needy beneficiaries in advance of the due date of payment. Part 7 examines some miscellaneous issues that fell outwith our earlier work in the area of trust investments,<sup>5</sup> and the extent to which the proposed reforms would apply to existing and future trusts and trustees. A list of the proposals and questions on which we invite views forms Part 8. Appendix A sets out the relevant law in some other jurisdictions that we have studied.

### **Pension trusts and authorised unit trusts**

1.7 Many of the topics covered in this discussion paper relate to matters which are regulated for pension fund trustees by the Pensions Act 1995 and subordinate legislation under that Act.<sup>6</sup> Similarly, the powers and duties of trustees of unit trusts and other collective investment schemes authorised by the Financial Services Authority under the Financial Services and Markets Act 2000 are already regulated.<sup>7</sup> None of our proposals in this discussion paper is intended to impact upon the existing legislation or rules affecting pension or unit trust trustees. We note that Part IV of the Trustee Act 2000 dealing with the appointment of agents, nominees and custodians was expressly disappplied from authorised unit trusts on the ground that these matters would be covered by the rules of the authorising

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<sup>4</sup> The performance of the trust by the trustees honestly and in good faith for the benefit of the beneficiaries has been stated to be the minimum necessary to give substance to the trust; *Armitage v Nurse* [1998] Ch 241, Millett L J at 253-4.

<sup>5</sup> See para 1.1 above.

<sup>6</sup> See Appendix B.

<sup>7</sup> In terms of s 242, an application for authorisation has to be submitted to the Authority who may make trust scheme rules with which all schemes must comply. These rules relate to matters such as the trustee taking trust property into its custody or under its control (Financial Services Authority Handbook published on its website [www.fsa.gov.uk](http://www.fsa.gov.uk), para 7.9.4), limitations on delegation by the trustee (*ibid*, para 7.10.4), and retirement or disqualification of the trustee and appointment of a new trustee (*ibid*, para 7.11.4).

person.<sup>8</sup> Moreover, advancing capital to beneficiaries is not a power that pension fund trustees or unit trust trustees would exercise. Nonetheless, the powers and duties of such trustees could be affected by the enactment of a few of our proposals, such as the conferment of a general management power.<sup>9</sup>

### **Legislative competence**

1.8 The proposals in this discussion paper relate to powers, duties and liabilities of trustees which are not in general reserved matters in terms of the Scotland Act 1998. However, our proposals extend to a limited extent to the powers, duties and liabilities of trustees of unit trusts and collective investment schemes<sup>10</sup> and also pension trusts,<sup>11</sup> which are matters reserved to the UK Parliament. Our provisional view is that the Scottish Parliament would nevertheless have legislative competence to implement our proposals in these areas in terms of section 29(4). This provides:

"A provision which –

- (a) would otherwise not relate to reserved matters, but
- (b) makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters,

is to be treated as relating to reserved matters unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise."

1.9 Scots private law includes the law of trusts<sup>12</sup> and the purpose of our proposals is to make the law in question apply consistently to trusts that deal with reserved matters and those that do not.

1.10 A further aspect of the legislative competence of the Scottish Parliament is that an Act of the Parliament must be compatible with the rights set out in the European Convention on Human Rights.<sup>13</sup> In our view enactment of the proposals made in this discussion paper would not breach Convention rights.

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<sup>8</sup> S 37, then the Secretary of State.

<sup>9</sup> See paras 3.34 – 3.51 below.

<sup>10</sup> Scotland Act 1998, Sch. 5, s A3.

<sup>11</sup> *Ibid*, Sch. 5, s F3.

<sup>12</sup> *Ibid*, s 126(4).

<sup>13</sup> *Ibid*, ss 29(2)(d) and 126(1). Convention rights are defined in s 1(1) of the Human Rights Act 1998.

# Part 2 Decision-making by Trustees

## Introduction

2.1 In this Part we look at the legal requirements for a body of trustees to reach an effective decision—ie a decision that binds all present and future trustees in their capacity as trustees.<sup>1</sup> To be effective a decision must be one which is within the trustees' powers to make.<sup>2</sup> We are not concerned with the implementation of decisions. That topic and, in particular, the execution of deeds by trustees<sup>3</sup> will be dealt with in our forthcoming discussion paper on the legal personality of trusts.

2.2 An effective decision binds any dissenting trustees but only in their capacity as trustees.<sup>4</sup> It does not of itself impose personal liability since a trustee can be involved in personal liability only by his or her personal act.<sup>5</sup> In other words, for the trustees not involved in making the decision to be personally liable they must in some way authorise, acquiesce in or adopt the decision made by their co-trustees.<sup>6</sup> If they do not and the decision is implemented without notice to them, they can free themselves from personal liability by taking prompt and effective steps to disclaim responsibility.<sup>7</sup>

2.3 We look first in this Part at the extent to which trustees are required to consult each other and exchange views before they can make an effective decision. Then we examine how many trustees are required to make an effective decision and consider some special situations: *sine quo non* trustees, joint trustees and trustees disqualified from being involved in a particular decision due to a personal conflict of interest.

## Consultation and meetings

2.4 Trustees are appointed to act as a body and are under a duty to consult each other in relation to trust business,<sup>8</sup> even though an effective decision may be made by a majority or quorum.<sup>9</sup> Each and every trustee has a right to take part in the decision-making process.<sup>10</sup> The report of *Reid v Maxwell*<sup>11</sup> contains the passage:

"At advising, it was observed by some of their Lordships, that in the administration of a trust, and especially in the exercise of so important a power as that of assuming new trustees, it was essential that the utmost fairness and openness should be observed among the trustees to each other; that ample time and opportunity for deliberation should be afforded;..."

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<sup>1</sup> Menzies, para 167.

<sup>2</sup> Menzies, paras 164 and 167; *Higgins v Livingstone* (1816) 6 Pat 243.

<sup>3</sup> See for example, Trusts (Scotland) Act 1921, ss 7 (deeds granted by trustees) and 21 (deed of assumption of new trustees).

<sup>4</sup> Norrie and Scobbie, p 98.

<sup>5</sup> Menzies, para 169; *Cunningham v City of Glasgow Bank* 1879 6R (HL) 98.

<sup>6</sup> Mackenzie Stuart, p 63; *Lumsden v Buchanan* (1864) 2M 695; *Higgins v Livingstone* (1816) 6 Pat 243.

<sup>7</sup> Wilson and Duncan, para 23-24; *Cambuslang West Church Committee v Bryce* (1897) 25R 322.

<sup>8</sup> Mackenzie Stuart, p 61.

<sup>9</sup> See paras 2.12 - 2.16 below.

<sup>10</sup> Norrie and Scobbie, p 96.

<sup>11</sup> (1852) 14D 449 at 449.

2.5 This was approved as being of general application by Lord President Inglis in *Wyse v Abbott*.<sup>12</sup> In that case two out of three trustees assumed two further trustees without any prior intimation of their intention to do so to the third. It was held that their assumption was invalid. Lord President Inglis said:<sup>13</sup>

"No two trustees can do a trust act without consultation with their co-trustee. It is of the essence of the duty of a body of trustees that they should meet and exchange views on the trust affairs. The trustees were bound to see that Mr Wyse had notice of their intention to nominate co-trustees, and an opportunity of stating his views... The omission of notice, and the want of consultation, are enough to make the appointment illegal."

2.6 It is sufficient that all trustees are given either an opportunity to attend a trust meeting and that the business to be transacted there is intimated to them<sup>14</sup> or have an opportunity to put forward their views. It is not necessary actually to receive the views of all the trustees. Formal intimation is unnecessary if a trustee otherwise knows of the meeting and its business.<sup>15</sup> Where intimation and consultation are impossible or highly impracticable, they may be dispensed with. In the case of *Malcolm v Goldie*<sup>16</sup> two out of three trustees assumed new trustees without any consultation with the third trustee who had recently sailed to Australia to take up permanent residence there. It was held that this assumption was valid. Where a trustee cannot attend a meeting the others (if a quorum) are not bound to obtain the absent trustee's opinion. Lord Kinnear said<sup>17</sup> that generally every trustee had to be given an opportunity of attending the meeting but "if the trustees are aware that he is resident in Australia, and that he does not intend to come back, to give notice of the meeting would be a mere futile formality". It is not clear that such a case would necessarily be decided in the same way today. Residence in Australia does not preclude participation, using modern methods of communication, in an exchange of views about trust business.

2.7 It has been suggested that while any important step in the trust administration should require consultation with all the available trustees, a quorum can properly deal with "matters of routine management" without reference to the other trustees.<sup>18</sup> This seems incorrect. The rule is probably that consultation, in so far as is reasonably practicable, is required for all trustees' decisions. In practice, routine management matters are often delegated to agents who may also be trustees. For example, a solicitor or accountant trustee will normally carry out the secretarial and general accounting for the trust as well as the legal or tax work. The authority to decide on "matters of routine management" stems from his or her appointment by the trustees as agent.<sup>19</sup>

2.8 We turn now to consider whether there is any obligation on trustees to meet or whether an effective decision can be the product of any other methods of exchanging views.

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<sup>12</sup> (1881) 8R 983 at 984.

<sup>13</sup> At 984; see also *Gibb v Stanners* 1975 SLT (Notes) 30 where a trustee was removed by the remaining trustees in terms of a power to do so in the trust deed. However it had been exercised without prior notice to the trustee and that rendered the removal invalid.

<sup>14</sup> Mackenzie Stuart, p 61.

<sup>15</sup> *Darling v Darling* (1898) 25R 747, intimation of meeting of church trustees from pulpit in accordance with normal custom.

<sup>16</sup> (1895) 22R 968.

<sup>17</sup> At 972.

<sup>18</sup> *Wilson and Duncan*, paras 23-22 and 23-23.

<sup>19</sup> See para 3.4 below.

In the 19<sup>th</sup> century meetings were certainly regarded as an essential feature of trust business, as Lord President Inglis observed in *Wyse v Abbott*<sup>20</sup>

"It is of the essence of the duty of a body of trustees that they should meet and exchange views on the trust affairs."

2.9 Menzies,<sup>21</sup> Mackenzie Stuart<sup>22</sup> and Norrie and Scobbie<sup>23</sup> writing in 1913, 1932 and 1991 respectively make statements to similar effect. The last mentioned authors remark "Making decisions is a joint effort, and the trustees therefore have a duty to meet together and to consult with each other". On the other hand, Wilson and Duncan<sup>24</sup> in 1995 allow for the possibility of consultation by post or telephone. They state:

"The requirement of consultation with co-trustees, which affects even *sine quo non* trustees, involves that whenever possible questions arising in the trust administration will be considered at meetings of which fair notice and a reasonable opportunity to attend is given to all trustees. Circumstances may, of course, render meetings impracticable if not impossible and in such cases consultation by written or telephonic communication would usually be acceptable."

2.10 Meetings have to be held in those trusts where it is a statutory requirement.<sup>25</sup> Most trustees will usually hold at least an annual meeting to approve the accounts, review policy and generally look at the performance of the trust. But we understand that in current practice many decisions are made otherwise than as a result of face-to-face meetings. Trustees are often written to or emailed with information as to the circumstances of and the need for a decision and invited to respond by telephone, letter or email. If some written record is desired the trustees will be invited to sign a resolution or a minute will be prepared.

2.11 We think that the position as to meetings is unclear. On the one hand there is 19<sup>th</sup> century case law authority, adopted by many authors of text books, that trustees have a duty to meet. However, Wilson and Duncan do not regard meetings as essential and in modern practice meetings are considered to be only one of the ways by which trustees can take decisions. We think legislation might usefully provide a clear statement of the rules and that these should reflect current practice. The essential point is that all the trustees should be given an opportunity to put forward their views on the trust affairs in question. Modern methods of communication allow this to be done by means other than meetings. We do not wish to discourage trustees from holding meetings where they can be arranged and held easily. A meeting may well be the best way of exchanging views and arriving at a decision, especially if the business is contentious. We put forward the following proposal:

- 1. Legislation should be enacted providing that before a decision which binds the trustees can be made all the trustees must be given so far as is reasonably practicable:**

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<sup>20</sup> (1881) 8R 983 at 984.

<sup>21</sup> Para 173.

<sup>22</sup> P 61.

<sup>23</sup> P 96.

<sup>24</sup> Para 23-18.

<sup>25</sup> One example of such a trust is the Scottish Hospital Endowments Research Trust. The Endowments Trust is constituted under the National Health Service (Scotland) Act 1978, s 12 and Sch. 7. Rules for its administration are contained in SI 1953/1918. Of particular interest is rule 7 which states that the "Trust shall hold such meetings as are required for the discharge of their functions under the Act."

- (a) adequate prior notice of the matters to be decided, and
- (b) an opportunity to put forward their views, either by attending a meeting of the trustees or in any other manner.

The above rules should apply in the absence of any contrary provision in the trust deed.

## Majority and quorum

2.12 In normal language, "quorum" means the number of persons who must be present at a meeting for it to be valid and able to transact business.<sup>26</sup> A quorum in trust law is the proportion of the whole body of trustees who may make an effective decision without the consent or concurrence of the others, subject to the duty of consultation.<sup>27</sup> Erskine, dealing with tutors, says:<sup>28</sup>

"Where several are named, the number that is to make a quorum is usually fixed in the nomination itself, the concurrence of which number is requisite in every act of administration."

and Robert Bell states:<sup>29</sup>

"But the term [quorum] is also applied to that number of a nomination of persons... who are authorised, by the deed of nomination, to exercise the functions vested generally in the nominees."

2.13 A quorum also used to have a further function in that a trust did not come into existence unless the specified quorum accepted office.<sup>30</sup> Now a trust may exist even though none of the nominated trustees survives or accepts office. The court will on application appoint new trustees or some other method of appointment may be available.<sup>31</sup> The trust will also continue to exist if at some point the number of acting trustees falls below the quorum specified in the trust deed. It continues but with the quorum provisions inoperative<sup>32</sup> and the trustees may be under a duty to appoint sufficient new trustees to make up the quorum.<sup>33</sup>

2.14 Section 3 of the Trusts (Scotland) Act 1921 provides that:

"All trusts shall be held to include the following powers and provisions unless the

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<sup>26</sup> *New Shorter Oxford English Dictionary* (1997) "A fixed minimum number of members whose presence is necessary to make the proceedings of a meeting, society etc. valid."

<sup>27</sup> *Alexander's Trs v Dymock's Trs* (1883) 10R 1189, Lord President Inglis at 1195.

<sup>28</sup> I.7.15, see also Fraser, *Parent and Child*, (3<sup>rd</sup> edn, Edinburgh 1906) Part 1, p 281 "...but to every act the whole quorum [of tutors] must consent."

<sup>29</sup> R Bell, *A Dictionary of the Law of Scotland*, (Edinburgh 1826) Vol II, p 379.

<sup>30</sup> *Halley v Gowans* (1840) 2D 623, Lord Ordinary (Cunninghame) at 629.

<sup>31</sup> Wilson and Duncan, para 18-56; Trusts (Scotland) Act 1921, s 22.

<sup>32</sup> Wilson and Duncan, para 23-21; Norrie and Scobbie, p 98.

<sup>33</sup> Mackenzie Stuart, pp 60 and 294 - 295; Wilson and Duncan, para 23-21.

contrary be expressed (that is to say):-

- (a)
- (b)
- (c) A provision that a majority of the trustees accepting and surviving shall be a quorum;"

2.15 This is a re-enactment of section 1 of the Trusts (Scotland) Act 1861. These statutory provisions regarding the right of trustees to act by a majority were considered to be declaratory of the common law rule of ordinary administration.<sup>34</sup> Prior to 1861 there was some doubt as to whether an act of extraordinary administration could be carried out by a majority (or quorum if specified in the trust deed)<sup>35</sup> or whether the concurrence of all the trustees was required.<sup>36</sup> Even after 1861 McLaren thought the distinction remained and doubted whether acts of extraordinary administration were valid when executed by a majority of the trustees even if the trust deed declared them to be a quorum.<sup>37</sup> Today it is accepted that a majority or quorum may make an effective decision on any matter.<sup>38</sup> Conversely, no effective decision can be made unless it is agreed by a quorum.<sup>39</sup>

2.16 Because of section 3(c) of the Trusts (Scotland) Act 1921, majority and quorum are generally synonymous. Occasionally, however, trust deeds stipulate that the quorum is to be a larger or smaller number of acting trustees.<sup>40</sup> If so, then it is the quorum that may make an effective decision, not the majority. It is clear that if a decision is to be made by a quorum then all the trustees making up that quorum must concur.<sup>41</sup> A meeting of trustees which has a bare quorum present may not make an effective decision by a majority of those present.<sup>42</sup> For example where there are seven trustees, four will be a quorum if the trust deed contains no contrary provision. If at a meeting five trustees are present, the concurrence of four trustees (the quorum) not three (the majority of those present) is required to make an effective decision.

### Exceptions to decision-making by a quorum

2.17 We now look at the exceptions to the general rule that a quorum of surviving and accepting trustees may make a decision that binds the other trustees. These are: (a) where

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<sup>34</sup> J McLaren, *The Law of Wills and Succession*, (Edinburgh 1894) Vol II, para 1666; see also Erskine I.7.15 regarding tutors who states that in absence of any nomination of a quorum "the concurrence of the majority of the accepting nominees then alive is sufficient to give force to their acts of administration".

<sup>35</sup> *Campbell & McIntyre v Campbell* (1824) 3S 126; *McCulloch v Wilson* (1846) 9D 32, Lord Jeffrey at 34.

<sup>36</sup> Menzies, para 165; *Freen v Beveridge* (1832) 10S 727, Lord Ordinary (Moncrieff) at 732-733. Menzies (para 165) thought that the distinction had disappeared with the introduction of the statutory provision for a quorum in 1861.

<sup>37</sup> Para 1671.

<sup>38</sup> Mackenzie Stuart, p 61; Norrie and Scobbie, p 98.

<sup>39</sup> *Wolfe v Richardson* 1927 SLT 490.

<sup>40</sup> *Cambuslang West Church v Bryce* (1897) 25R 322, quorum 4 out of 9 trustees. Providing for a quorum which is less than a majority may be done in public trusts with a large number of trustees (in order to get a good spread of interests) where it may be difficult to get a majority to meetings. Any decision of a smaller quorum could be over-ruled by the other trustees who would be in the majority. A better solution is to have a small number of executive trustees coupled with a larger advisory board. This avoids any danger of "ping pong" between two sets of trustees, each a quorum, with different entrenched views.

<sup>41</sup> *Wilson and Duncan*, para 23-25; *Lynedoch v Ouchterlony* (1827) 5S 358.

<sup>42</sup> This is unlike the situation with local authorities where a meeting is quorate with one quarter of councillors present but the meeting may decide matters by a majority of those present; Local Government (Scotland) Act 1973, Sch 7, paras 4 and 5.

one or more of the trustees is appointed on a *sine quo non* basis, (b) where the trustees are appointed jointly, and (c) where one or more of the trustees has a personal interest in the decision.

2.18 If a *sine quo non* trustee is appointed by the truster, his or her concurrence to any act of trust administration must always be secured.<sup>43</sup> A *sine quo non* trustee has, in effect, a right of veto over decisions made by the remaining body of trustees.<sup>44</sup> He or she can refuse to consent to any change in administration or investment management. Appointing trustees on such a basis has long been considered to be impractical. In 1894 McLaren<sup>45</sup> described *sine quo non* appointments as a:

"most inconvenient arrangement, because the collective vote of the majority of the trustees is neutralised by the single vote of the *sine qua non*; and because, in the event of differences of opinion arising between the *sine qua non* and the other trustees, the business of the trust cannot be performed."

2.19 As a consequence of the administrative inconvenience they cause, *sine quo non* appointments are rare in modern practice and are used only in special circumstances. For example, where one of the trustees is the legal representative of a child beneficiary he or she might be appointed on a *sine quo non* basis,<sup>46</sup> and many banks appointed in testamentary or other family trusts other than as sole trustees will insist that the trust deed designates it as a *sine quo non* trustee.<sup>47</sup> Trusters should consider carefully before appointing a *sine quo non* trustee in view of the difficulties that could arise.

2.20 It is competent to appoint more than two trustees and to provide in the trust deed that they are to act jointly.<sup>48</sup> In this case, the trust deed disapplies the rule in section 3(c) of the Trusts (Scotland) Act 1921 (majority being a quorum) and all the trustees must agree to every trust decision.<sup>49</sup> In effect, each and every joint trustee is a *sine quo non* trustee. Again, joint trusteeship is virtually unknown in current practice.<sup>50</sup>

2.21 A number less than a majority or quorum may make a particular decision if one or more of the trustees is disqualified from acting in that matter due to an adverse interest.<sup>51</sup> Where the trust deed contains or is deemed to contain a provision that the majority is a quorum then a majority of the disinterested trustees form a quorum for that particular decision.<sup>52</sup> Thus in *Shanks v Aitken*<sup>53</sup> eight trustees were appointed, of which the majority resident in or within 10 miles of Glasgow were to form a quorum. Four trustees raised an action against another trust of which two of the trustees were also trustees and so had a conflicting interest. It was held that the four trustees had title and interest to sue as they

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<sup>43</sup> Menzies, para 162.

<sup>44</sup> Mackenzie Stuart, p 60.

<sup>45</sup> J McLaren, *The Law of Wills and Succession*, (Edinburgh 1894) Vol II, para 1656. He uses the term "*sine qua non*" rather than "*sine quo non*"

<sup>46</sup> Norrie and Scobbie, pp 97 - 98

<sup>47</sup> Wilson and Duncan, para 23-18, note 33.

<sup>48</sup> This should not be confused with the rule that trustees are the joint owners of the trust estate.

<sup>49</sup> Wilson and Duncan, para 23-18. Two trustees must always act jointly as there will be no majority or quorum.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, para 23-22.

<sup>52</sup> Menzies, para 181; *Blisset's Trs v Hope's Trs* (1854) 16D 482; *Neilson v Mossend Iron Co* (1885) 12R 499, especially Lord Shand at 516 - 7.

<sup>53</sup> (1830) 8S 639.

formed a quorum for the purposes of that litigation. It seems competent for the trust deed to provide that a trustee could participate in a decision even though personally interested.<sup>54</sup>

### **Proposals for reform**

2.22 The use of the word "quorum" in trust law is potentially misleading in view of the fact that trustees may make effective decisions otherwise than at meetings. We think it would be better to replace section 3(c) of the Trusts (Scotland) Act 1921 by a provision that does not use the concept of a quorum. The new statutory provision would also have to deal with *sine quo non* trustees, joint trustees and interested trustees where the simple majority rule does not apply. Accordingly, we put forward the following proposal:

- 2. There should be new statutory provisions in place of section 3(c) of the Trusts (Scotland) Act 1921 along the following lines:**
  - (a) For a decision to bind the trustees it must be made by a number of trustees at least equal to the majority of the trustees then acting, but a trustee who has a personal interest in a decision is not to be counted as an acting trustee and is to be disqualified from participating for the purposes of making that decision.**
  - (b) The above rule should apply in the absence of any contrary provision in the trust deed.**

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<sup>54</sup> Pension trust deeds often authorise employee-trustees to participate in distribution decisions even though they will be among the class to benefit, see *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32.

## Part 3 Appointment of agents, delegates, nominees and custodians; a general management power

### Introduction

3.1 In this Part we look at the various powers of trustees to delegate their functions to others. Sections A and B examine delegation, which may take two forms. First, there can be collective delegation by the trustees of some of their functions to an agent. The main issue with agents is the extent to which delegation of discretionary powers and functions should be allowed. Secondly, in many jurisdictions an individual trustee may appoint a co-trustee or a third party to exercise some or all of his or her functions (including discretionary powers), usually on a temporary basis. We consider whether this should be introduced into Scots law.

3.2 In Sections C and D we look at trustees' powers to employ nominees and custodians in relation to trust property and put forward proposals for reform. A nominee holds the property, typically securities, in its own name and appears to the world as the owner. There will be a separate private agreement between the nominee and the trustees acknowledging that the property is held on behalf of the trustees and setting out the terms of the nominee'ship. The term "custodian" is sometimes used for a nominee, especially in the investment field. A custodian proper holds in safe custody titles or other documents relating to trust property where the title stands in the name of the trustees or moveables that form part of the trust estate.

3.3 The final part, Section E, considers the various statutory management powers enumerated in section 4 of the Trusts (Scotland) Act 1921 and asks whether they could be replaced by the general power to manage which an owner has in relation to his or her own property and financial affairs.

### A: DELEGATION BY TRUSTEES TO AGENTS

#### Power to appoint agents

3.4 Trustees are not bound to perform the whole duties of the trust personally,<sup>1</sup> although more will be expected of remunerated trustees.<sup>2</sup> Trustees have a statutory power to appoint law agents and factors.<sup>3</sup> In addition, they have a more extensive common law power to appoint agents, managers, factors and others,<sup>4</sup> even to carry out tasks that the trustees could have performed themselves, provided such a course would be followed by reasonably

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<sup>1</sup> *Hay v Binny* (1861) 23D 594.

<sup>2</sup> *Wilson's Trs v Wilson's Creds* (1863) 2M 9.

<sup>3</sup> Trusts (Scotland) Act 1921, s 4(1)(f).

<sup>4</sup> Manager of brick-making business, *Mills v Brown's Trs* (1900) 2F 1035 (trustee could not be a paid manager but trustees could have appointed a paid manager); manager of a farm, *Dunbar's Trs* 1915 SC 860; factor of a Highland estate *Mackenzie v Baird's Trs* 1907 SC 838 (factor may do all a proprietor could do if he managed the estate in person, including managing unlet farms).

prudent people in relation to their own affairs. Indeed, trustees have a duty to appoint agents to carry out tasks that are beyond their skills and qualifications. The view has been expressed that this duty arises if an agent would be appointed by a reasonably prudent person who is looking after the affairs of others.<sup>5</sup>

3.5 Section 4(1)(f) of the Trusts (Scotland) Act 1921 empowers trustees "to appoint factors and law agents and pay them suitable remuneration". This could with advantage be reformulated. The words, "factors" and "law agents", have a 19<sup>th</sup> century ring to them. Also there seems no need to single out the providers of legal services. If legislation is to continue to have a statutory list of trustees default powers,<sup>6</sup> then we suggest that "agent" is used to cover all the types of people that trustees appoint to carry out trust business on their behalf. We therefore propose that:

**3. Section 4(1)(f) of the Trusts (Scotland) Act 1921 should be replaced by a provision empowering trustees to appoint agents and pay them suitable remuneration.**

3.6 The trustees' duty of care extends to the appointment of agents whom they reasonably believe to be competent and reputable.<sup>7</sup> It is good practice for the appointment of agents to be formally minuted. This serves to ensure that the trustees have applied their minds to the need for the appointment, its terms and the most suitable person to carry out the delegated tasks. They must also exercise reasonable and appropriate supervision, for example by checking a factor's administration and accounts periodically.<sup>8</sup> The trustees should also review the need for the agency and the terms on which it is conducted. Provided the trustees have appointed and supervised their agent properly they are not liable to the beneficiaries for losses caused by any default on the agent's part.<sup>9</sup> We tend to think that these matters do not require to be made the subject of specific legislative provision.

### **Extent of delegation**

3.7 We turn now to discuss the limits of decisions which trustees can competently entrust to agents. The line that is usually drawn is between delegation of ministerial or administrative functions (which is permissible) and delegation of discretionary functions (which is not). As Menzies says:

"The trustee must never surrender his own judgement; the confidence of the truster was placed in his discretion and his alone."<sup>10</sup>

The author makes the same point later in relation to the appointment of a factor:

"Care must be taken that none of the discretionary functions of the trustee is allowed to pass into his hands, for any such delegation of his duties by the trustee would be a breach of trust on his part. The factor acts only in a ministerial capacity."<sup>11</sup>

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<sup>5</sup> Menzies, para 193.

<sup>6</sup> See paras 3.41 - 3.51 below where we ask for views on giving trustees a general power of administration.

<sup>7</sup> Wilson and Duncan, para 23-30.

<sup>8</sup> *Sym v Charles* (1830) 8S 741; Menzies, para 244.

<sup>9</sup> *Seton v Dawson* (1841) 4D 310.

<sup>10</sup> Para 196.

<sup>11</sup> Para 242.

In *Innes v Reid's Trustees*<sup>12</sup> an objection that a title was defective in that commissioners appointed by the trustees had carried through the sale of trust property was rejected as this was a ministerial act. The trustees had not delegated their discretion, which was in deciding to sell, and had appointed commissioners merely to carry the sale through. Another example is *Esdale v Inland Revenue*<sup>13</sup> where trustees purported to authorise the law agents to the trust to decide whether and to what extent to lend capital to the life tenant for her better maintenance. Lord President Normand in the course of his opinion said:<sup>14</sup>

"On any view it appears to be impossible that the trustees should delegate their discretionary power, whether it be under the trust deed or obtained from some other source, to law agents and authorise them to make advances as they (the law agents) might think fit."

3.8 A modern illustration is *Scott v Occidental Petroleum (Caledonia) Ltd*<sup>15</sup> which concerned damages payable to a widow and her two children in respect of her husband's death in the Piper Alpha disaster. The widow wished to direct the damages into separate trust funds for each child in which she was to be one of the trustees. This was held incompetent as it involved delegation of all the powers and duties of the mother as tutor and trustee for her children.<sup>16</sup> Lord President Hope in delivering the opinion of the First Division said that two principles had to be considered; the power of a tutor or any fiduciary to appoint a factor or agent to administer the estate, and non-delegation of tutorship itself. The latter was analogous to the principle that trustees cannot delegate their trust. The proposed arrangement went far beyond the appointment of a factor. He said it amounted to:<sup>17</sup>

"Nothing less than the delegation to the proposed trustees of all the powers and authority of the tutor herself, including not only the power of day-to-day administration of the sums involved but also the taking of all decisions as to the way in which those sums are to be held and applied for the children's benefit until they are of full age."

But the Lord President went on to say<sup>18</sup> that the mother could appoint an agent or factor to perform acts of administration on her behalf "to enable her to be relieved of much of the day-to-day burdens of administration and investment of the sums involved".

3.9 The current Scottish position is clear in principle: trustees may delegate to agents administrative tasks required to carry out the purposes of the trust but not acts that require the exercise of discretion or judgment. However, the dividing line is sometimes unclear in practice and depends to some extent on the size and nature of the trust estate and the objectives of the trust. In larger trusts it is unrealistic that the trustees should have to take all the decisions that require the exercise of judgment. For example, where the trust estate includes a substantial business or a large agricultural estate the trustees have to give wide authority to the manager or factor and allow him or her a fair amount of discretion in the day-to-day running of the business or estate.

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<sup>12</sup> (1822) 1S 518.

<sup>13</sup> (1936) 20 TC 700.

<sup>14</sup> At 709.

<sup>15</sup> 1990 SLT 882.

<sup>16</sup> In 1990 parents were tutors and as such trustees to their pupil children, Law Reform (Parent and Child) (Scotland) Act 1986, ss 2 and 8, Trusts (Scotland) Act 1921, s 2. Now parents are legal representatives of their children, Children (Scotland) Act 1995, ss 1 and 2, but are not trustees, 1995 Act, Sch 4, para 6.

<sup>17</sup> At 886E.

<sup>18</sup> At 887F.

3.10 Much of the pressure for reform or clarification in this area appears to come from the management of investments.<sup>19</sup> Where a trust has a substantial portfolio it is not feasible for the trustees to obtain and take advice on and consider every decision to acquire or dispose of investments. Increasingly, large portfolios are managed on a discretionary basis by expert fund managers who are authorised to take investment decisions without reference to the client. Discretionary management is often adopted by prudent people with large sums to invest. Such funds may be able to achieve superior performance because the managers can seize profitable investment opportunities as and when they arise. Scots trust law almost certainly allows the use of discretionary fund managers. Provided the fund managers operate to agreed policy guidelines set by the trustees and their performance is monitored, there is no delegation to an extent that is incompatible with trusteeship and the trustees' duty of care. The situation is analogous to appointing a factor to manage an estate, which is certainly permissible. The thrust of the Inner House's opinion in *Scott v Occidental Petroleum (Caledonia) Limited*<sup>20</sup> seems to be that the mother could delegate administration of the trust fund and its investments but not the decisions as to the application of the income and capital for the children's benefit.

3.11 There appears to be general agreement in the jurisdictions we have studied that administrative acts should be capable of delegation while discretionary and distributive functions must remain the province of the trustees.<sup>21</sup> The present issue is whether it is possible to provide clearer guidance by way of new statutory provisions.

3.12 The draft legislation recommended by the Ontario Law Reform Commission and, separately, by the British Columbia Law Institute provides that trustees may employ agents to carry out any act required to be done in the administration of the trust including the execution of documents, the payment, transfer and receipt of money or other property and the giving of discharges for receipts, but cannot delegate "the exercise of any express or statutory discretion as to the transfer or distribution of trust property to or among beneficiaries of the trust". However, we can see difficulties with this formulation. If it is taken to mean that everything other than the non-delegable exclusions can be carried out by agents, then in our view it goes too far. Trustees should not be permitted to surrender every function other than distribution. Even if they hand over the day-to-day administration of the trust and its assets they should still decide basic policy, set guidelines, communicate them to agents and keep these matters under review. Not to do so would in our view amount to a breach of their duty of care. On the other hand, it should be open to trustees to authorise agents to act upon or implement distributive decisions made by the trustees. Another interpretation is that there remains a range of functions that are neither clearly delegable nor clearly non-delegable, so that the grey areas of the current law would remain unresolved. We are not attracted by this draft legislative formula.

3.13 Another approach, exemplified by section 11(2) of the English Trustee Act 2000, quoted in Appendix A,<sup>22</sup> is to empower trustees to appoint agents to carry out any function other than specified non-delegable functions. The non-delegable functions in the 2000 Act are those relating to the distribution of the trust assets, the allocation of fees and other

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<sup>19</sup> Report on *Trustees' Powers and Duties*, paras 4.4 - 4.10; British Columbia Law Institute, *Report on Statutory Powers of Delegation by Trustees* (2000) III, A.

<sup>20</sup> 1990 SLT 882.

<sup>21</sup> See Appendix A, paras 7 – 17.

<sup>22</sup> Para 7.

payments between income and capital, the appointment of a new trustee and the power to delegate or to appoint a nominee or custodian. To avoid too extensive an authority being conferred, section 13 provides that when delegating asset management functions (eg trust funds to a discretionary fund manager) trustees must provide the agent with a written policy statement giving guidance as to how the functions are to be exercised and which the agent is required to observe. Even so, the range of delegable functions seems too extensive. Trustees should have to decide the basic strategy for carrying out the trust and whether to retain or dispose of substantial assets. In Part 6 below we propose that trustees should have a statutory default power to make advances of capital and payments out of income to beneficiaries. These are clearly non-delegable functions.

3.14 The opposite approach to that in the Trustee Act 2000 is to set out what the trustees may delegate to agents. But this is not feasible given the wide variety of trusts and the multitude of tasks that trustees have to perform. The current difficulties are not with the principles that limit delegation but in applying them to the wide variety of circumstances that are met with in practice. At present we consider that it would be very difficult to frame rules applicable to all trusts that provided clearer guidance than the existing common law. However, we seek views on the following question:

4. **Is the existing common law on the extent to which trustees may delegate their powers to agents satisfactory or would it be better to have new statutory provisions?**

## Foreign property

3.15 Some jurisdictions allow delegation of discretionary trust powers in relation to foreign property. In Australia, in all jurisdictions except South Australia and Tasmania there are statutory provisions allowing trustees to appoint an agent to exercise any discretion or trust or power in relation to out-of-state property.<sup>23</sup> The appointee is not a true delegate in that he or she remains subject to the trustees' directions and does not act in their place. The appointee is merely an agent upon whom extensive powers have been conferred.<sup>24</sup> In England and Wales, section 23(2) of the Trustee Act 1925 permitted trustees to delegate all or any of their functions including their fiduciary powers in relation to property situated outwith the United Kingdom. The Law Commission in the Report on *Trustees' Powers and Duties* recommended<sup>25</sup> the abolition of this power on the grounds that it was a relic of an era when communications were slow and that it was anomalous for trustees' powers over trust property to vary with its location. Section 23(2) of the Trustee Act 1925 was repealed by the Trustee Act 2000.<sup>26</sup> The view has been expressed, however, that the common law which was put in legislative form by section 23(2) has now revived.<sup>27</sup>

3.16 There is no equivalent legislation in Scotland. Many Scottish trusts hold foreign property which is managed by agents appointed with extensive authority but who are not autonomous. Such agents remain subject to the control and direction of the trustees. We

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<sup>23</sup> See for example New South Wales Trustee Act 1925, s 55.

<sup>24</sup> Ford and Lee, para 9500.

<sup>25</sup> Para 4.13.

<sup>26</sup> Sch 2, Pt II, paras 23 and 24, Sch 4, Pt II.

<sup>27</sup> Lewin, para 36.10C.

do not think that special provisions should be enacted now in relation to foreign property. They are a relic of the days when communications were slow and uncertain. The existing common law is adequate in relation to foreign property in that it permits trustees to delegate matters within a policy framework. We therefore make no proposals for the introduction of legislation giving Scottish trustees different powers of delegation in relation to property situated outwith the United Kingdom.

## B: DELEGATION BY A TRUSTEE TO A SUBSTITUTE

3.17 In England and Wales, section 25 of the Trustee Act 1925 permitted a trustee who would be absent from the United Kingdom for more than one month to delegate his or her discretionary powers.<sup>28</sup> The Trustee Delegation Act 1999 which implemented the Law Commission's Report on *The Law of Trusts: Delegation by Individual Trustees*<sup>29</sup> substituted a new version of section 25. As before, delegation may be for any reason and remains limited to a maximum of 12 months.<sup>30</sup> A statutory form of appointment for a trustee power of attorney is prescribed and a separate power is needed in respect of each trust for which delegation is to apply.<sup>31</sup> A trustee may delegate to a co-trustee even if this results in only one effective trustee.<sup>32</sup> Notice of the delegation has to be given to all the trustees and every person who can appoint a new trustee and this notice must specify the reason for the delegation. The delegating trustee is vicariously liable for any default of the delegate.

3.18 We have some doubt as to whether similar legislation is necessary for Scotland. It is necessary in England and Wales because of the rule that any trust decision has to be made by all the trustees. In the absence of delegation by an absent or ill trustee trust business could grind to a halt. Scottish trustees on the other hand can make decisions by majority unless the trust deed provides otherwise. It is interesting to note that temporary statutory provision was made for delegation by English trustees serving abroad during the First and Second World Wars,<sup>33</sup> but that these enactments did not apply to Scotland. Allowing delegation of discretionary functions, even on a temporary basis, blurs the present useful distinction between delegable administrative and non-delegable discretionary functions.<sup>34</sup> We doubt the practical need for such delegation. Nowadays going abroad for a period seldom prevents a trustee from acting as such. However, a delegate or substitute could be useful where there were only two trustees and one of them anticipated a temporary inability to attend to future trust business (for example, because of an elective operation), since otherwise there would be no quorum with power to act.

3.19 In order to elicit views we ask the following questions:

**5. Should legislation be introduced authorising a trustee to delegate his or her discretionary functions on a temporary basis? If so, what restrictions, if any, should be imposed?**

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<sup>28</sup> This was amended in 1971 by s 9 of the Powers of Attorney Act 1971 to allow delegation for any reason but the period of delegation was limited to 12 months.

<sup>29</sup> Law Com No 220, 1994.

<sup>30</sup> Trustee Act 1925, s 25(2)(b).

<sup>31</sup> *Ibid*, s 25(6).

<sup>32</sup> *Ibid*, s 25(3). Section 7 of the Trustee Delegation Act 1999 however prevents each of the trustees appointing the same outside attorney or appointing the same co-trustee (other than a trust corporation) to exercise their functions in relation to receipts for capital sums or conveyances of land where two trustees are required to act.

<sup>33</sup> Trust (War Facilities) Acts 1914 and 1915; Emergency Provisions (Trustee Powers) Act 1939.

<sup>34</sup> See Proposal 4 at para 3.14 above.

## C: APPOINTMENT OF NOMINEES

### The current law

3.20 Trustees are under a duty to ingather and become the owners of the trust assets. Thereafter they are under a duty to keep the trust estate under their own control and will be liable for any losses arising out of a breach of this duty.<sup>35</sup> In *Ferguson v Paterson*<sup>36</sup> the law agent for the trust had received a substantial sum from the realisation of a bond and held it in his firm's bank account while looking for a new permanent trust investment. After some months, as no suitable investment could be obtained, the trustees directed that he put the money on deposit receipt. He put the money on deposit receipt in his own name for behoof of the trustees. On seeing this receipt the trustees ordered that the money be re-deposited in name of all the trustees but they failed to ensure that this was done. The law agent uplifted the money for his own use and became bankrupt and the trustees were held liable for the loss. Lord Davey explained<sup>37</sup> that the first duty of trustees was to preserve the trust estate under their own control and that they should not allow it to remain under the sole control and at the sole disposition of a third party such as a lawyer.

3.21 A more recent case is *Tibbert v McColl*<sup>38</sup> where the trustees of a company pension fund paid a cheque payable to them in respect of money due to a retiring employee into the company's overdrawn bank account. The company went into liquidation before payment was made to the employee. The trustees were held to have committed a clear breach of trust by putting trust funds outwith their control and so were liable for the loss. As Lord Justice-Clerk Ross said, in delivering the opinion of the Second Division:<sup>39</sup>

"Even if that account had been in credit at the time, the defenders as trustees would thereby have been alienating the funds in favour of a third party, namely, the company. The trust funds would thus have been at the risk of creditors of the company who could have arrested the bank account and prevented the defenders from withdrawing the money from that account. ....What is plain as plain can be is that once the cheque from Sun Life Assurance Society was paid into the company's bank account, the defenders as trustees no longer had these funds under their control as trustees. The defenders as trustees could not operate the company's bank account.

In these circumstances we are satisfied that what the defenders did with the sum which they had received from the Sun Life Assurance Society amounted to clear breach of trust."

Transferring the ownership of trust assets to a third party nominee is thus a breach of trust, irrespective of the care the trustees took in selecting the nominee.

3.22 Solicitors, factors and other agents often need funds for transacting current trust business. Allowing such persons to hold trust money and have access to it without further authorisation from the trustees is permissible provided the amount is appropriate and the

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<sup>35</sup> Wilson and Duncan, para 23-03.

<sup>36</sup> (1900) 2F(HL) 37, also known as *Wyman v Paterson*.

<sup>37</sup> At 46.

<sup>38</sup> 1994 SC 178.

<sup>39</sup> At 182C - 182F.

arrangement is kept under review,<sup>40</sup> or funds are entrusted for a purely temporary purpose, such as the immediate purchase of investments.<sup>41</sup>

### Proposals for reform

3.23 Having trust property, particularly investments, held by nominees has many benefits. Discretionary management of funds where the managers buy and sell to an agreed policy but without referring individual transactions to clients is greatly facilitated by the managers or their nominees holding the securities as owners.<sup>42</sup> If the clients were the owners the managers would have to send out the required transfer forms and get them returned signed within the normal five day settlement period currently in operation. It would often be difficult to achieve this with trustees where more than one person has to sign. While it is possible to deal on a longer settlement period the costs are greater and the dealing prices are often worse. Another advantage of nominee holdings is that it is one way in which CREST, a cheaper electronic settlement system for shares, can be used by trustees.<sup>43</sup> Furthermore, a change in trustees requires to be notified to the registrars of the companies in which the trust has shares. Where there is a large portfolio or frequent changes of trustees this task can become burdensome. It can be avoided by having all the shares held by a nominee. Nominee holdings also help to shield trust assets from unwanted publicity and discovery because the share register will show only the nominee as the holder of the shares. Other uses for nominees noted by the Law Commission in the Report on *Trustees' Powers and Duties* are to provide an administrative service in relation to investments (with the nominee company collecting dividends, remitting money periodically or investing it and dealing with tax matters) and to facilitate dealing in those overseas investments which are traded using computerised systems.<sup>44</sup>

3.24 Nevertheless, the use of nominees poses risks for trustees and the beneficiaries. Instead of a real right in the trust assets themselves the trustees have only a personal right against the nominees. Losses may occur due to fraud, negligence or insolvency of the nominees. But these risks can be minimised in several ways. First, the trustees should select a nominee who is reputable and carries adequate insurance against fraud or negligence. Also the Financial Services Compensation Scheme, set up in December 2001 under the Financial Services and Markets Act 2000, covers losses arising out of investments, deposits and insurance. The scheme will pay the first £30,000 and 90% of the next £20,000 (ie a maximum of £48,000) of losses arising from a firm's inability to meet claims for payment of money due or claims for bad advice or poor management. Trusts with substantial assets in nominee holdings would receive less than full compensation under this scheme. A nominee company under the control of Scottish solicitors will be covered by the Scottish Solicitors Guarantee Fund<sup>45</sup> which compensates clients for losses arising out of a solicitor's dishonesty. The risk of insolvency can be greatly reduced if the nominee carries out no other business, especially activities such as stock lending.

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<sup>40</sup> *Mustard v Mortimer's Trs* (1899) 7 SLT 71.

<sup>41</sup> *Ferguson v Paterson* (1900) 2F(HL) 37, Lord Chancellor Halsbury at 38.

<sup>42</sup> The securities are usually held by a nominee, such as a bank, rather than by the managers themselves.

<sup>43</sup> Companies Act 1989, s 207 and Uncertificated Securities Regulations 2001, SI 2001/3755. Reg 40 specifically provides that trustees are empowered to use CREST.

<sup>44</sup> Para 5.3. The report was joint in respect of trustee investments only.

<sup>45</sup> Set up under s 43 of the Solicitors (Scotland) Act 1980.

3.25 Secondly, it would be possible to set up the nominee as an express trust. The assets so held by the nominee would not then form part of its estate on insolvency. In the absence of an express trust, a trust may be implied from the nominee holding property "on behalf of", or "for behoof of", the trustees or similar expressions and the circumstances of the case.<sup>46</sup> In *Bain Petitioner* Lord Cameron of Lochbroom, delivering the opinion of the Extra Division said<sup>47</sup> that:

"The question is whether the circumstance of the case are consistent with the interpretation of a trust, and, in particular, its creation, and absolutely inconsistent with any other interpretation."

3.26 The alternative interpretation is that nominee is merely a contractual arrangement, with the nominee being bound to return the property on demand. Lord Drummond Young in *China National Star Petroleum Co v Tor Drilling (UK) Ltd*<sup>48</sup> considered that a nominee bank account is a trust account, saying:

"Account (c) was opened in the name of the defender, but the defender has accepted that, in so doing, it holds its rights in the account as nominee of the owner. That implies a trust relationship; a nominee necessarily holds in trust."

3.27 Another disadvantage of nominee holdings is that the trustees are not the registered shareholders of investments held by their nominees. They therefore cannot exercise shareholder rights (such as voting at company meetings) and do not get company literature such as annual reports.<sup>49</sup> The issue of "shareholder" rights in relation to nominee holdings is under consideration by the Department of Trade and Industry. The Company Law Review's Final Report *Modern Company Law for a Competitive Economy* published in July 2001 recommended that section 360 of the Companies Act 1985 should be amended so that companies were permitted to recognise the rights of persons other than the registered holder, including the right to appoint proxies, and that the rights of proxies should be improved.<sup>50</sup> The Government in its White Paper, *Modernising Company Law*,<sup>51</sup> accepted this recommendation, but is considering the practicality of legislation compelling companies to recognise the rights of persons other than the registered holder

3.28 Nominees are a common feature of current practice and we think the law should authorise trustees to use them. The benefits of nominees holding trust assets seem to outweigh the disadvantages provided the trustees take appropriate care in selecting a suitable nominee. The main advantage is in relation to marketable securities, but we consider that it would be unnecessarily limiting to restrict trustees' powers of using nominees to such assets as the USA Uniform Trust Code does. We prefer the liberal approach of the Trustee Act 2000 for England and Wales and the Guernsey Law of 1989.<sup>52</sup>

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<sup>46</sup> *Gillespie v City of Glasgow Bank* (1879) 6R(HL) 104, Lord Chancellor Cairns at 107.

<sup>47</sup> 2002 SLT 1112 at 1116.

<sup>48</sup> 2002 SLT 1339 at 1344.

<sup>49</sup> Some nominees will obtain company literature for the trustees, but such a service is relatively expensive if a large number of holdings is involved. Persons with nominee holdings are also excluded from any benefits or perks granted by companies to their shareholders, but this is of little relevance to trustees.

<sup>50</sup> Para 7.4.

<sup>51</sup> Cm 5553, July 2002.

<sup>52</sup> See Appendix A, para 20.

3.29 The Trustee Act 2000 restricts the appointment of nominees to (a) those who carry on a business which consists of or includes acting as a nominee (b) a body corporate controlled by the trustees or (c) a body corporate recognised by the Law Society (under section 9 of the Administration of Justice Act 1985) as suitable to provide professional services such as are provided by solicitors or multi-national partnerships.<sup>53</sup> The Guernsey Law simply refers to "professional persons". Restricting nominees to "professional" nominees reduces the risk as such bodies should have proper administrative procedures in place to avoid errors and adequate insurance to cover any losses and would be covered by the Financial Services Compensation Scheme. Arguably a statutory default provision should err on the side of caution. Another restriction might be that the nominee should not be a trustee, or an agent of the trustees, in order to avoid a conflict of interests. On the other hand, the USA Code has no restrictions on nominees, and a modern style current in Scotland empowers trustees "to allow the estate or any part thereof to be registered in the names of .... any person, firm, corporation or other body as nominee of my Trustees".<sup>54</sup> If the nominee were set up as an express trust then perhaps no restrictions would be necessary.

3.30 It should be stressed that our proposal merely prevents the use of a nominee being of itself a breach of trust. Trustees would remain liable for losses arising out of an inappropriate use of a nominee, the selection of an unsuitable nominee or failure to keep the nominee's performance under review. The proposed new power would be without prejudice to the existing power of trustees to allow agents to hold funds for the purpose of transacting trust business.<sup>55</sup> The proposed new statutory power in relation to nominees would be a default provision. It would be open to trusters to include clauses in the trust deed prohibiting the use of nominees or making more generous provisions.

3.31 We seek views on the following proposal and question:

6. **Trustees should, unless the trust deed provides otherwise, have a new statutory power to transfer ownership of trust property to a person who would hold it as a nominee of the trustees**
7. **Should such a nominee be restricted to one providing nominee services in the normal course of its business? Should there be any other restrictions and if so what?**

## D: APPOINTMENT OF CUSTODIANS

### The current law

3.32 Trustees are under a duty to take proper care of the trust estate.<sup>56</sup> Title deeds relating to trust property, securities and other documents can be held on behalf of all the trustees by one of the trustees or the trustees' solicitor.<sup>57</sup> Another option is to deposit them

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<sup>53</sup> S 19.

<sup>54</sup> Barr *et al*, Style 10, cl 11(8).

<sup>55</sup> See para 3.22 above.

<sup>56</sup> Menzies, para 328.

<sup>57</sup> Wilson and Duncan, para 23-04.

in a bank for safe custody. This last course should be followed for bearer securities<sup>58</sup> which should be deposited in the name of all the trustees.<sup>59</sup> Corporeal moveables may have to be put into storage on behalf of the trustees.<sup>60</sup> Any titles and papers held in safe custody should be inspected periodically either by the trustees themselves or by someone carrying out an audit or inspection on their behalf.<sup>61</sup> Safe custody of documents of title is less important nowadays due to the availability of extracts and the widespread use of nominees to hold securities.

### **A need for reform?**

3.33 We think that the existing common law in this area is satisfactory. Documents of title, other trust papers and valuables may be held by one of the trustees, the trustees' solicitor or another organisation such as a bank. We note that the current published styles of trust deeds do not contain any clauses expressly dealing with custody of trust documents. This lends some support to our provisional view that legislative intervention is unnecessary. Elsewhere we have proposed<sup>62</sup> that the existing statutory prohibition<sup>63</sup> on trustees holding bearer securities be repealed so that trustees would be entitled to acquire and hold bearer securities to the same extent as an ordinary prudent person. The duty of care would require keeping the securities in safe custody with a bank or similar body. In order to elicit views from those with practical experience of the problems we ask:

- 8. Should any changes be made to the existing law in relation to the custody of trust documents and other valuables, and if so what changes should be made?**

## **E: GENERAL MANAGEMENT POWERS**

### **Introduction**

3.34 Originally, trustees' powers were limited to those expressed in the trust instrument or implied from the purposes of the trust.<sup>64</sup> This was unsatisfactory for trustees and those dealing with them as there was uncertainty as to what powers were implied. The Trusts (Scotland) Act 1867 therefore conferred on trustees various powers over the trust estate in all trusts,<sup>65</sup> but these powers could be excluded or supplemented by clauses in the trust deed. The 1867 Act was subsequently amended and then replaced altogether by section 4 of the Trusts (Scotland) Act 1921 which by and large consolidated the then existing statutory

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<sup>58</sup> Section 15 of the Trusts (Scotland) Act 1921 prohibits trustees from holding bearer securities beyond a reasonable time for conversion or realisation, unless authorised by the trust deed.

<sup>59</sup> Wilson and Duncan, para 23-04.

<sup>60</sup> D Walker, *Principles of Private Law* (3rd edn), Vol IV, p 37.

<sup>61</sup> Wilson and Duncan, para 23-04.

<sup>62</sup> Paras 7.9 – 7.12.

<sup>63</sup> Trusts (Scotland) Act 1921, s 15.

<sup>64</sup> See Bell, I, 37.

<sup>65</sup> S 2.

provisions. Section 4 has in turn been amended<sup>66</sup> several times since 1921 and now consists of a lengthy and detailed list of powers.

3.35 The powers of trustees are now those expressly given in the trust deed, those implied by the trust deed and trust purposes, those conferred by section 4 of the Trusts (Scotland) Act 1921 or other statutes,<sup>67</sup> and those conferred by the court. Trustees' powers of investment of the trust estate are regulated by the Trustee Investment Act 1961. The 1961 Act sets out a detailed list of investments in which trustees are authorised to invest. Most trust deeds confer much wider powers, but some statutory trusts restrict the permitted investments to certain types of 1961 Act investments. In 1999 in our joint report with the Law Commission, *Trustees' Powers and Duties*, we considered that a "list approach" to investment was no longer appropriate and that trusts and their beneficiaries would benefit from the increased returns that could be achieved if trustees had more freedom to invest. We therefore recommended that trustees should have the same powers of investment as if they were the beneficial owners of the trust estate and that much of the Trustee Investment Act 1961 should be repealed.<sup>68</sup> The need to obtain proper advice would serve to prevent trustees investing rashly. Beneficiaries would be protected since trustees owed a duty of care in making investments. We now consider whether there should be a similar reform of the other powers of administration of the trust estate.

### The current law

3.36 Section 4(1) of the Trusts (Scotland) Act 1921 provides:

"In all trusts the trustees shall have power to do the following acts, where such acts are not at variance with the terms or purposes of the trust, and such acts when done shall be as effectual as if such powers had been contained in the trust deed, viz:

- (a) To sell the trust estate or any part thereof, heritable as well as moveable.
- (b) <sup>69</sup>
- (c) To grant leases of any duration (including mineral leases) of the heritable estate or any part thereof and to remove tenants.
- (d) To borrow money on the security of the trust estate or any part thereof, heritable as well as moveable.
- (e) To excamb any part of the trust estate which is heritable.

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<sup>66</sup> S 4(1)(b), the power to grant feus, was prospectively repealed by the Abolition of Feudal Tenure etc. (Scotland) Act 2000, s 76 and Sch 13, Part 1. S 4(1)(ee) was added by the Trusts (Scotland) Act 1961, s 4 in response to the decision in *Moss's Trs v King* 1952 SC 523 (see the *Ninth Report of the Law Reform Committee for Scotland* Cmnd. 1102). S 4(1)(o) and (p) were added by the Trustee Investment Act 1961, s 10.

<sup>67</sup> See the National Parks and Access to the Countryside Act 1949, s 16(5)(b) (power to enter into agreements for land to be managed as a nature reserve), the Forestry Act 1967, Sch 2 (power to enter into forestry dedication agreements), the Countryside (Scotland) Act 1967, s 13(5) (power to enter into access agreements), the Ancient Monuments and Archaeological Areas Act 1979, s 18(5) (power to execute a guardianship deed, grant an authorised servitude, enter into an agreement concerning ancient monuments), the Field Monuments Act 1972, s 1(4) and the Schedule (power to enter into acknowledgement payment agreements), the National Parks (Scotland) Act 2000, s 15(4) (power to enter into management agreements).

<sup>68</sup> These recommendations were implemented for England and Wales by the Trustee Act 2000, s 3 and Sch 2(l) para 1. In June 2004 the Scottish Executive published a consultation draft of the Charities and Trustee Investments (Scotland) Bill which contained provisions implementing our recommendations.

<sup>69</sup> Para (b) "To grant feus of the heritable estate or any part thereof" was repealed by the Abolition of Feudal Tenure etc. (Scotland) Act 2000, Sch 13, Part I.

(ee) To acquire with funds of the trust estate any interest in residential accommodation (whether in Scotland or elsewhere) reasonably required to enable the trustees to provide a suitable residence for occupation by any of the beneficiaries.

(f) To appoint factors and law agents and to pay them suitable remuneration.

(g) To discharge trustees who have resigned and the representatives of trustees who have died.

(h) To uplift, discharge, or assign debts due to the trust estate.

(i) To compromise or to submit and refer all claims connected with the trust estate.

(j) To refrain from doing diligence for the recovery of any debt due to the truster which the trustees may reasonably deem irrecoverable.

(k) To grant all deeds necessary for carrying into effect the powers vested in the trustees.

(l) To pay debts due by the truster or by the trust estate without requiring the creditors to constitute such debts where the trustees are satisfied that the debts are proper debts of the trust.

(m) To make abatement or reduction, either temporary or permanent, of the rent, lordship, royalty, or other consideration stipulated in any lease of land, houses, tenements, minerals, metals, or other subjects, and to accept renunciations of leases of any such subjects.

(n) To apply the whole or any part of trust funds which the trustees are empowered or directed by the trust deed to invest in the purchase of heritable property in the payment or redemption of any debt or burden affecting heritable property which may be destined to the same series of heirs and subject to the same conditions as are by the trust deed made applicable to heritable property directed to be purchased.

(o) To concur, in respect of any securities of a company (being securities comprised in the trust estate), in any scheme or arrangement –

- (i) for the reconstruction of the company,
- (ii) for the sale of all or any part of the property and undertaking of the company to another company,
- (iii) for the acquisition of the securities of the company, or of control thereof, by another company,
- (iv) for the amalgamation of the company with another company, or
- (v) for the release, modification, or the variation of any rights, privileges or liabilities attached to the securities or any of them,

in like manner as if the trustees were entitled to such securities beneficially; to accept any securities of any denomination or description of the reconstructed or purchasing or new company in lieu of, or in exchange for, all or any of the first mentioned securities; and to retain any securities so accepted as aforesaid for any period for which the trustees could have properly retained the original securities.

- (p) To exercise, to such extent as the trustees think fit, any conditional or preferential right to subscribe for any securities in a company (being a right offered to them in respect of any holding in the company), to apply capital money of the trust estate in payment of the consideration, and to retain any such securities for which they have subscribed for any period for which they have power to retain the holding in respect of which the right to subscribe for the securities was offered (but subject to any conditions subject to which they have that power); to renounce, to such extent as they think fit, any such right; or to assign, to such extent as they think fit and for the best consideration that can reasonably be obtained, the benefit of such right or the title thereto to any person, including any beneficiary under the trust."

The section 4 powers may imply others. For example, there is no statutory power to grant servitudes, but this may be implied from the wider power of sale.<sup>70</sup>

3.37 The powers in section 4 relating to the administration and management of the trust and the trust estate are default provisions in that there is no power to do any of the above acts if it is at variance with the terms or purposes of the trust. A particular power may be excluded by express provision in the trust deed or by implication from the purposes of the trust. Trustees can apply to the court for authority to exercise one or more of the section 4 powers notwithstanding that it is at variance with the terms and purposes of the trust.<sup>71</sup>

3.38 Trustees may apply to the court for powers over and above those granted by the trust deed or section 4(1). They may do this in a number of ways:

- (a) an application under section 1 of the Trusts (Scotland) Act 1961;
- (b) an application to the *nobile officium*; or
- (c) an application under the statute governing the particular trust.

3.39 Section 1 of the Trusts (Scotland) Act 1961 extends the common law principle that trusts can be varied if all the beneficiaries and potential beneficiaries agree. Under this provision the court may approve an arrangement varying or revoking all or any of the trust purposes or enlarging the trustees' powers of managing or administering the trust estate. The court is empowered to give approval on behalf of incapable, under-age or future beneficiaries,<sup>72</sup> if all the other existing beneficiaries consent. There have been applications under this section to extend the powers of investment beyond those permitted by the trust deed and the Trustee Investments Act 1961.<sup>73</sup> The *nobile officium* has been used to grant powers not contained in the trust deed or section 4. For example, trustees have successfully petitioned for power to purchase heritable property.<sup>74</sup> The power sought must be necessary or strongly expedient<sup>75</sup> and must not be prohibited by the trust deed.<sup>76</sup> The *nobile officium* cannot be used where a statutory remedy is available.<sup>77</sup>

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<sup>70</sup> See 18 *Stair Memorial Encyclopaedia*, para 449.

<sup>71</sup> Trusts (Scotland) Act 1921, s 5.

<sup>72</sup> Trusts (Scotland) Act 1961, s 1(a)–(c).

<sup>73</sup> *Henderson, Petr.*, 1981 SLT (Notes) 40.

<sup>74</sup> *Anderson's Trs* 1921 SC 315, *Fletcher's Trs* 1949 SC 330.

<sup>75</sup> *Gibson's Trs* 1933 SC 190.

<sup>76</sup> See *Berwick* (1874) 2 R 90, *Scott's Hospital Trs* 1913 SC 289, *Hall's Trs v McArthur* 1918 SC 646.

<sup>77</sup> For example Trusts (Scotland) Act 1921, s 5.

3.40 It is common for trust deeds to grant wider powers of management and administration than those contained in section 4 of the 1921 Act.<sup>78</sup> Even for short-lived executry trusts it is common to give the executors full powers as if they were absolute beneficial owners.<sup>79</sup> This does not give trustees unlimited power: they must still carry out their duties as trustees and act in accordance with the purposes of the trust. But it allows them to achieve the trust purposes without any administrative impediment. In longer trust styles, it is common to give trustees full powers as if absolute beneficial owners and then also give a list of specific powers without prejudice to the generality.<sup>80</sup> This is done so there is no question about whether the trustees have a particular power. The specific powers listed are wider than those in section 4 (1) of the 1921 Act. Examples of such additional powers include a power to hire out moveables, wide powers of investment, a power to insure, more widely worded powers of management of the heritable estate, power to carry on a business, power to lend money with or without security, or borrow without security, and power to allow beneficiaries to use any part of the estate.<sup>81</sup> Neither a general power nor specific administrative powers authorise trustees to act in breach of their fiduciary duties. For this reason, trust deeds often contain express provisions authorising certain breaches.<sup>82</sup> For example, it is commonplace for a trust deed to include a charging clause authorising the remuneration of trustees and, especially in the commercial field, authority may be given for the trustees to sell their own property to the trust and to buy trust property.

### Proposals for reform

3.41 The statutory default powers are to be found in section 4(1) of the Trusts (Scotland) Act 1921. There are separate default powers in relation to investment of the trust estate which are presently contained in the Trustee Investments Act 1961. Some of the section 4(1) powers are very generally expressed, such as the power "to sell the trust estate or any part thereof, heritable as well as moveable". Others have been inserted to meet specific situations that have arisen. Thus in 1961 the Trustee Investments Act 1961 added paragraphs (o) and (p) conferring powers on trustees as holders of securities of limited companies so that they may concur in reconstruction schemes and subscribe for bonus offers.

3.42 One option for reform would be to amend the current list by adding new powers and widening existing powers. We call this the list option. A different approach would be to confer on the trustees a general power to take any steps or perform any actions that owners could take or perform in relation to their own property - the general power approach. It would also be possible to have a general power either with a list of specific powers or a list of specific derogations.

3.43 The list approach has the advantage of continuity. Those involved with trust law have been familiar with a statutory list of default powers for nearly 150 years. If the default powers are inadequate to carry out the trust purposes then trusters can confer additional powers in the trust deed and many do so. Examples of additional powers include carrying on a business, lending or borrowing money without security, acquiring land and allowing

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<sup>78</sup> Barr *et al*, para 7.02.

<sup>79</sup> *Ibid*, Styles S1.6, S2.24, S3.8, S4.7, S8.9, S11.9.

<sup>80</sup> *Ibid*, Styles S5.12, S6.13, S7.10, S9.8, S10.11.

<sup>81</sup> *Ibid*, paras 7.04 – 7.27.

<sup>82</sup> *Ibid*, para 7.03.

beneficiaries to make use of any part of the trust estate.<sup>83</sup> In the Report on *Trustees' Powers and Duties* (1999) we recommended the addition of a default power to acquire land, whether or not for investment.<sup>84</sup> These and other powers could be added to the existing statutory list. A list is useful for trustees in that they can readily determine whether or not they have power to carry out the action under consideration and, perhaps more importantly, can readily demonstrate to any third party involved that the action is within their powers.

3.44 The disadvantage of the list option is its inflexibility. Trustees are restricted to the powers in the list, any additional powers in the trust deed and the powers that can be readily implied from them. It is not possible to include every power trustees are likely to need, even trustees of ordinary trusts. Over the lifetime of a trust new situations or new ways of carrying out transactions may emerge for which the listed powers are inadequate. In Part 5 we propose that trustees should be entitled to apply to the court for extra powers that are necessary or expedient in the circumstances that have arisen.<sup>85</sup> A simple method of obtaining additional powers would mitigate the inflexibility of the list approach.

3.45 The general power approach would confer on trustees a wide power to manage, invest and generally deal with the trust estate. The trustees would be given by statute all the powers that a competent adult had in relation to his or her own property. However, because of their position as trustees, they would be subject to controls that are absent in the case of ordinary owners. Trustees have fiduciary duties and a duty of care towards the beneficiaries. They must also use the trust estate to further the purposes of the trust. A general power approach has been adopted elsewhere.<sup>86</sup> The Quebec Civil Code confers on full administrators general powers of administration, although section 1307 specifically mentions the power to sell property, grant a real right over it or change its destination. In England and Wales trustees of a trust of land have all the powers of an absolute owner.<sup>87</sup> A general power exists in other areas of Scots law. Section 64(1) of the Adults with Incapacity (Scotland) Act 2000 empowers the sheriff in appointing a guardian to an adult to confer general powers, ie power to deal with all aspects of personal welfare and power to manage the property and financial affairs of the adult.<sup>88</sup>

3.46 Trustees exercising the proposed general power would be bound by the terms and purposes of the trust in the same way as they are in relation to the powers listed in section 4(1) of the Trusts (Scotland) Act 1921. Section 5 of the 1921 Act empowers the court to authorise trustees to exercise any of those powers even though that would be at variance with the terms and purposes of the trust. Authority is granted only if the transaction would be "in all the circumstances expedient for the execution of the trust".<sup>89</sup> Section 5 would still have a role to play if trustees had a wide general power as there could be doubts as to whether a proposed transaction was in accordance with the terms or purposes of the trust.

3.47 Having a general statutory default power would be in line with current practice where such a power is often combined with a list of specified powers.<sup>90</sup> Even if drafters of trust

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<sup>83</sup> *Ibid*, Styles S5.12, S6.13, S7.10, S9.8, S10.11

<sup>84</sup> Para 2.48. In June 2004 the Scottish Executive published a consultation draft of the Charities and Trustee Investments (Scotland) Bill which contains provisions implementing that recommendation.

<sup>85</sup> See para 5.38

<sup>86</sup> See Appendix A, paras 26 – 29.

<sup>87</sup> Trusts of Land and Appointment of Trustees Act 1996, s 6(1).

<sup>88</sup> The guardianship order may alternatively confer only such powers as are specified in the order, s 64(1).

<sup>89</sup> S 5; *Chalmers Hospital (Banff) Trs* 1923 SC 220; *Tennent's JF v Tennent* 1954 SC 215.

<sup>90</sup> *Barr et al*, Styles S5.12, S6.13, S7.10, S9.8, S10.11.

deeds prefer to carry on the practice of enumerating the trustees' powers, a general statutory default power would ensure that there were no gaps. In trusts that are going to last for many years it is impossible to foresee the powers the trustees may need in the future. New types of transactions or new legislative requirements may arise for which the trustees' powers might be inadequate. We have proposed elsewhere<sup>91</sup> that the court should have power to confer additional powers on trustees where they are necessary or expedient, but this would involve considerable expense and effort.

3.48 The main argument against a general power is that it confers too much power on the trustees. The default position should perhaps err on the conservative side. Trusters and their advisors preparing trust deeds might have to specify the powers that they do not wish to confer. It would not be a useful reform if trust deeds had to contain a long list of exceptions to a general power. However, it should be remembered that the conferment of a power merely authorises the trustees to carry out the act in question. They still have to consider whether the act would further the purposes of the trust and not be in conflict with their duties as trustees. It would be possible for the legislation conferring a general power to specify exceptions.<sup>92</sup> The Adults with Incapacity (Scotland) Act 2000 adopts this approach with guardianship.<sup>93</sup> Views are sought from those with experience of preparing trust deeds on what powers (if any) might usefully be excluded from a general power.

3.49 Another argument against legislation conferring only a general power is that there may be doubts as to the extent of the trustees' authority. The uncertainty problem affects trustees more than it affects third parties who are considering entering into a transaction with the trustees. Section 2 of the Trusts (Scotland) Act 1961 provides that where trustees carry out a transaction specified in paragraphs (a) to (ee) of section 4(1) of the Trusts (Scotland) Act 1921 (sale, lease, excambion, borrowing money or acquiring a residence for a beneficiary) the validity of the transaction is not challengeable on the ground that it was at variance with the terms and purposes of the trust. We assume that if trustees had a general power, section 2 would be amended to refer to any transaction carried out under the general power. Section 2 does not protect trustees from claims by co-trustees or beneficiaries that the act in question was at variance with the terms and purposes of the trust.<sup>94</sup> It does however protect third parties as they do not need to investigate whether the trustees have power to carry out the proposed transaction.

3.50 It would be possible for the legislation to provide, for the avoidance of doubt, that certain specified powers were deemed to be included in the general power. The Age of Legal Capacity (Scotland) Act 1991 defines transactions for the purposes of the Act as meaning any transaction having legal effect and then, for the avoidance of doubt, lists seven types of transactions as being included.<sup>95</sup> In the trust law field possible candidates for an "avoidance of doubt list" would be power to acquire and dispose of land and power to transfer trust property to persons as nominees of the trustees.

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<sup>91</sup> See paras 5.37 – 5.38.

<sup>92</sup> Some or all of these could be reinstated by means of express provisions in the trust deed if the truster so desired.

<sup>93</sup> Even if a general personal welfare power is conferred, the guardian is not entitled to place an unwilling adult in a hospital for treatment for mental disorder or consent to certain forms of medical treatment on the adult's behalf, s 64 (2)(a) and (b).

<sup>94</sup> S 2(2).

<sup>95</sup> S 9; for example, making a will and raising or defending civil proceedings.

3.51 We put forward the following alternative proposals:

- 9. A**
- (1)** Section 4(1) of the Trusts (Scotland) Act 1921 should be replaced by a power to administer, invest and generally deal with the trust estate as if the trustees were the beneficial owners, subject to any contrary provisions in the trust deed. In the exercise of this power the trustees would be bound by their duty of care, their fiduciary duties and the terms and purposes of the trust.
  - (2)** Should legislation conferring a general power expressly confer, for the avoidance of doubt, any specific powers, and, if so, what powers should be conferred?
  - (3)** Should legislation conferring a general power exclude specific powers, and, if so, what powers should be excluded?

**OR**

- 9. B** The list of powers set out in section 4(1) of the Trusts (Scotland) Act 1921 should be amended by the inclusion of additional powers. We invite views on what additional powers should be added to the present list.

# Part 4 Appointment, Resignation and Removal of Trustees

## Overview

4.1 In this Part we look at the ways in which the constitution of a body of trustees in a continuing trust may change over time. Section A examines the assumption of new trustees by existing trustees in terms of sections 3 and 21 of the Trusts (Scotland) Act 1921, and the appointment of new trustees by the court under its common law powers or section 22 of the 1921 Act. The section concludes with consideration of a scheme whereby the beneficiaries could in certain circumstances appoint new trustees. We then turn to examine the ways in which trustees may vacate the office of trustee. In Section B we undertake an analysis of trustees' power to resign and the circumstances in which resignation must be authorised by the court. The power of non-gratuitous trustees to resign is currently closely circumscribed and we put forward proposals for reform in this area. Finally, Section C looks at the removal of a trustee from office. Removal procedures may be effected judicially either at common law or under the statutory powers contained in section 23 of the Trusts (Scotland) Act 1921. However, resort to these procedures is rare as normally the trustee in question will, or can be persuaded to, resign. Nevertheless, sometimes compulsory measures have to be employed and we put forward proposals for reform of these court-based procedures and consider the introduction of non-judicial mechanisms for removing trustees.

## A: APPOINTMENT OF TRUSTEES

### Introduction

4.2 Section 3(b) of the Trusts (Scotland) Act 1921 gives trustees power to assume or appoint new trustees unless the trust deed makes provision to the contrary.<sup>1</sup> The power is exercisable by a quorum if the trustees number more than two. The new trustees are appointed by a deed of assumption in terms of section 21 of the 1921 Act. The court also has a power of appointment under section 22 of the 1921 Act and at common law. The truster will normally have appointed the initial trustees<sup>2</sup> and may occasionally have reserved a power in the trust deed to appoint further trustees or have conferred power on some other person to appoint them. In this section we assume that there are no such powers in the trust deed and that the deed contains no provisions limiting or excluding the trustees' powers of assumption.

4.3 Two other methods of appointing trustees should be noted. The first is limited to private trusts. The truster while alive has, by implication of law, power to appoint new trustees to the trust if there are no acting trustees.<sup>3</sup> The second method applies only to

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<sup>1</sup> Such a contrary expression need not be explicit. For example, in *Thomson's Tr, Petr* 1948 SLT (Notes) 28 it was held that a clause in a trust deed expressly stating that the testator's trustees were to be his wife and anybody else she may select to act alongside her was equivalent to a direction that, so long as she was alive, she alone would have the power to assume new trustees.

<sup>2</sup> In certain circumstances they will have been appointed by the court.

<sup>3</sup> *Glentanar v Scottish Industrial Musical Association Ltd* 1925 SC 226.

charitable trusts. The Lord Advocate may appoint new trustees<sup>4</sup> if there are no trustees or if the existing trustees are unable or unwilling to ensure that the number of trustees does not drop below three.<sup>5</sup>

### **Ex officio trustee**

4.4 Some uncertainty exists as to whether an *ex officio* trustee may assume, or take part in the assumption of, new trustees. In *Vestry of St Silas Church v Trustees of St Silas Church*<sup>6</sup> doubts were expressed as to the competency of this procedure, although the judges reserved their opinions. The point came before Temporary Judge Coutts in *Balnagowan Trustees, Petitioners*.<sup>7</sup> He held that an *ex officio* trustee could in general assume another trustee by virtue of the power given to "trustees" by section 3 of the Trusts (Scotland) Act 1921. Section 2 of the 1921 Act defines "trustee" to include an *ex officio* trustee for the purposes of that Act and while section 3 is subject to any contrary indication in the trust deed, the mere fact of the trustee being appointed on an *ex officio* basis was not a sufficient contrary intention. We tend to agree with this opinion but ask for views on the following questions:

- 10. Is there a need to clarify the law on the power of *ex officio* trustees to assume new trustees? If so, should there be legislation expressly giving trustees such power?**

### **Appointment by the court**

4.5 Section 22 of the Trusts (Scotland) Act 1921 provides:

"When trustees cannot be assumed under any trust deed, or when any person who is the sole trustee appointed in or acting under any trust deed is or has become insane or is or has become incapable of acting by reason of physical or mental disability, or being absent continuously from the United Kingdom for a period of at least six months, or by having disappeared for a like period, the Court of Session or an appropriate sheriff court may, upon the application of any party having interest in the trust estate, after such intimation and enquiry as may be thought necessary, appoint a trustee or trustees under such deed..."

This provision stems from section 12 of the Trusts (Scotland) Act 1867. It is said to cover most of the situations in which judicial appointment of trustees is found necessary.<sup>8</sup> A common example of judicial appointment is where a sole trustee dies without having assumed new trustees.<sup>9</sup>

4.6 The Court of Session also has a common law power to appoint trustees by virtue of its *nobile officium*. This was extensively used before a statutory power to assume new

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<sup>4</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 13.

<sup>5</sup> Acts done by less than three trustees would be valid, *Taylor, Petr* 2000 SLT 1223 (construing a similar provision in a pension scheme trust deed).

<sup>6</sup> 1945 SC 110.

<sup>7</sup> 1999 SLT 817.

<sup>8</sup> Wilson and Duncan, para 21-02.

<sup>9</sup> *Zoller, Petr* (1868) 6M 577; *Graham, Petr.* (1868) 6M 958. In a private trust the truster, if alive, may appoint new trustees, see para 4.3 above.

trustees was conferred on gratuitous trustees.<sup>10</sup> The common law power remains available today but is used only where the statutory powers in section 22 of the 1921 Act are inapplicable. Examples of appointment at common law are: where the trust administration is deadlocked because of disagreement between the trustees;<sup>11</sup> where the sole trustee is removed due to unsatisfactory conduct;<sup>12</sup> and where the "office" of the *ex officio* trustees ceases to exist.<sup>13</sup>

4.7 We consider that the current position could with advantage be simplified. The court should have a new statutory power to appoint a trustee or trustees in any case where this is necessary for the administration of the trust. Such a power would enable the court to appoint new trustees in all the situations that are presently dealt with by section 22 and the common law. It seems unnecessary to mention specific situations such as the incapacity of a sole trustee. Although the application would be capable of being made by one of several trustees, the procedure could not be used by a minority of the trustees to force the appointment of additional trustees against the wishes of the majority. Such an appointment would not be necessary for the administration of the trust.<sup>14</sup>

4.8 Accordingly, we propose that:

11. **The powers of the courts to appoint new trustees at common law or under section 22 of the Trusts (Scotland) Act 1921 should be reformulated in a new statutory provision along the following lines:**

**The court should have power, on the application of one or more of the trustees or any person with an interest in the trust estate, to appoint a trustee where this is necessary for the administration of the trust.**

### **Appointment of new trustees by the Lord Advocate**

4.9 Section 13 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 deals with the appointment of new trustees to a charitable trust. The trustees are under a statutory duty to appoint new trustees if the number drops below three. If the trustees are unwilling or unable to make an appointment then the Lord Advocate may appoint new trustees.<sup>15</sup> We think that this second provision should apply to non-charitable public trusts.<sup>16</sup> The justification for the Lord Advocate's intervention is that Scots law regards public trusts in a kindly light. In the absence of such a provision, a non-charitable public trust with no acting

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<sup>10</sup> Trusts (Scotland) Act 1861, s 1.

<sup>11</sup> *Aikman, Petr* (1881) 9R 213; *Taylor, Petr* 1932 SC 1.

<sup>12</sup> *Lamont v Lamont* 1908 SC 1033.

<sup>13</sup> *Coal Industry Social Welfare Organisation, Petr* 1959 SLT (Notes) 3.

<sup>14</sup> Unless the majority were so failing in their duties that they ought to be removed.

<sup>15</sup> S 13(2).

<sup>16</sup> For charitable trusts it is likely that this function will be transferred to the Office of the Scottish Charity Regulator, a body established by the draft Charities and Trustee Investments (Scotland) Bill.

trustees would be burdened with the expense of applying to the court for the appointment of new trustees. We propose that:

- 12. The Lord Advocate's power to appoint new trustees under section 13(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 should be extended to non-charitable public trusts.**

### **Appointment by beneficiaries**

4.10 Another issue is whether beneficiaries should be able to appoint new trustees as is the case in England and Wales under the Trusts of Land and Appointment of Trustees Act 1996.<sup>17</sup> In general, we are not in favour of this for the reasons set out in paragraph 4.51 below in relation to removal of trustees by beneficiaries. Briefly, removal could inhibit impartial administration and would affect the balance of rights and interests in the existing trust structure. Giving a power of appointment would enable the beneficiaries to appoint sufficient new trustees to outvote the existing trustees which would be tantamount to removing the latter. However, there are two situations, both involving a sole trustee, where a power of appointment by beneficiaries might be considered useful. The first is where the sole trustee or the sole surviving trustee has died and there is no individual available or entitled to appoint new trustees. There are a number of ways of dealing with this situation, but unless the trust administration is at a stage where all that remains to be done is for the trust estate to be conveyed to those entitled to it, they all involve an application to the court. A non-judicial process could be quicker and cheaper. On the other hand the deed of appointment by beneficiaries should have to be signed by all the beneficiaries in order to prevent one group of beneficiaries securing the appointment of trustees to run the trust in line with their wishes. Third parties who transacted in good faith with the appointed trustees would have to be protected against any defect in the deed of appointment as otherwise they would have to investigate the situation to satisfy themselves of its validity, for example that all the beneficiaries had signed.<sup>18</sup> A sheriff court application for appointment of new trustees which was unopposed would not be much more expensive or slower than preparing a deed and having it signed by all the beneficiaries. Moreover, an application to the court would have to be made if, for any reason, not all the beneficiaries consented.

4.11 The second possible situation where the beneficiaries might become entitled to appoint new trustees is if a sole trustee becomes incapable of acting or unfit to continue acting. At paragraphs 4.49 – 4.52 below we propose that the other trustees should be able to remove a trustee who has been certified as mentally incapable or convicted of a crime involving dishonesty. This proposed procedure would, of course, not be available where the trustee in question was the sole trustee. However, the objections set out in the previous paragraph to appointment of new trustees by beneficiaries apply with greater force since replacement involves removing the trustee, an element which is absent if the sole trustee has died.

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<sup>17</sup> Ss 19 and 20 and see Appendix A, paras 44 - 45.

<sup>18</sup> A similar problem arises when new trustees are assumed by existing trustees, but the investigation may be easier.

4.12 Our provisional view is that beneficiaries should not be able to appoint trustees, even in the situations set out above. The additional legislative provisions that would be necessary would complicate the law for little practical advantage. In order to elicit views we make the following negative proposal and ask the following questions:

13. (1) **The present law should continue whereby beneficiaries are not entitled to appoint new trustees, unless such power is conferred by the trust deed.**
- (2) **Should exceptions be made to this general rule where the sole trustee:**
- (a) **has died,**
  - (b) **has been certified as being incapable, or**
  - (c) **has been convicted of a crime involving dishonesty;**
- and there is no other person entitled to act as trustee and no other person is entitled under the trust deed to appoint a new trustee?**
- (3) **If any such appointment by beneficiaries were to be introduced should it have to be made by a deed executed by all of them?**

## B: RESIGNATION OF TRUSTEES

### The current law

4.13 At common law, trustees had no general right to resign.<sup>19</sup> Extra-judicial resignation required the consent of all the beneficiaries (if of full legal capacity) and co-trustees,<sup>20</sup> or an express power of resignation in the trust deed. In addition, the court would authorise resignation if that would be in the general interest of the trust. In *Dick's Trustees v Pridie*<sup>21</sup> a trustee who was in poor health applied for authority to resign. It was held that it was in the interest of the trust for him to resign.

4.14 A statutory power to resign was first conferred on gratuitous trustees by section 1 of the Trusts (Scotland) Act 1861. There was uncertainty as to the classes of trustee to whom this power applied. Various attempts were made to clarify the law by enactment of provisions in the Gratuitous Trusts (Scotland) Act 1863, the Trusts (Scotland) Act 1867 and the Trusts (Scotland) Amendment Act 1884. Cases under the 1861 Act as amended illustrate the attitude of the courts to resignation by non-gratuitous trustees. A trustee aged 74 who had acted for many years and received an annuity of £20 per year for acting was

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<sup>19</sup> Mackenzie Stuart, p 306.

<sup>20</sup> Wilson and Duncan, para 22-15. cf 24 *Stair Memorial Encyclopaedia*, para 164, where it is stated that the consent of all of the beneficiaries or *at least* all the co-trustees is required.

<sup>21</sup> (1855) 17D 835.

allowed to resign.<sup>22</sup> In *Orphoot, Petitioner*<sup>23</sup> a sheriff-substitute accepted the office of trustee and a legacy of 100 guineas. It became clear that the estate was of such a size and complexity that acting as trustee was incompatible with his official duties. He was allowed to resign and he repaid the legacy. However, it was not of itself sufficient for resignation that a non-gratuitous trustee offered to repay the legacy. Thus in *Scott v Muir's Trustees*<sup>24</sup> a testamentary trustee who was entitled to a legacy of £100 petitioned for authority to resign as the duties involved were more onerous than he had initially anticipated. Even though the trustee offered to forego the legacy the petition was dismissed. Lord Justice-Clerk Macdonald observed:<sup>25</sup>

"Such a ground is not sufficient to interpose authority to his resignation."

4.15 The 19<sup>th</sup> century statutory provisions have now been replaced<sup>26</sup> by section 3 of the Trusts (Scotland) Act 1921. In terms of section 3(a) of the 1921 Act, unless the contrary is expressed in the trust deed, all trusts shall be held to include the power of any trustee to resign the office of trustee. To this general rule there are four exceptions:

- (1) a sole trustee who has not assumed new trustees,<sup>27</sup>
- (2) a judicial factor<sup>28</sup> or an executor dative,<sup>29</sup>
- (3) a trustee "who has accepted any legacy or bequest or annuity expressly given on condition of the recipient thereof accepting the office of trustee",<sup>30</sup> and
- (4) a trustee "appointed to the office on the footing of receiving remuneration for his services".<sup>31</sup>

In this section we concentrate on the last two exceptions.<sup>32</sup> The position of trustees who have accepted a legacy or bequest or annuity conditional on acting as trustee is further regulated by the 1921 Act. The court may, on application, permit them to resign and may attach to this permission such conditions with respect to repayment or otherwise of the legacy as it thinks just.<sup>33</sup> It should be noted that this proviso for repayment only appears to apply to 'legacy' *stricto sensu*, but Mackenzie Stuart regarded "legacy" as being used in a wide sense to cover bequest and annuity.<sup>34</sup>

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<sup>22</sup> *Alison and another, Petrs* (1886) 23 SLR 362.

<sup>23</sup> (1897) 24R 871.

<sup>24</sup> (1894) 22R 78.

<sup>25</sup> *Ibid* at 79.

<sup>26</sup> The 1921 Act, Sch C, repealed the 1861, 1867 and the 1884 Acts. The 1863 Act was repealed by the Statute Law Revision Act 1893.

<sup>27</sup> S 3, proviso (1).

<sup>28</sup> *Ibid*, proviso (3).

<sup>29</sup> Succession (Scotland) Act 1964, s 20.

<sup>30</sup> S 3, proviso (2).

<sup>31</sup> *Ibid*.

<sup>32</sup> Where a sole trustee wishes to resign but has not assumed new trustees who have accepted office, the trustee may apply to the court for the appointment of new trustees or a judicial factor under the Trusts (Scotland) Act 1921, s 19(2). After such an appointment has been made the trustee can resign. This situation would be most unusual as the sole trustee would normally appoint new trustees and then resign. Judicial factors and executors dative are appointed by the court which should also be involved in authorising any resignation and appointing a replacement.

<sup>33</sup> Trusts (Scotland) Act 1921, s 3, proviso (2).

<sup>34</sup> Mackenzie Stuart, p 309.

4.16 There have been very few reported cases on the resignation provisions in the 1921 Act. In *Johnston, Petitioner*<sup>35</sup> a trustee who had received a £50 legacy on accepting office was permitted to resign when he averred that the trust estate was comprised mostly of shares issued by a company of which he was a director and shareholder. The shares were to be disposed of and under the articles of association of the company the shares fell to be valued by the board of directors and to be offered first for sale at such valuation to the other shareholders in the company. There was therefore a clear conflict of interest between the trustee's duties as trustee and his powers and duties as director of the company. The Lord Ordinary (Pitman) confirmed the need for an application to the court in these circumstances:

"The application was necessary on account of section 3 of the Trusts (Scotland) Act, 1921, under which a trustee who has accepted a legacy is not entitled to resign without the consent of the Court."<sup>36</sup>

The trustee was permitted to resign without repayment of the legacy, but as he should have foreseen the conflict of interest he had to pay the expenses of the petition himself.

4.17 The only other reported case, *Collie, Petitioner*,<sup>37</sup> concerned a solicitor who was a trustee and had been appointed law agent to the trustees "with the usual professional remuneration for his services". However, by the time he petitioned the court for authority to resign other partners in the law firm were acting as agents and so he had ceased to be a "remunerated" trustee. He had received no other remuneration as trustee and the Lord Ordinary (Pitman) dismissed the petition as unnecessary and incompetent since the petitioner was essentially a gratuitous trustee. The opinion is unfortunately brief so it is difficult to ascertain whether the decision is based on the fact that the petitioner was no longer receiving any remuneration or that the petitioner had never actually received any remuneration for his services as trustee but rather as law agent to the trustees.

4.18 The absence of reported cases under section 3 of the 1921 Act may be a consequence of the common practice of including a clause in trust deeds reserving the right of resignation to any trustee or executor who receives some benefit such as a legacy or remuneration for acting as such.<sup>38</sup> Moreover, most professional trustees who receive remuneration for services rendered are remunerated as agents of the trustees rather than as trustees. Arguably, they do not fall within the class of remunerated trustees who have to apply to the court in terms of proviso (2) of section 3 of the Trusts (Scotland) Act 1921.<sup>39</sup>

### **Proposals for reform**

4.19 We support the general rule in section 3 of the Trusts (Scotland) Act 1921 that trustees should be entitled to resign unless the contrary is expressed in the trust deed. However, proviso (2), which requires trustees who are remunerated or accept a legacy to have to apply to the court for authority to resign, seems in need of reform. Such trustees should be entitled to resign in the same way as any other trustees. Unwilling trustees should not be forced to continue to act. Moreover, the trust is likely to suffer if a trustee is unable for

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<sup>35</sup> 1932 SLT 261.

<sup>36</sup> *Ibid*, at 262.

<sup>37</sup> 1933 SLT 46.

<sup>38</sup> See Barr *et al*, where the authors include a power for trustees to resign in all suggested drafting styles: para 3.23 and p 393 ff. Wilson and Duncan state that it is also the practice of banks and similar concerns to require the trust deed appointing them to allow them to resign at will, para 22-21.

<sup>39</sup> That is to say, a trustee "appointed to the office on the footing of receiving remuneration for his services."

personal reasons to give proper attention to its administration. The question of repayment of any legacy or other remuneration should be left to the rules of unjustified enrichment. The courts should therefore be involved only in the event of disputes about such repayment.

4.20 We invite views on the following proposal:

14. **Proviso (2) to section 3 of the Trusts (Scotland) Act 1921 (a trustee who has accepted a legacy, bequest or annuity conditional on accepting office and a trustee who was appointed on a remunerated basis not entitled to resign without prior judicial approval) should be repealed.**

## C: REMOVAL OF TRUSTEES

### Introduction

4.21 Resignation is a preferable alternative to removal when the aim is for a trustee to leave the trust. In practice, resignation tends to be utilised as often as possible and resort to the procedures for removal of trustees is consequently rare. However, in some circumstances removal is the only option. For example, a trustee may refuse to resign or may be unable to resign on account of mental incapacity or the restrictions<sup>40</sup> discussed above. We examine the court-based procedures available to effect the removal of a trustee and put forward proposals for their reform and also consider the introduction of non-judicial mechanisms for removing trustees. The sequestration of the trust estate and the appointment of a judicial factor is an alternative to removal. If this course is followed the trustees remain in office but with no power over the estate.<sup>41</sup> We intend to look at this topic in our forthcoming examination of judicial factors.<sup>42</sup>

### The current law

4.22 **Common law.** Removal of a trustee is achieved at common law by application to the Court of Session which in the exercise of the *nobile officium* has a general discretion to remove a trustee. The petition is presented to the Outer House<sup>43</sup> by one or more of the trustees or beneficiaries.

4.23 Before removing a trustee, the court must be satisfied that the beneficiaries would be prejudiced or the trust purposes obstructed if the trustee were to continue in office.<sup>44</sup> Minor irregularities or technical illegalities are not generally sufficient. As Lord President Inglis said in *Gilchrist's Trustees v Dick*.<sup>45</sup>

"[I]n order to justify us in adopting so extreme a measure as the removal of a trustee, there must be something more than mere irregularity or illegality. We are not in the habit of removing trustees unless there has been a decided malversation of office,

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<sup>40</sup> Paras 4.13 – 4.20.

<sup>41</sup> *Foggo* (1893) 20R 273, Lord President Robertson at 275; N M L Walker, *Judicial Factors*, (Edinburgh, 1974), p 33.

<sup>42</sup> *Sixth Programme of Law Reform*, Scot Law Com No 176, (2000), paras 2.9 – 2.10; *Thirty-ninth Annual Report 2003*, p 17.

<sup>43</sup> RC 14.2(c)(ii).

<sup>44</sup> *Orr Ewing's Trs v Orr Ewing* (1885) 13R(HL) 1, Lord Blackburn at 23.

<sup>45</sup> (1883) 11R 22 at 24.

and there is nothing of that kind here. There is no suggestion that the trustees did not act in perfectly good faith."

This statement was applied in *Shariff v Hamid*<sup>46</sup> where a petition for the removal of trustees was dismissed as their conduct fell far short of malversation of office.<sup>47</sup>

4.24 Persistent disregard of duties may also be a ground for removal. In *Walker*<sup>48</sup> two trustees who went abroad and failed to answer correspondence were removed as no trust business could be transacted. In a later case, an assumed trustee was removed when he persistently failed or delayed to deal with correspondence or return trust documents sent for signature.<sup>49</sup> Lord President Clyde observed:<sup>50</sup>

"It seems to me that a complete and unexplained contempt of trust duty – persisted in, as here, notwithstanding every reasonable remonstrance and producing if not complete deadlock, something closely approaching to it – is a sufficient ground for removing a trustee."

4.25 A conflict between the trustee's personal interests and fiduciary duties will usually result in removal.<sup>51</sup> However, where a trustee had been appointed by a testator who had considered the possibility of such a conflict, removal was not granted.<sup>52</sup> It was suggested by Lord President Inglis in *Whyte and Others, Petitioners*<sup>53</sup> that where all the beneficiaries apply for the removal of a trustee this might be taken as a good reason for removal without imputing blame. However, in that case the trustee had utterly failed to follow the directions of the truster in relation to the trust. While the fact that all or a substantial majority of the interested parties request removal may be considered material, it seems that the court will not exercise its powers unless a more substantial ground is established. Support for this is found in *McWhirter v Latta*<sup>54</sup> where Lord Lee commented that trustees who were carrying out their duties would not be removed simply to provide the beneficiaries with a more acceptable administration.<sup>55</sup>

4.26 Insolvency is not, in itself, a sufficient ground to remove a trustee. However, it may be sufficient to justify removal when taken in combination with other relevant circumstances.<sup>56</sup> Absence from the United Kingdom, even when short of the statutory six month period mentioned in section 23 of the Trusts (Scotland) Act 1921, may justify removal of a trustee where this impedes the execution of trust business,<sup>57</sup> as may permanent illness or physical or mental incapacity.

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<sup>46</sup> 2000 SLT 294.

<sup>47</sup> See also *Brodie of Brodie v Secretary of State for Scotland*, Lady Smith, 6 June 2002, unreported.

<sup>48</sup> (1868) 6 M 973.

<sup>49</sup> *MacGilchrist's Trs v MacGilchrist* 1930 SC 635.

<sup>50</sup> *Ibid.*, at 638.

<sup>51</sup> *Fleming v Craig* (1863) 1M 850, a sole trustee misusing marriage contract funds; *Cherry's Trs v Patrick* 1910 SC 32, one trustee suing the others on the basis that the truster had defrauded him.

<sup>52</sup> *Dryburgh v Walker's Trs* (1873) 1R 31, family settlement in which some of the trustees were given lifetime loans by the testator which the trustees were to leave outstanding unless they considered it necessary to have them repaid. The trustees declined to require repayment from one individual.

<sup>53</sup> (1891) 28 SLR 901 at 902.

<sup>54</sup> (1889) 17R 68.

<sup>55</sup> The trustee was in fact removed as he was preventing the widow enjoying the full use of her life-entailed property.

<sup>56</sup> *Cowan v Crawford* (1837) 15S 398, Lord Moncrieff at 404 - 405.

<sup>57</sup> *Waugh's Trs* (1892) 20R 57, Lord McLaren at 58; *Walker* (1868) 6M 973.

**4.27 Removal under statutory powers.** Section 23 of the Trusts (Scotland) Act 1921 empowers the court to remove a trustee who is or becomes insane or incapable of acting by reason of physical or mental disability, or who is absent from the United Kingdom continuously for at least six months, or who has disappeared for the same period. Where insanity or incapacity, mental or physical, is the relevant ground, removal is automatic on the ground being established. For mental incapacity medical certificates similar to those that were used for petitions for the appointment of a curator bonis are sufficient, unless the petition for removal is opposed.<sup>58</sup> In the case of an application on the ground of absence or disappearance for at least six months, removal is at the court's discretion.

**4.28 Removal under power in trust deed.** Power to remove a trustee may be conferred on the truster, the trustees or some other person by the trust deed. Such a power is rare in family trusts, except perhaps marriage contract trusts, but is said to be common in commercial cases.<sup>59</sup> In the case of *Gibb v Stanners and Another*<sup>60</sup> the trust deed conferred a power to remove a trustee by a resolution signed by all the remaining trustees. The trustees purported to exercise this power against one of their number and the court did not regard the power to be, in itself, invalid. However, the removal in this instance was invalid as the trustees had failed to give notice to the trustee they sought to remove. This was in violation of the principle that all trustees must at least be consulted on decisions concerning the trust.<sup>61</sup>

### **Proposals for reform: judicial removal**

**4.29** The present powers of the court to remove trustees are contained in section 23 of the Trusts (Scotland) Act 1921 and the common law. We do not think this situation is satisfactory. The statutory provisions relating to judicial removal should deal with all the grounds of removal. It is potentially misleading for section 23 to present only part of the picture.

**4.30** If new statutory provisions are drawn up, what should be the grounds for judicial removal? One approach would be to give the court a general power to remove a trustee, as is done in South Africa.<sup>62</sup> This has the advantage that the ground for removal is not fault based so that removal implies no necessary criticism of the trustee. Removal on fault grounds could have considerable repercussions for professional trustees and an action for removal could result in bitter and prolonged litigation. However, it seems too simple: courts should be given some guidance on when the power of removal should be exercised.

**4.31** The opposite approach would be for legislation to set out in detail the grounds on which a trustee may be removed. Legislation in this form would be complex and would require to be amended from time to time to update references to other legislation, such as that dealing with mental health and incapacity. Although it would be possible to set out some of the more usual grounds, such as mental incapacity, it would not be possible to provide for all eventualities, except with the addition of a "catch all" ground.

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<sup>58</sup> *Lees* (1893) 1 SLT 42.

<sup>59</sup> Lewin, para 13-41.

<sup>60</sup> 1975 SLT (Notes) 30.

<sup>61</sup> See paras 2.4 – 2.7 above.

<sup>62</sup> See Appendix A, para 48.

4.32 Our preferred option is for the grounds to be set out in fairly general terms. Neglect of duty and physical or mental infirmity should be grounds for removal if they resulted in a substantial impairment of the execution of the trust and its purposes. These could be summed up as unwilling or unable to act as a trustee. But the existing statutory ground in section 23 of the Trusts (Scotland) Act 1921, whereby a trustee who is continuously absent from the UK for more than 6 months may be removed, should not be retained. It looks dated in today's world of rapid global communications. Trustees should be judged by their attendance to trust business rather than by their physical location.

4.33 Sometimes a trustee who is willing and capable of acting ought nevertheless to be removed. Section 12 of the Sheriff Courts (Scotland) Act 1971 sets out the procedure for removing a sheriff or sheriff principal. The Scottish Ministers<sup>63</sup> may make an order of removal on receiving a report from the Lord President and the Lord Justice-Clerk that the person is "unfit for office by reason of inability, neglect of duty or misbehaviour". In *Stewart v Secretary of State for Scotland*<sup>64</sup> it was held that "inability" did not mean only physical or mental infirmity, but it extended to any form of incapacity for performing the functions of a judge. Misbehaviour was not restricted to conduct in court. Conviction of a crime or being involved in disreputable practices or associations would also warrant removal. Similarly, sheriff officers and messengers-at-arms, collectively called officers of court, are liable to be deprived of office for misconduct.<sup>65</sup> Misconduct is defined as including "conduct tending to bring the office of messenger-at-arms or sheriff officer into disrepute".<sup>66</sup> Although trustees do not hold public office in the same way as judges and officers of court do, we think there is a moral dimension to trusteeship. Trustees have to be trusted by the beneficiaries and by their co-trustees. This trust is liable to be forfeited if a trustee is other than a person of integrity and honesty. A trustee should therefore be capable of being removed if he or she is unfit to continue to act as trustee. Unfitness may be shown by their conduct in the trust, for example having committed a serious breach of trust or allowed personal interest to conflict with trust duties. Or it may arise out of something external, such as dishonest conduct, conviction of a non-trivial criminal offence or possibly being bankrupt.

4.34 Section 706(b) of the USA Uniform Trust Code lists among the grounds for removal, failure to co-operate with co-trustees to the extent that this impairs the administration of the trust. We have some doubts as to whether this ground should be adopted in Scotland. Mere disagreement with co-trustees is not, and should not be, a sufficient ground for removal. In cases of deadlock the court can either appoint a judicial factor to take over the trust administration or appoint additional trustees.<sup>67</sup> But disagreement may be unreasonable or capricious or be done in a very confrontational manner. On the other hand, unpleasant relationships are to some extent a part of life and the other trustees can resign if they find the situation intolerable. If unreasonable behaviour is to be a ground for removal then we think it should be judged objectively, ie what normal people would regard as unreasonable, rather than subjectively, ie what the other trustees in question find distressing.

4.35 In exercising the power of removal, the court would take into account the best interests of the trust and its beneficiaries. Thus a trustee who might otherwise be removed

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<sup>63</sup> Formerly the Secretary of State of Scotland.

<sup>64</sup> 1998 SC (HL) 81.

<sup>65</sup> Debtors (Scotland) Act 1987, s 80.

<sup>66</sup> *Ibid*, s 79(9).

<sup>67</sup> Wilson and Duncan, para 23-19.

might be retained because of his or her intimate personal knowledge of the trust purposes or the beneficiaries' circumstances. Conversely, conduct in matters outwith trust business which might be acceptable in a trustee of a private family trust might be grounds for removing a trustee of a public trust for religious purposes.

4.36 Section 23 confers title to apply for a trustee's removal on a co-trustee, a beneficiary or any other person interested in the trust estate. At common law one or more of the trustees or beneficiaries has title to apply. We prefer the slightly more open statutory formula.

4.37 In South Africa the court may suspend rather than remove a trustee.<sup>68</sup> This might be a useful alternative to removal where, for example, one of the trustees became mentally incapable but was expected to recover in the foreseeable future, if there were other trustees capable of acting. The suspension could be for a period specified by the court or for an indefinite period. On the other hand, the ability of Scottish trustees to act by a quorum allows an incapable trustee to be effectively sidelined.

4.38 We invite views on the following proposal and question:

**15. Section 23 of the Trusts (Scotland) Act 1921 (removal of trustees on specified grounds) and the common law grounds for the removal of trustees should be replaced by new statutory provisions. These should provide that a trustee may be removed by the court, on application, if it is satisfied that:**

- (a) the trustee is unfit or unable to continue to act as trustee in the trust; or**
- (b) the trustee has neglected his or her duties as trustee.**

**The application should be capable of being made by one or more of the trustees, any beneficiary or any other person with an interest in the trust estate.**

**16. Should the court also have power to suspend a trustee from office on the above grounds for a definite period or until further order?**

### **Proposals for reform: non-judicial removal**

4.39 We turn now to examine whether, as in many other jurisdictions, there should be procedures available for removing trustees which do not involve an application to the court. Some trust deeds reserve to the truster the power to remove or replace trustees or confer this power on others. In the following discussion we assume the absence of such powers in the trust deed. Non-judicial removal could take several forms. First, the termination of a trustee's tenure of office could arise by operation of law if a particular event occurred. Second, the trustee could be removed by a resolution of the other trustees. Third, the

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<sup>68</sup> See Appendix A, para 49.

trustee could be removed by the beneficiaries. The main advantage of a non-judicial procedure is that it could be faster and cheaper than an application to the court. It also avoids the publicity of judicial proceedings. However, it may fail to protect the interests of the trustee removed.

**4.40 Automatic termination.** Termination of trusteeship by operation of law occurs at present on the death of a trustee. As the trustees hold the trust property jointly, it vests automatically in the remaining trustees. Where the deceased trustee was the sole trustee the title to the trust estate vests in his or her executors who can then transfer it to the new trustee or trustees appointed by the court. Should any other event result in the automatic termination of trusteeship? The event would have to be fact-based and easily provable, as well as being clearly of the kind that should result in termination. In the interests of simplicity the trusteeship should be terminated rather than suspended. Possible candidates are insanity, bankruptcy or commission of a crime involving dishonesty or imprisonment. For corporate trustees, being dissolved or in liquidation would be regarded as the equivalent of the death of an individual.

4.41 Section 18 of the Solicitors (Scotland) Act 1980<sup>69</sup> provides for the automatic suspension of a solicitor's practising certificate if:

- "(a) in pursuance of the Mental Health (Scotland) Act 1984 the solicitor is, by reason of mental disorder, admitted to a hospital and becomes liable to be detained there;
- (b) a guardian is appointed under the Adults with Incapacity (Scotland) Act 2000;
- (c) the estate of the solicitor is sequestrated;
- (d) the solicitor grants a trust deed for behoof of creditors;
- (e) a judicial factor is appointed on the estate of the solicitor under section 41;"<sup>70</sup>

4.42 Section 8(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 provides for the disqualification of persons concerned in the management or control of recognised bodies, ie Scottish charities. This is in addition to judicial removal under section 7 of the 1990 Act. A person who:

- "(a) has been convicted of an offence involving dishonesty;
- (b) is an undischarged bankrupt;
- (c) has been removed, under section 7 of this Act, from being concerned in the management and control of any body; or
- (d) is subject to a disqualification order under the Company Directors Disqualification Act 1986."

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<sup>69</sup> As amended by the Adults with Incapacity (Scotland) Act 2000, Sch 5, para 15.

<sup>70</sup> Para (e) requires the Council of the Law Society of Scotland to be satisfied that the solicitor has failed to comply with the provisions of the Solicitors Accounts Rules and the business is practically insolvent or likely to be practically insolvent.

is disqualified from being concerned with the management or control of a Scottish charity. Acting while disqualified is a criminal offence. There are further provisions in section 8 explaining what is meant by an undischarged bankrupt and dealing with the effect of the Rehabilitation of Offenders Act 1974.<sup>71</sup>

4.43 Mental incapacity could be a ground for termination of trusteeship. We do not think it would be sensible to frame legislation in terms of listing all the various orders under the Adults with Incapacity (Scotland) Act 2000 or the Mental Health (Care and Treatment) (Scotland) Act 2003 and perhaps also their equivalents in the other United Kingdom jurisdictions. Foreign orders should perhaps be excluded as the degree of incapacity involved may need to be investigated. Such legislation would be complex and would have to be amended every time there was a change in mental incapacity legislation in any part of the United Kingdom. We consider that it would be preferable for termination to occur if the trustee was certified as suffering from mental disorder<sup>72</sup> or if an order had been granted on the basis of certified mental disorder or mental incapacity. Even this would be a somewhat blunt instrument since some mental disorders might not affect the trustee's performance or could be controlled with appropriate medication.

4.44 Sequestration of the trustee's estate or the granting of a trust deed for creditors are not at present grounds on which the court will necessarily remove a trustee. We think this policy is correct. Some people become bankrupt by misfortune rather than having been involved in any financial malpractice or ineptitude. Especially in family trusts, a bankrupt trustee's personal knowledge and judgment may be difficult to replace. It should normally be possible to reorganise the trust administration to prevent the bankrupt being able to access trust money. Accordingly, our present view is that neither of these events should automatically result in the individual ceasing to be a trustee in a private trust. We do not propose any changes to the disqualification of charity trustees as we agree that more stringent requirements are appropriate for charitable trusts.

4.45 Trustees are expected to act honestly at all times and must enjoy the confidence of the beneficiaries and their co-trustees. The conviction of a crime involving dishonesty or resulting in imprisonment could lead automatically to termination of the trustee's office.

4.46 Automatic termination would give rise to many questions. Is the appointment of a trustee whose estates are sequestrated void or voidable? If the trustee becomes mentally incapable after appointment what is the effect of any acts the trustee has already carried out? Are they void, effective until the trustee is certified and then retroactively invalidated or effective? Should a conviction for a crime of dishonesty be limited to one occurring after the trustee's appointment, and should the Rehabilitation of Offenders Act 1974 apply? The legislation addressing these and the many other questions that would arise would be complex. Such problems do not arise at present as the only automatic terminating event is death or the dissolution of a juristic person. Moreover, automatic removal of a sole trustee would necessitate an application to the court for the appointment of new trustees. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 avoids these problems by merely making it a criminal offence for a Scottish charity trustee to act after disqualification.

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<sup>71</sup> Very similar provisions apply in relation to charity stewards under the Scottish Executive's Consultation Draft Charities and Trustee Investment (Scotland) Bill, ss 51 - 52.

<sup>72</sup> Most people suffering from mental disorders are admitted to hospital or treated on a voluntary basis rather than being the subject of court orders, but they could be certified for the purpose of trusteeship.

4.47 Our provisional view is that automatic termination of trusteeship on the occurrence of certain specified events should not be introduced. The complexity of the necessary provisions would outweigh the advantages. Moreover, other non-judicial procedures could be introduced to address more effectively the removal of unfit trustees.

4.48 **Removal by trustees.** Termination of a trustee's tenure of office by a resolution of the remaining trustees should also have to be confined to certain easily provable fact based situations. We agree with the Ontario Law Reform Commission<sup>73</sup> that trustees should not have to make subjective value judgments or resolve disputed questions of fact. Situations which require that, such as the commission of a breach of trust, should be dealt with by the courts. Removal by trustees has, however, an element of discretion and judgment which is necessarily lacking in a scheme for termination by operation of law. The trustees would be under a duty to consider whether to remove a trustee, for example, on becoming aware that he or she had become bankrupt, but would not be bound to do so. Similarly, with a mental illness they might take the view that it was better to see whether the trustee recovered rather than remove him or her forthwith. We imagine that there would be very few cases where a trustee who was convicted of a crime of dishonesty or imprisoned during his or her period in office would not be removed. However, a more lenient approach might be taken in relation to a pre-appointment offence that came to light later, even if not technically spent.

4.49 The draft bill appended to the Ontario Law Reform Commission's Report on *The Law of Trusts* lists being mentally incompetent, being convicted of an indictable offence or being bankrupt as grounds for removal by trustees.<sup>74</sup> The list in section 36 of the Trustee Act 1925 (England and Wales) is (apart from death and wishing to retire): remaining out of the United Kingdom for more than 12 months; refusal or unfitness to act; incapable of acting; or being an infant. For the reasons already stated in paragraph 4.32 above, we do not favour absence from the UK as such being grounds for removal.<sup>75</sup> We take a similar view on bankruptcy.<sup>76</sup> We think that both refusal and unfitness to act require a subjective value judgment as to the quality of the trustee's actings so that removal on these grounds should be reserved to the courts. In Scotland, under the Age of Legal Capacity (Scotland) Act 1991, persons under the age of 16 do not have the capacity to act as trustee<sup>77</sup> and if appointed would be advised that they could not act. We therefore see no need to include persons under 16 among the categories of persons whom the trustees should have power to remove. On the other hand, incapacity could be satisfactorily established by certification of mental disorder or the grant of an order grounded on certified mental disorder.<sup>78</sup> Likewise, a conviction for a crime involving dishonesty could be readily established. As the trustees would only remove a trustee on becoming aware of a ground for removal, the problems of retroactivity associated with automatic termination would not occur.

4.50 At present a quorum can take decisions on behalf of the trustees and has an express statutory power to assume new trustees.<sup>79</sup> We think that this rule should apply to the

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<sup>73</sup> Report on *The Law of Trusts*, Vol I, 107.

<sup>74</sup> Clause 19. There are also other grounds – trustees who are dead or wish to retire.

<sup>75</sup> *Thomson's Trs, Petr* 1948 SLT (Notes) 28, a trustee who is absent for more than six months does not *ipso facto* demit office.

<sup>76</sup> Para 4.44.

<sup>77</sup> Ss 1(1)(a) and "transaction" 9(f). Children do not commonly act as trustees and anyway the terms of s 2(1) do not sit well with trusteeship.

<sup>78</sup> See para 4.43 above.

<sup>79</sup> Trusts (Scotland) Act 1921, s 3(b); see Part 2 above.

proposed new power of removal. However, for the purposes of exercising the power, the trustee sought to be removed should not be counted as one of the trustees. Thus, if there were two trustees, one of whom was convicted of a crime involving dishonesty, the other trustee should be able to execute a valid deed of removal.

**4.51 Removal by beneficiaries.** The final method we consider for removing trustees without involving the courts is removal by beneficiaries. In England and Wales under section 19 of the Trusts of Land and Appointment of Trustees Act 1996 the beneficiaries, if absolutely entitled to the trust estate and acting unanimously, can direct a trustee to resign or direct the trustees to appoint a specified person as a new trustee in replacement of another trustee.<sup>80</sup> Section 20 empowers the beneficiaries to replace a mentally incapable trustee. An application to the court becomes necessary only if the addressees did not act or appoint as directed. Our provisional view is that such powers should not be introduced into Scots law. We think that the administration of the trust should remain in the hands of the trustees. Permitting beneficiaries to direct trustees confuses their respective roles. Moreover, beneficiaries have sufficient other remedies to deal with unfit trustees. The rationale for section 19 of the 1996 Act was that since the beneficiaries can agree to bring the trust to an end and then resettle the funds in the same way with their choice of trustees, so they ought to be entitled to do this in a more direct way. But this argument could also be used to support an entitlement to alter the trustees' powers, to re-settle some of trust estate or require the trustees to advance capital. Removal of trustees is a serious matter and should, we think, continue to require some maladministration or unfitness on the part of the trustee. Mere incompatibility with the beneficiaries is insufficient and should remain so. Disputes between beneficiaries and trustees regarding the running of the trust should have to be resolved by the courts, not by the beneficiaries being able to replace the trustees at their own hands. The view has been expressed that section 19 of the Trusts of Land and Appointment of Trustees Act 1996 will be of use mainly in relation to family homes or other constructive or resulting trusts where there is a sole legal owner holding on trust for another who has contributed to the purchase price.<sup>81</sup> Scots law does not recognise constructive trusts in such situations, although remedies based on unjustified enrichment may be available.

**4.52** Summing up, we can see advantages in having some non-judicial process for removing a trustee in certain clearly defined situations. But it seems unnecessary to have more than one such process. If a non-judicial procedure is to be introduced our preference is for removal of a trustee by a resolution of the other trustees. This keeps the trust administration in the hands of the trustees and avoids the problem of retroactivity associated with termination by law on the occurrence of a specified event. We accordingly invite views on the following proposals:

- 17. There should be no automatic termination of trusteeship by reason of the trustee's insanity, incapacity, bankruptcy, conviction of a crime involving dishonesty, or any other event indicative of unfitness for office.**

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<sup>80</sup> See Appendix A, para 44.

<sup>81</sup> Current Law Statutes Annotated, commentary on s 19 by Prof and Mrs Kenny in the Introduction and General Note.

- 18. The beneficiaries should not be empowered to remove (or to direct the trustees to remove) a trustee from office.**
- 19. Trustees should be given a discretionary power to remove a trustee on becoming aware that the trustee:**
  - (a) has been certified as being mentally disordered or mentally incapable of acting as a trustee, or is the subject of an order grounded on certified mental disorder; or**
  - (b) has been convicted of a crime involving dishonesty or imprisoned.**

Views are sought on whether there should be any other situations, such as bankruptcy, in which the trustees should have the power to remove a trustee.

- 20. The power to remove a trustee should be exercisable by a deed executed by at least a majority of the other trustees (if more than two).**

# Part 5 The Role of the Courts

## Overview

5.1 In this Part we examine the various powers of the court in relation to trustees. Trusteeship, even in private trusts, is to some extent a public office. There is a public interest in ensuring the effective, prudent and honest management of trusts. The court has a crucial role in this context and, accordingly, enjoys a number of powers, both facilitative and regulatory. We focus on three aspects of these powers. In section A we consider the power of the court to review the exercise by trustees of a discretionary power. In section B we examine the powers of the court to give guidance or advice in relation to a question or dispute concerning the trust estate. At present in Scotland, a trustee may lodge a petition for directions, submit a special case to the Court of Session in terms of the Court of Session Act 1988 or raise an action of multipoleinding to determine the validity of competing claims to the trust estate. With a view to expanding the role of the courts in Scotland, we look at the procedures available in some other jurisdictions. Section C deals with the court's power to grant trustees additional administrative powers. Finally, in section D we look at the various applications relating to trusts that may be made to the Court of Session (Inner and Outer House) and the sheriff courts and put forward proposals for them to be heard at the appropriate level.

### A: INTERFERING WITH TRUSTEES' DISCRETION

#### Introduction

5.2 In Scotland trustees are usually given a discretion as to whether or not they exercise any of the express powers granted by the trust deed.<sup>1</sup> As we will see, courts are reluctant to review the exercise of these discretionary powers. This reluctance is due largely to their recognition that the trustor has committed responsibility to the trustees. On this basis, therefore, courts consider that the administration of the trust is properly the responsibility of the trustees.<sup>2</sup> Courts are also alive to the fact that it is the trustees who possess all the necessary background information for the operation of the trust.<sup>3</sup> However, the courts are willing to intervene in certain limited circumstances.

#### The current law

5.3 Trustees who are given a discretion under a trust deed must exercise it in appropriate circumstances. They cannot simply refuse to apply their minds to the question.<sup>4</sup>

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<sup>1</sup> See Mackenzie Stuart, p 250.

<sup>2</sup> See, for example, *Orr Ewing v Orr Ewing's Trs.* (1884) 11R 600 at 627 - 628 where Lord President Inglis said that "[t]he great principle in the administration of Scotch testamentary trusts is, to leave the administration where the testator himself has placed it, unless from fault or accident the trust has become unworkable; and even in that case the Courts do not undertake the administration, but appoint new trustees, or a judicial factor, who will occupy the same position, and possess the same powers of extra-judicial administration which the trustees named by the testator occupied and possessed."

<sup>3</sup> *Earl of Stair's Trs.* (1896) 23R 1070, Lord McLaren at 1074 .

<sup>4</sup> *Train v Buchanan's Trs.* 1907 SC 517, Lord President Dunedin at 524 - 525.

One of the earliest cases to examine the power of the court to interfere with a decision of trustees is *Baird v Baird's Trustees*<sup>5</sup> where the testator left an estate worth over one million pounds in trust for his wife and son. The court held that the sum which the trustees proposed to pay to the widow for the maintenance of the son was unreasonably low and directed that it should be increased from between £1-2,000 to £3,000. Lord President Inglis reasoned that the maintenance and education of a boy ten years old may not much exceed £500 a year but that the education of a young man with prospects like the young heir was conducted at home much more than at school. It was highly desirable that the boy should "imbibe a taste for field sports and other country pursuits, which necessitate a very liberal establishment both in stable and kennel". He considered further that the young man should be early associated with those whose influence and example will "engender and cultivate manly and refined tastes and sentiments" which his Lordship thought would enable him "to take such part in society as his wealth and position will justify, and perhaps also to aid in advancing the civilisation of his country and the age in which he lives". The basis for judicial interference was that the trustees had come to an unreasonable decision.

5.4 However, some 35 years later in *Chivas' Trustees v Stewart*<sup>6</sup> the court refused to interfere with a beneficiary's annuity. Lord Low held that as it was not suggested that the trustees had acted otherwise than in good faith, he was not prepared to say that the amount was so extravagant that the trustees could be regarded as having exercised their discretion unreasonably.<sup>7</sup> In other cases, the courts have departed from the test of reasonableness of the trustees' decision. In *MacTavish v Reid's Trustees*,<sup>8</sup> for example, Lord Kyllachy held that apart from very definite and precise averments of *mala fides* or abuse by the trustees of the discretion vested in them, the court could not review or examine the grounds on which the trustees had exercised their discretion.

5.5 The leading modern case is *Board of Management for Dundee General Hospital v Bell's Trustees* where Lord Reid<sup>9</sup> said that that the test was:

"[i]f it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question, they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith, then there was no true decision and the Court will intervene."

But in addition the trustees' decision must not be irrational. Even if they had applied their minds to the correct question and acted in good faith, the court will set their decision aside if it is one at which, in its opinion, no sensible body of trustees could have arrived.<sup>10</sup>

5.6 Mackenzie Stuart<sup>11</sup> notes that the court will be more ready to intervene where the trustees have an interest in the decision. In *Thomson v Davidson's Trustees*<sup>12</sup> the trustees were residuary legatees who made allowances for certain children. The court was not prepared to hold that the trustees had been "actuated by their personal feelings" but the fact

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<sup>5</sup> (1872) 10M 482.

<sup>6</sup> 1907 SC 701.

<sup>7</sup> See also *Train v Buchanan's Trs* 1907 SC 517 aff'd, *sub nom Train v Clapperton* 1908 SC(HL) 26.

<sup>8</sup> (1904) 12 SLT 404 at 405; See also *Dick v Audsley* 1908 SC(HL) 27, Lord Loreburn LC at 28.

<sup>9</sup> 1952 SC(HL) 78, at 92.

<sup>10</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

<sup>11</sup> P 252.

<sup>12</sup> (1888) 15R 719.

that they did have a personal interest seems to have made the court more ready to intervene.<sup>13</sup>

5.7 The courts proceed on the same principles whether or not the trustees give reasons for their decision. The only difference lies in the fact that it becomes easier to examine a decision if the reasons for it have been disclosed.<sup>14</sup> If the reasons given are unsound the court will correct the decision unless the truster had indicated that the trustees' decision was to be final and conclusive. Then it seems that the trustees' decision cannot be attacked on any ground other than they had acted *mala fide* or *ultra vires*.

## Summary

5.8 The test enunciated by Lord Reid in *Board of Management for Dundee General Hospital v Bell's Trustees*<sup>15</sup> coupled with review on the ground of irrationality seem to us to be the correct approach to the courts' intervention. The court will intervene only if it can be shown that the trustees considered the wrong question, or when purporting to consider the right question did not really apply their minds to it, or they perversely shut their eyes to the facts, or did not act honestly or in good faith, or reached a decision at which no sensible body of trustees could have arrived. We think that any lesser test would expose trustees to too great a risk of litigation. It would also undermine trust administration in that third parties with an interest in the trustees' decision could not be sure that it would stand unchallenged. To elicit views we make the following negative proposal:

- 21. There should be no change to the law on the powers of the courts to review decisions made by trustees in the exercise of their discretionary functions.**

## B: COURT DIRECTIONS

### Introduction

5.9 This section examines the extent to which courts are able to assist trustees by providing guidance, directions and advice where trustees encounter problems relating to the administration of the trust or the rights of the beneficiaries and other parties involved.

5.10 There are presently three main ways in which trustees may obtain guidance, advice or authority from the court in relation to a question or dispute concerning the trust estate. The trustees may lodge a petition for directions or submit a special case to the Court of Session in terms of the Court of Session Act 1988. Additionally, the trustees may raise an action of multiplepinding to determine the validity of competing claims to the trust estate.

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<sup>13</sup> See also *Ritchie v Davidson's Trs* (1890) 17R 673.

<sup>14</sup> *Board of Management for Dundee General Hospital v Bell's Trustees* 1952 SC(HL) 78, Lord Normand at 85. See also *Scott v National Trust* [1998] 2 All ER 705.

<sup>15</sup> 1952 SC(HL) 78.

## Petition for directions

5.11 Section 6(vi) of the Court of Session Act 1988<sup>16</sup> provides for petitions as follows:

"6. With a view to securing that causes coming before the Court may be heard and determined with as little delay as is possible, and to the simplifying of procedure and the reduction of expense in causes before the Court, the Court shall...provide by act of Sederunt...

(vi) for enabling trustees under any trust deed to obtain the direction of the Court on questions relating to the investment, distribution, management or administration of the trust estate, or the exercise of any power vested in, or the performance of any duty imposed upon, the trustees notwithstanding that such direction may affect contingent interests in the trust estate, whether of persons in existence at, or of persons who may be born after, the date of the direction..."

The procedure is set out in the Rules of the Court of Session.<sup>17</sup>

5.12 Such a petition is presented to the Inner House and is disposed of at a hearing on the Summar Roll where the court may order inquiry by proof, remit to a reporter or affidavit, as it thinks fit. It may also order the petition to be served on creditors, beneficiaries or other persons interested in the subject-matter of the petition.<sup>18</sup> Petitions for directions offer trustees a relatively informal and expedient means of obtaining advice on straightforward questions relating to the trust estate and the rules relating to it are to be given a liberal construction.<sup>19</sup>

5.13 The court will not consider petitions for directions on complex issues of fact or other questions which require a full hearing and comprehensive submissions by all parties. As Lord Blackburn observed:<sup>20</sup>

"The purpose of a petition for directions is to obtain advice as to how an estate should be administered, and it is not designed to enable the petitioners, or those who may lodge minutes to the petition, to obtain a decision of the court which would be binding on all parties on what may be a knotty legal question."

This should not be read as precluding all questions of law from being answered by a petition for directions. Where a question of law is at issue then so long as the petition for directions is *prima facie* competent it will not be dismissed so long as all the parties are represented who would have had to be represented if the question had been submitted in a competent special case.<sup>21</sup> Parties with conflicting interests must be separately represented,<sup>22</sup> but in comparatively simple cases not involving questions of law only the trustees need be represented.

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<sup>16</sup> Petitions were formerly lodged under the Administration of Justice (Scotland) Act 1933, s 17 and Rules 41 – 43 of Ch IV of the Rules of Court 1934.

<sup>17</sup> Rules 63.4 - 63.6.

<sup>18</sup> Rule 63.5(3).

<sup>19</sup> *Taylor, Petr* 2000 SLT 1223.

<sup>20</sup> *Mitchell's Trs*, First Divison, 28 March 1935, unreported but quoted in *Andrew's Trs v Maddeford* 1935 SC 857, Lord President Normand at 864.

<sup>21</sup> *Peel's Trs v Drummond* 1936 SC 786, Lord President Normand at 794. It would also appear that an appeal to the House of Lords is competent where a question of law is in issue, *Grant's Trs v Hunter* 1938 SC 501.

<sup>22</sup> *Coutts & Co, Petr* 1990 SLT 529.

5.14 Petitions for directions were designed for the summary disposal of urgent requests by trustees and should not be used as a means of "throwing into court, without due consideration and preparation, questions which ought to be dealt with formally by special case or by other existing procedure".<sup>23</sup> Petitions for directions should be justified by "some emergency or specialty which renders more formal procedure inefficacious, or by circumstances which render other procedure incompetent".<sup>24</sup> It should be noted that the question need not be urgent in the normal sense, but one that requires to be addressed now or in the reasonably foreseeable future.<sup>25</sup> The court will not consider hypothetical or academic questions. Competence of a petition is in itself not sufficient as convenience must also be assessed.<sup>26</sup> The determination of whether a question is appropriate for a petition for directions should be carried out by reference to a practical test of what the question posed, in substance, seeks to resolve:

"If what has to be determined is really the rights of the parties who have an interest in the trust-estate, and the question of distribution is subordinate, then a petition for directions can rarely be appropriate."<sup>27</sup>

Borderline cases will not be dismissed, although it may be that the only direction given will be for the trustees to continue to hold the estate until claims are made in another process.

5.15 Where an interested party is, through excusable error, not represented before the court, the court has an inherent power to give that party an opportunity to be heard after the interlocutor has been pronounced and, if necessary, to alter its previous interlocutor, subject to such conditions as to expenses as it might deem proper.<sup>28</sup>

5.16 The following questions have been dealt with by way of a petition for directions: whether a sum is to be treated as capital or income;<sup>29</sup> whether a beneficiary is entitled to receive immediately a portion of the trust fund;<sup>30</sup> construction of a power of investment;<sup>31</sup> construction of a clause authorising advances of capital to beneficiaries;<sup>32</sup> whether interest is payable on an advance of capital; whether a beneficiary had by his actions declined an offer to purchase trust property;<sup>33</sup> and whether a trustee had been validly appointed.<sup>34</sup> The court may also give directions on incidental matters arising out of the issue in question.<sup>35</sup>

### Special case

5.17 Where there is agreement amongst the interested parties as to the facts of a particular dispute then those interested parties may, without raising any proceedings or at any stage of any proceedings, present to the Inner House a case signed by their counsel setting out the facts upon which they are agreed and the question of law arising from those

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<sup>23</sup> *Henderson's Trs v Henderson* 1938 SC 461, Lord President Normand at 464.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Taylor, Petr* 2000 SLT 1223, at 1225B.

<sup>26</sup> *Grant's Trs v Hunter* 1938 SC 501.

<sup>27</sup> *Andrew's Trs v Maddeford* 1935 SC 857, Lord President Normand at 864.

<sup>28</sup> *Milne's Tr* 1936 SC 487.

<sup>29</sup> *Lord Hamilton's Trs* 1935 SC 705.

<sup>30</sup> *Peel's Trs v Drummond* 1936 SC 786.

<sup>31</sup> *Thomson's Trs v Davidson* 1947 SC 654.

<sup>32</sup> *Moss's Trs v King* 1952 SC 523.

<sup>33</sup> *Barrowman, Petr* Inner House, 21 February 2003, unreported.

<sup>34</sup> *Taylor, Petr* 2000 SLT 1223.

<sup>35</sup> *Barrowman, Petr* Inner House, 21 February 2003, unreported.

facts which is in dispute so that the court may give its opinion or its judgment on that question of law.<sup>36</sup> A special case will be competent only if the question raised could form the legitimate subject matter of some other form of action,<sup>37</sup> if there is complete agreement on the facts and all interested parties are represented.<sup>38</sup>

5.18 The parties in dispute must clearly state the contentions of their respective cases so that the court may ascertain whether or not the questions upon which its opinion is asked are purely speculative.<sup>39</sup> It is therefore necessary that there is a genuinely disputed question before the court on which both parties have made representations.<sup>40</sup> If the question is raised purely at the instance of the trustees without any contradictors the court will not give an abstract opinion in order to clear up confusion or uncertainty in the minds of the trustees as to how best to administer the estate. As Lord Kinnear noted in *Mackinnon's Trustees v MacNeill*:<sup>41</sup>

"It is not the purpose of special cases to obtain an opinion of the Court on questions which are not brought before it in such a way as to enable the Court not only to express an opinion but to give a decisive judgment on them...we are not in the practice of deciding questions which are not disputed..."

This requirement for actual disagreement between the parties also means that the court will not answer purely hypothetical questions.<sup>42</sup> Moreover, an opinion will not be given if the question is being asked prematurely. For example, in *Robson Scott's Trustees v Robson Scott*<sup>43</sup> it was deemed inappropriate to raise a question as to whether the testator's son, who was said to have died in the course of an operational flight in World War II, survived to take bequests under his father's will before a formal certificate of death was issued.

5.19 If the dispute is between parties other than the trustees, for example two sets of potential beneficiaries each challenging the entitlement of the other, the trustees should not become involved in the special case by stating contentions unless they have a "duty to represent and protect the interests of parties, or possible parties, who cannot state their own contentions, for example to protect the interests of children who may yet be born, or unless the trustees have a duty to maintain their right to hold the estate in trust contrary to the claims of some or all of the parties to the case."<sup>44</sup>

5.20 The court may be asked for an opinion or an opinion and judgment.<sup>45</sup> Where only an opinion is given there can be no appeal to the House of Lords. An opinion and judgment is *res judicata* against the parties to the case and an appeal to the House of Lords is available unless all parties agree otherwise.<sup>46</sup>

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<sup>36</sup> Court of Session Act 1988, s 27.

<sup>37</sup> *Turner's Trs v Turner* 1943 SC 389, Lord Carmont at 394.

<sup>38</sup> Wilson and Duncan, para 23-47.

<sup>39</sup> *Stewart's Trs v Stewart* (1895) 23R 93.

<sup>40</sup> *Turner's Trs v Turner* 1943 SC 389.

<sup>41</sup> (1897) 24R 981 at 987 – 988.

<sup>42</sup> *Bailey's Trs v Bailey* 1954 SLT 282.

<sup>43</sup> 1945 SLT 118.

<sup>44</sup> *Bell's Trs v Skeil* 1944 SLT 228, Lord President Normand at 228.

<sup>45</sup> See further, D Maxwell, *The Practice of the Court of Session* (HMSO, 1980), pp531 – 534.

<sup>46</sup> *Macdougall* (1869) 7M 976.

5.21 Special cases have been used to determine the following types of question:<sup>47</sup> whether a codicil revoked a legacy; the validity of a bequest; how income which could no longer be accumulated should be disposed of; the validity of a liferent; the validity of the exercise of a power of appointment; the revocability of a trust; the existence or otherwise of a radical right; whether a sum was income or capital; the amount payable in respect of an annuity; and whether conditions attached to legacies were void from uncertainty.

### **Multiplepointing**

5.22 Where the issue is one of competing claims to the same fund or property, an action of multiplepointing may be the most appropriate method of resolving the dispute:

"Where there is any substantial difficulty in law or in fact as to the distribution of the estate, or as to the ascertainment of the beneficiaries or as to the sufficiency or ability of them to grant a valid discharge, the trustees are entitled to obtain judicial sanction for their proposed distribution of the estate and exoneration for their intrusions."<sup>48</sup>

The trustees need not wait for competing claims to be presented to them before raising an action of multiplepointing. It is enough that there are doubtful questions as to the parties entitled to the trust fund, even though these parties have not actually (yet) made conflicting claims.<sup>49</sup> As Lord President Hope observed in *Taylor v Noble*.<sup>50</sup>

"The process of multiplepointing is the common mode by which trustees seek to obtain judicial exoneration. They do not require to allege actual double distress to entitle them to bring that process."

5.23 Accordingly, trustees may raise an action of multiplepointing where there are competing claims between legatees and creditors or different people claiming as beneficiaries or, alternatively, where the distribution of the trust estate is so complex and the identity of the correct beneficiaries is so unclear as to make it unsafe for the trustees to act on their own judgment. However, the trustees may not raise a multiplepointing merely to obtain advice from the court on an entirely non-contentious matter. There must be a conclusion for exoneration before the court will entertain the petition. As Lord Kincairney pointedly remarked in *Paterson's Trustees v Paterson*.<sup>51</sup>

"Any doubts which the trustees may entertain as to what they ought to do does not, in my opinion, warrant them in throwing the case into Court. They must act on their own judgment or on the best advice they can get. It is not my province to advise them."

### **Options for reform**

5.24 The current procedures which may be used to provide trustees with advice and guidance seem broadly satisfactory. The petition for directions is a useful and relatively informal mechanism to give trustees advice on pressing administrative difficulties. The exclusion, in most cases, of the requirement for proper rules of evidence and representation allows trustees to obtain directions from the court relatively quickly and efficiently. More

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<sup>47</sup> Wilson and Duncan, para 23-46.

<sup>48</sup> Mackenzie Stuart, p 342.

<sup>49</sup> *McClement's Trs v Lord Advocate* (1949) SLT (Notes) 59.

<sup>50</sup> (1836) 14S 817 at 819-820.

<sup>51</sup> (1899) 7 SLT 134 at 134.

complex and serious problems can be resolved by a special case. The stricter rules of representation provide the trustees and the beneficiaries with the additional protection required in view of the difficult legal questions often at stake. We address the question of which courts should deal with these proceedings later in this Part.

5.25 A question for consideration is whether a procedure should be introduced akin to *Benjamin* orders in English law, whereby trustees can be authorised by the court to distribute the trust estate on a particular footing – for example, that a particular person predeceased the testator without issue.<sup>52</sup> This judicial authority protects trustees against being personally liable should it be shown later that the true situation is not as was presumed by the court. Unlike existing Scottish declarators which affect rights and bind the beneficiaries,<sup>53</sup> *Benjamin* orders merely provide immunity to the trustees. As a result, courts are more willing to grant them.<sup>54</sup> Special cases cannot be used to decide whether or not an event has occurred because the facts have to be agreed.

5.26 There may also be a need for some procedure to deal with contingencies, events that may or may not happen in the future. A trust estate might otherwise have to remain undistributed to the current beneficiaries because of a remote chance that some other person will become entitled to it and the trustees are not prepared to take the risk of being personally liable should the contingency arise and the recipients be unable to pay the true beneficiaries. Special cases have been used to some extent in this area, as Scottish courts have granted authority to trustees to distribute where the emergence of issue is extremely unlikely. In the case of *G v G's Trustees*,<sup>55</sup> the court was prepared to proceed on the presumption that a woman aged 53 was incapable of having further children so allowing the estate to be shared between her existing children when she renounced her liferent. This age limit now seems too low, but the principle of discounting the possibility of future issue at some age remains. *Munro's Trustees v Monson*<sup>56</sup> was unusual in that it involved male fertility. A beneficiary's entitlement depended on two brothers dying without issue. The brothers were unmarried, aged 81 and 76 respectively, and one was mentally incapable of entering into a marriage. The court authorised the trustees to distribute to the beneficiary as the risk of defeasance was minimal. It is not certain that merely authorising trustees to distribute relieves them of personal liability. However, if the court directed the trustees to distribute it would have that effect. It has not done so in any of the reported cases, although in *McPherson's Trustees v Hill* Lord Justice-Clerk Macdonald said that he would not have hesitated to have ordered the trustees to disregard the contingency and distribute the estate if such an order had been necessary.<sup>57</sup>

5.27 The case of *Neilson's Executors, Petitioners*<sup>58</sup> illustrates another type of contingency. Mr Neilson had been a Lloyds Name and his estate had unknown liabilities in respect of his underwriting activities. These were re-insured but the executors were reluctant to make over his estate to the legatees because there was the possibility that the re-insurance would

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<sup>52</sup> See Appendix A, para 73.

<sup>53</sup> For example, under the Presumption of Death (Scotland) Act 1977.

<sup>54</sup> In the original case *Re Benjamin* [1902] 1 Ch 723, the court was reluctant to declare that a potential beneficiary had predeceased the testator but authorised the trustees to proceed on that basis as such authorisation seemed sufficient in the circumstances.

<sup>55</sup> 1936 SC 837.

<sup>56</sup> 1965 SLT 314.

<sup>57</sup> (1902) 4F 921, at 924.

<sup>58</sup> Extra Division, 25 June 2002; unreported.

prove inadequate. The court, following the earlier English case of *Re Yorke*,<sup>59</sup> authorised distribution without retention or other provision being made for the contingency. The risk was very remote and the injustice of holding up distribution for many years was greater than the injustice of the creditors being deprived of recourse against the executors personally. The court also granted the executors relief from any personal liability arising out of distributing the estate in accordance with its directions. Following *Neilson's Executors* a Practice Note<sup>60</sup> was issued to regulate procedure concerning petitions for directions relating to the distribution of estates of deceased underwriting members of Lloyds.

5.28 In our Discussion Paper on *Breach of Trust* we proposed that trustees should not be personally liable for wrongful distribution of the trust estate provided they had acted in good faith and had taken all reasonable steps to find out who were the correct beneficiaries.<sup>61</sup> But this proposal would not deal with the cases where the trustees were aware of the uncertainty as to past events or a future contingency. We think that it would be useful to introduce a procedure giving the courts an express power to authorise distribution of the trust estate and relieve the trustees from personal liability. This power would be framed in general terms and would be available where it was very likely (but not certain) that a particular event had, or had not, happened or where there was some remote chance of the present beneficiaries' entitlements being defeated by some future event. Trustees would not be obliged to use the new procedure. The cost of an application to the court would have to be balanced against the risk and other ways of minimising it. In many cases, especially where the sums were relatively modest, insurance (with the premium paid by the trust estate) or undertakings from the recipients to repay would be sufficient. We invite views on the following proposal and question:

22. (1) **The court should be empowered, on application by the trustees or others with an interest in the trust estate, to grant an order authorising the trustees to make payments from the estate on the footing that a specified event has or has not happened or will not happen. The court may make an order subject to such conditions as it thinks fit.**
- (2) **Trustees who act in accordance with the authorising order should not be personally liable should the footing on which the court made the order turn out not to be correct, unless they concealed facts or acted fraudulently in the application. The freeing of the trustees from personal liability should not prejudice any right of the true beneficiaries to recover the trust estate from those to whom it had been distributed.**
- (3) **Should any other changes be made to the law or procedure relating to petitions for directions or special cases, and if so what changes should be made?**

5.29 Many problems faced by trustees are resolved by obtaining an opinion from a recognised expert - a practitioner or an academic. The opinion will generally be accepted by

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<sup>59</sup> [1997] 4 All ER 907.

<sup>60</sup> No 2 of 2002.

<sup>61</sup> Proposal 1, para 2.16.

all parties, although any dissatisfied person may bring legal proceedings to obtain a more formal and binding answer. We see no need for the half-way house procedure in section 48 of the Administration of Justice Act 1985 in terms of which a High Court judge in England or Wales may authorise trustees to proceed on the basis of an expert's written opinion.

## C: GRANTING ADDITIONAL MANAGEMENT POWERS

### Introduction

5.30 The powers of administration enjoyed by trustees are partly statutory and partly conferred by the trust deed. Section 3 of the Trusts (Scotland) Act 1921 grants trustees some powers, such as the power of resignation and the power of assumption, while section 4 allows trustees to do a number of specified acts<sup>62</sup> provided they are not "at variance with the terms or purposes of the trust". This is supplemented by section 5 of the 1921 Act which empowers the court to authorise the trustees to do any act specified in section 4 notwithstanding that it would be at variance with the terms and purposes of the trust, provided it is satisfied that carrying out the act would be expedient for the execution of the trust. Investment powers are currently dealt with by the Trustee Investments Act 1961, but the draft Charities and Trustee Investments (Scotland) Bill, published by the Scottish Executive in June 2004, gives trustees the same power of investment that a capable person enjoys and the power to acquire land for purposes other than investment.<sup>63</sup> The trust deed may confer additional powers and nowadays most deeds confer extremely wide management powers. Less commonly, the trust deed will prohibit the trustees from exercising some of their powers under the 1921 or 1961 Acts, or restrict the circumstances in which they can be used.

5.31 This section examines the limited ability of the courts to facilitate trustees' administration of the trust estate by providing them with powers over and above those conferred by the trust deed and by statute. The difficulties this limited ability causes may be less than they appear at first sight. As already mentioned, most modern trust deeds confer extremely wide management powers and there are legislative proposals to confer unrestricted investment powers. Moreover, in Part 4 we have proposed that, unless the trust deed provides otherwise, trustees should have the same wide powers of management in relation to the trust estate that a capable person has in relation to his or her own property. If that proposal were to be enacted, applications to the court for additional powers would be needed only where the trust deed derogated from the general statutory power.

### The current law

5.32 **The *nobile officium*.** One way in which trustees may seek greater powers than they enjoy under the trust deed is to petition the *nobile officium* of the Court of Session for special powers. Although the scope of the *nobile officium* in this context is uncertain,<sup>64</sup> the jurisdiction of the court in such cases has been narrowly circumscribed. As Lord Johnston observed in *Hall's Trustees v McArthur*,<sup>65</sup> the *nobile officium* is:

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<sup>62</sup> These include selling any part of the trust estate, borrowing money, appointing factors and law agents. The full list is set out at para 3.36 above.

<sup>63</sup> This implements our recommendations in the Report on *Trustees' Powers and Duties*.

<sup>64</sup> Norrie and Scobbie, pp 105 - 107.

<sup>65</sup> 1918 SC 646 at 650.

"...an extraordinary equitable jurisdiction, the exercise of which has always been scrupulously guarded, and rarely carried beyond precedent."

His Lordship continued:

"In the matter of trusts, which are an important branch of its exercise, resort to it has been practically confined to cases where something administrative or executive is wanting in the constituting document to enable the trust purposes to be effectually carried out.... But where no such executive or administrative provisions are wanting in the trust deed, the Court will not interfere, for the Court in Scotland does not undertake, as does the Court of Chancery in England, the administration of trusts."

5.33 The *nobile officium* is therefore used sparingly. It is generally considered that the court will not grant the trustees higher powers than those contained in the trust deed.<sup>66</sup> In most cases the court will only intervene in relation to powers which the trustees already enjoy,<sup>67</sup> but which have been limited in some way. Moreover, even if the trustees seek the modification of limits placed on powers granted by the truster, "[t]he Court, in the exercise of the *nobile officium*, will not help them to dispense with these limits by granting powers which the truster has withheld."<sup>68</sup> In trust administration, however, the preservation of the trust estate and the fulfilment of the truster's wishes are the pre-eminent considerations. Therefore, in cases where either may be compromised to such an extent as to make the trust unworkable<sup>69</sup> and where the difficulty may be resolved by altering the conditions imposed by the truster, the court will intervene. In exceptional cases the court may even confer powers which were not previously provided at all in the trust deed.<sup>70</sup> However, the court will not simply confer powers on the trustees in order to advance the interests of the trust.

5.34 The court will only interfere with the trust powers in cases of necessity or strong expediency.<sup>71</sup> Mere expediency is not sufficient. So, for example, in *Scott's Hospital Trustees*<sup>72</sup> trustees were directed by the testator to invest certain trust funds in landed property and to invest the proceeds of any future sale of such land in the purchase of other land. The trustees petitioned the *nobile officium* seeking the power to sell a portion of the landed estate and to invest the proceeds in "approved trust securities". The trustees averred, and it was accepted by the court, that such a power would allow the trust to earn a considerably larger income than would be obtained by the purchase of land. Despite its

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<sup>66</sup> Mackenzie Stuart, p 255; 24 *Stair Memorial Encyclopedia*, para 203; Wilson and Duncan, para 24-11; *Kinloch and Ors, Petitioners* (1859) 22D 174; *Berwick and Ors, Petrs* (1874) 2R 90; *Hall's Trs v McArthur* 1918 SC 646, Lord Mackenzie at 652. However, in relation to investment powers, the Trustee Investments Act 1961, s 15, expressly provides that "[t]he enlargement of the investment powers of trustees by this Act shall not lessen any power of a court to confer wider powers of investment on trustees or affect the extent to which any such power is to be exercised".

<sup>67</sup> Cf *Anderson's Trs* 1921 SC 315 where an entirely new power was granted to the trustees. It should be noted that the court emphasised the exceptional nature of this case and held that it should not be used as a precedent.

<sup>68</sup> Mackenzie Stuart, p 255.

<sup>69</sup> *Scott's Hospital Trs* 1913 SC 289, Lord Salvesen at 291.

<sup>70</sup> See, for example, *Anderson's Trs* 1921 SC 315 where the court granted the trustees both the authority to purchase land and the authority to borrow money for that purchase as this was the only means by which the main purpose of the trust could be fulfilled; and *Fletcher's Trs* 1949 SC 330 where the court granted the trustees the authority to purchase a small piece of land that projected into trust land evidently because, whereas it was not necessary, under the circumstances it was expedient to do so.

<sup>71</sup> 24 *Stair Memorial Encyclopedia*, para 203; Wilson and Duncan, para 24-10; *Gibson's Trs* 1933 SC 190.

<sup>72</sup> 1913 SC 289.

acceptance that the trustees' proposals were eminently sensible and to the benefit of the trust, the petition was refused with Lord Justice-Clerk Macdonald noting:<sup>73</sup>

"I do not think it is in the power of this Court, merely because we think it expedient, to set aside the directions of the truster..."

**5.35 Variation of trust.** Trustees' powers may be altered by variation of the trust which can be effected either at common law or under the Trusts (Scotland) Act 1961. At common law, there are two main situations in which a variation may be effected. First, in a revocable *inter vivos* trust the truster if *sui juris* may alter its terms.<sup>74</sup> Second, a variation may be carried out where all the beneficiaries and potential beneficiaries are identified, are of full age, are *sui juris* and agree to the proposed variation.<sup>75</sup> It can often be difficult to satisfy all these criteria. However, section 1(1) of the Trusts (Scotland) Act 1961 empowers the Court of Session to approve on behalf of three classes of beneficiary "any arrangement varying or revoking all or any of the trust purposes of the trust, or enlarging the powers of the trustees of managing or administering the trust estate – if in their opinion the carrying out thereof would not be prejudicial to any of those persons."<sup>76</sup> The beneficiaries on whose behalf the court may grant consent are:

(a) any of the beneficiaries who because of any legal disability by reason of nonage or other incapacity is incapable of assenting, or

(b) any person (whether ascertained or not) who may become one of the beneficiaries as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who is capable of assenting and would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the presentation of the petition to the court, or

(c) any person unborn."<sup>77</sup>

This provision does not alter the common law rule that all beneficiaries must consent to the variation. Rather, it allows the court to substitute its consent for that of certain classes of beneficiary.<sup>78</sup> At one time it was considered that section 1(1) of the Trusts (Scotland) Act 1961 did not extend to investment powers on account of these having been expressly dealt with in the Trustee Investment Act 1961.<sup>79</sup> However, the court will now approve an extension of investment powers.<sup>80</sup>

**5.36 Specific statutory regimes.** In addition to the general circumstances in which trustees may have their powers of administration extended, trustees of trusts set up under specific statutory regimes may enjoy the right to petition the court for an extension of their powers under the constituting statute. One example is the Education (Scotland) Act 1980, section 105(4A) of which provides that the Court of Session shall have the power to "give

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<sup>73</sup> *Ibid* at 290.

<sup>74</sup> *24 Stair Memorial Encyclopedia*, para 75.

<sup>75</sup> *Gray v Gray's Trs* (1877) 4R 378, Lord Gifford at 383; Mackenzie Stuart, p 346; Wilson and Duncan, paras 13-09 to 13-14; Norrie and Scobbie, pp 159 - 160; *24 Stair Memorial Encyclopedia*, para 75.

<sup>76</sup> Wilson and Duncan, para 13-24. See also Norrie and Scobbie, pp 163 - 164.

<sup>77</sup> S 1(1).

<sup>78</sup> See further, Wilson and Duncan, paras 13-17 to 13-21; *Pollok-Morris and Ors, Petrs* 1969 SLT (Notes) 60.

<sup>79</sup> *Inglis and Ors, Petrs* 1965 SLT 326.

<sup>80</sup> *Henderson, Petrs* 1981 SLT (Notes) 40; *University of Glasgow, Petrs* 1991 SLT 604.

effect to draft schemes for the future government and management" of an educational endowment scheme.<sup>81</sup>

### Options for reform

5.37 While the powers given by the truster in the trust deed should not be lightly enlarged, they should not be regarded as sacrosanct. Useful powers may have been inadvertently omitted, powers that seemed unnecessary when the trust was set up may have become necessary or the legal or factual background may have changed in ways unimagined by the truster. The existing methods are unsatisfactory. The scope of the court's jurisdiction to confer such powers under the *nobile officium* is unclear, with many of the authorities seemingly contradictory. In addition, powers will be granted only on grounds of necessity or strong expediency. Judicial variation of trusts under section 1 of the Trusts (Scotland) Act 1961 is designed to deal principally with the variation of purposes rather than enlargement of powers. All the ascertained, living and capax beneficiaries must consent and the court merely consents on behalf of the others. The result is that one beneficiary can veto the acquisition of useful additional powers.

5.38 We think there should be a simple way of obtaining additional powers relating to the administration or management of the trust estate where variation by agreement of all the beneficiaries is not possible.<sup>82</sup> We are attracted by the procedure available in England and Wales under section 57 of the Trustee Act 1925. This provides that where a transaction is expedient but the trustees lack power to carry it out, the court may confer the power, either generally or in that instance, and may impose such conditions as it thinks fit. Similar procedures exist in many Commonwealth jurisdictions.<sup>83</sup> We therefore propose that:

23. (1) **The court should be empowered, on application by the trustees, to grant an order conferring additional administrative and managerial powers in relation to the trust estate on them, if satisfied that the order would be of benefit to the future administration of the trust estate.**
- (2) **The application should be intimated to all the beneficiaries, who would have an opportunity to object. An order should be capable of being granted notwithstanding the objections of some beneficiaries.**
- (3) **The court should have power to attach such conditions to the order as it thinks fit.**

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<sup>81</sup> See, *University of Glasgow, Petrs* 1991 SLT 604; *Governors of Dollar Academy, Petrs* 1995 SLT 596.

<sup>82</sup> We intend to examine the variation of trusts by the beneficiaries or the courts in a future discussion paper.

<sup>83</sup> See Appendix A, paras 83 – 84 for details.

## D: ALLOCATION OF TRUST APPLICATIONS AMONGST THE SCOTTISH COURTS

### Introduction

5.39 In this section we examine the allocation of trust litigation amongst the Inner and Outer Houses of the Court of Session and the sheriff court. We are not considering jurisdiction in the international sense, ie whether the Scottish courts or the courts of some other state have jurisdiction. Historically the issue of internal jurisdiction, ie which Scottish court could deal with a case, was not a problem as almost all trust proceedings were, as a question of subject-matter competency, within the exclusive jurisdiction of the Court of Session. Also all trust petitions were to the *nobile officium* and hence dealt with by the Inner House of the Court of Session. As a result of delegation by various statutes and rules of court much of the trust litigation is now conducted in the Outer House.<sup>84</sup> In 1980 the Law Reform (Miscellaneous Provisions) (Scotland) Act of that year conferred jurisdiction on the sheriff courts in relation to certain functions in appointing and removing trustees.<sup>85</sup>

### Inner House petitions

5.40 ***Nobile officium***. Rule 14.3(d) of the Rules of the Court of Session provides that an application to the *nobile officium* is to be made by petition to the Inner House, except applications mentioned in rule 14.2(c). These exceptions, which are dealt with by the Outer House, relate to "(i) the administration of a trust; (ii) the office of trustees; or (iii) a public trust".

5.41 **Petition for directions**. Trustees acting under a trust deed as defined in the Trusts (Scotland) Act 1921<sup>86</sup> may obtain the direction of the court on questions relating to the investment, distribution, management or administration of the trust estate, or the exercise of any power vested in, or the performance of any duty imposed on, the trustees. The Court of Session is empowered to regulate the procedure<sup>87</sup> and rules 14.3(e) and 63.4-63.6 provide for such a petition to be dealt with by the Inner House on its Summar Roll.

5.42 **Trust variation**. Section 1 of the Trusts (Scotland) Act 1961 is concerned with two types of petition. Section 1(1) deals with the power to vary trust purposes while the power to vary alimentary provisions is dealt with under section 1(4). As well as varying the interests of beneficiaries, the trustees' powers may also be enlarged.<sup>88</sup> Rule 14.3(g) allocates such petitions to the Inner House.

### Outer House petitions

5.43 Outer House petitions are those which have been allocated there by statute or Rules of Court. In terms of statute, petitions under any section of the Trusts (Scotland) Act 1921 are to be presented to the Outer House.<sup>89</sup> These consist of a petition:

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<sup>84</sup> Statutory provisions giving the Lord Ordinary jurisdiction began with the Court of Session Act 1857.

<sup>85</sup> S 13 amending ss 22 - 24 of the Trust (Scotland) Act 1921.

<sup>86</sup> *Lowlands Territorial Assoc v Lord Advocate* 1971 SC 125.

<sup>87</sup> Court of Session Act 1988, s 6(iv) re-enacting s 17(iv) of the Administration of Justice (Scotland) Act 1933.

<sup>88</sup> See for example *Henderson, Petr* 1981 SLT (Notes) 40, where trustees were granted additional powers of investment.

<sup>89</sup> But the sheriff courts have concurrent jurisdiction in relation to certain applications, see paras 5.47 – 5.48 below.

- (a) by a trustee who has received a legacy to be allowed to resign;<sup>90</sup>
- (b) for authorisation, on the grounds of expediency, of an act mentioned in section 4 of the 1921 Act which is at variance with the terms and purposes of the trust;<sup>91</sup>
- (c) in relation to a fiduciary fee;<sup>92</sup>
- (d) to authorise advances of capital to underage beneficiaries;<sup>93</sup>
- (e) for superintendence by the Accountant of Court of the trustees' administration;<sup>94</sup>
- (f) for discharge of resigning trustees or heirs of deceased trustees;<sup>95</sup>
- (g) by a sole trustee who wishes to resign;<sup>96</sup>
- (h) for appointment of new trustees;<sup>97</sup>
- (i) for removal of trustees;<sup>98</sup>
- (j) for completion of title by a beneficiary of a lapsed trust;<sup>99</sup>
- (k) for indemnifying trustees who commit breaches of trust at the instigation of a beneficiary;<sup>100</sup> and
- (l) for relief from personal liability for breach of trust.<sup>101</sup>

5.44 Rules of Court have allocated certain trust matters to the Outer House. Rule 14.2(c) provides that petitions in relation to the administration of a trust, the office of trustee and public trusts are all Outer House petitions. Many of the matters relating to trust administration are covered by the Trusts (Scotland) Act 1921 and are allocated to the Outer House by virtue of that Act.<sup>102</sup> However, the Court of Session also has common law powers in this area, resort to which have to be made where the situation does not fall within the statutory grounds of application. Thus, for example, authority may be granted to trustees to advance capital to adult beneficiaries.<sup>103</sup> The court also has common law powers in relation to appointing and removing trustees.<sup>104</sup>

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<sup>90</sup> S 3.

<sup>91</sup> S 5.

<sup>92</sup> S 8.

<sup>93</sup> S 16.

<sup>94</sup> S 17.

<sup>95</sup> S 18.

<sup>96</sup> S 19.

<sup>97</sup> S 22.

<sup>98</sup> S 23.

<sup>99</sup> S 24.

<sup>100</sup> S 31.

<sup>101</sup> S 32.

<sup>102</sup> See para 5.43 above.

<sup>103</sup> *Robertson's Trs* 1909 SC 236.

<sup>104</sup> See paras 4.22 – 4.26.

5.45 One aspect of the public trusts jurisdiction concerns *cy près*. This involves an application to the *nobile officium* of the court for: (i) administrative machinery to carry out the trust where none has been provided by the truster; or (ii) approval of a scheme to vary the purposes of the trust when the truster's directions cannot be carried out but there is a general charitable intention or where the trust fails after a period in operation. In the latter case the variation approved will be close to the original trust purposes. Another aspect is the applications which may be made under Part 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 in relation to the administration or reorganisation of charitable bodies and other public trusts. The 1990 Act applications and the *cy près* applications are both expressly allocated to the Outer House by rule 63.7(1).<sup>105</sup>

5.46 Section 26 of the Trusts (Scotland) Act 1921 provides for the situation where in the exercise of the powers pertaining to the court of appointing trustees and regulating trusts, it is necessary to settle a scheme for the administration of any charitable or other permanent endowment. In these cases:

"...the Lord Ordinary shall, after preparing such scheme, report to one of the divisions of the court, by whom the same shall be finally adjusted and settled, and in all cases where it shall be necessary to settle any such scheme, intimation shall be made to His Majesty's Advocate, who shall be entitled to appear and intervene for the interests of the charity or any object of the trust or the public interest."

### **Applications to the sheriff court**

5.47 Sections 22, 23 and 24 of the Trusts (Scotland) Act 1921 allow for concurrent jurisdiction between the Court of Session and the sheriff courts. Section 22 deals with the appointment of trustees, section 23 deals with the removal of trustees and section 24 relates to the completion of title. The sheriff courts also have jurisdiction along with the Court of Session in relation to charitable bodies and public trusts under most of Part I of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.<sup>106</sup> However, the Outer House of the Court of Session alone deals with applications under sections 7 and 9, which deal respectively with management of charitable bodies and reorganisation of public trusts.<sup>107</sup>

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<sup>105</sup> Rule 63.7(1) also provides for applications relating to educational endowments under Part VI of the Education (Scotland) Act 1980 to be Outer House petitions. There are six types of application under this Act. They are first, an application for the giving of effect to a draft scheme for the future government and management of any university, theological or less than 20 years old educational endowment or of a Carnegie Trust: Education (Scotland) Act 1980, s 105(4A) (as inserted by the Education (Scotland) Act 1981, Sch 6, para 4(g)) and s 122(2). Second, by a governing body for the giving of effect to a draft scheme for the future government or management of an educational endowment which is at least 20 years old: 1980 Act, s 105(4C) (as inserted by the 1981 Act, Sch 6, para 4(g)) and s 122(1) and (2). Third, by a governing body for the giving of effect to a draft scheme for the future government or management of a non-educational endowment: 1980 Act, s 108 as amended by the 1981 Act, Sch 6, para 7(a). Fourth, by the Lord Advocate for the giving of effect to a draft scheme for the future government or management of a non-educational endowment; 1980 Act, s 108A renumbered and amended by the 1981 Act, Sch 6, para 7(b). Fifth, for the amendment or substitution of a scheme made by an education authority for the future government or management of an educational endowment which is at least 20 years old: 1980 Act, s 112(7) (as substituted by the 1981 Act, Sch 6, para 11(i)) and s 122(1) and (2). Sixth, by the Lord Advocate for summarily compelling governing bodies of certain educational endowments to give effect to a provisional order or scheme made under Part VI of the Act of 1980 or its predecessors: 1980 Act, s 120(1) as amended by the 1981 Act, Sch 6, para 18.

<sup>106</sup> S 5, application to court by Lord Advocate for interdict etc; s 6, summary application to sheriff for order requiring person to provide information and documents; s 11, application to the court by Lord Advocate for order prohibiting small trust from spending capital and s 14 winding up charitable companies.

<sup>107</sup> But see s 9(5) considered in para 5.55 below.

5.48 We consider in paragraphs 5.55 - 5.59 below the question of geographical jurisdiction, ie which sheriff court should deal with a particular case and the appropriate connecting factors.

### Proposals for reform

5.49 We believe that it should be possible for the sheriff courts to have a much greater role to play in trust litigation. Also, there has been some redirection of trust business already from the Inner House to the Outer House and this could be taken further. The argument in favour of keeping the Court of Session as the main forum for trust litigation is that it enables expertise to be built up and retained, particularly if such business is normally heard by the same Lord Ordinary or Division.<sup>108</sup> However, the sheriff court may be a cheaper and more convenient forum than the Court of Session.<sup>109</sup>

5.50 Petitions by trustees for directions currently heard by the Inner House should be capable of being presented to the Outer House or the sheriff courts. The purpose of such petitions is to provide a simple and expeditious way of obtaining guidance on practical problems relating to trust administration. As such it seems to us a suitable matter for concurrent jurisdiction. We also favour giving the sheriff court concurrent jurisdiction with the Outer House of the Court of Session in all applications under the Trusts (Scotland) Act 1921 and in relation to the reorganisation of endowments under the Education (Scotland) Act 1980. We do not think that any of these matters necessarily requires the expertise of a Court of Session judge. Conferring concurrent jurisdiction would allow petitioners to continue to use the Court of Session for cases that were complex or involved very substantial amounts of money. Petitions relating to the administration of trusts and the office of trustees which are applications to the *nobile officium* that have been allocated to the Outer House by rule 14.2(c) could also be made capable of being brought in the sheriff courts if those courts were to have concurrent jurisdiction in 1921 Act applications. It would seem odd that a sheriff could remove a trustee on one of the statutory grounds set out in section 23 of the 1921 Act but not on another common law ground, or that a sheriff could authorise advances to under-aged beneficiaries under section 16 of the 1921 Act but not to adult beneficiaries at common law. The county courts in England and Wales enjoy a wide jurisdiction in relation to trusts of modest value. Our proposals would allow *cy près* applications to be heard in the sheriff court if the public trust was local in character. On the other hand, applications involving large or national trusts could continue to be presented to the Outer House.

5.51 Applications under section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 are restricted to the Outer House of the Court of Session. These deal

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<sup>108</sup> Rule 63.8 provides for *cy près* petitions and petitions under the Education (Scotland) Act 1980 and Part I of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 to be heard by a nominated judge.

<sup>109</sup> Direct comparisons are difficult as there are so many variables in the way proceedings might be carried out and charged. Very similar issues arose during the Parliamentary passage of the Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 which conferred concurrent jurisdiction in divorce actions on the sheriff courts. A direct comparison of the expenses of a divorce action in each court could not be made. The Lord Advocate (Lord Mackay of Clashfern) considered that sheriff court actions would be cheaper and he was supported by Lord Hughes, Chairman of the Royal Commission on Legal Services in Scotland, HL Debs, vol 439, cols 834 and 850 respectively. This was doubted by Lord McCluskey (col 840) and the Society of Solicitors in the Supreme Courts in Scotland produced a memorandum showing that a sheriff court divorce might be more expensive. R Reid, "Divorce in the Sheriff Court" 1976 JLS 356, also thought there would be little or no saving in expenses except where two solicitors were involved.

with misconduct in relation to charities and the protection of their property. Section 30 of the draft Charities and Trustee Investments (Scotland) Bill issued for consultation in June 2004 continues this approach which we support as there is a need for interdicts and other orders to be effective throughout Scotland. Section 9 of the 1990 Act empowers the Court of Session, on application, to reorganise a public trust and subsection (5) provides that an application may be made to the appropriate sheriff court where the trust has an income not exceeding a limit prescribed in an order made by the Secretary of State. No such order has been made yet. We note that section 56 of the draft Bill continues the current policy of extending jurisdiction to the sheriff courts by subordinate legislation. In view of this a proposal for concurrent jurisdiction seems unnecessary.

5.52 The requirement for applications under section 1 of the Trusts (Scotland) Act 1961 for variation of a trust to have to go to the Inner House now seems anomalous. In 1961, it would have been seen as equivalent to a *nobile officium* application which was then reserved to the Inner House. Now many trust applications to the *nobile officium* have been redirected to the Outer House. We do not think that variation of trusts is necessarily so complex or important that it justifies being heard by three senior judges. We note that in England and Wales similar applications under the Variation of Trusts Act 1958 are dealt with by a single Chancery Division judge, or even in the case of trusts of modest value, by a county court judge.<sup>110</sup> We do not envisage that the volume of appeals in relation to directions or variation of trusts would be large enough to negate the benefit of the applications being dealt with by courts lower than the Inner House.

5.53 Special cases should continue to be dealt with by the Inner House. However, we doubt the need for the Inner House to be involved in settling a scheme drawn up by the Lord Ordinary for the administration of any charitable or permanent endowment.<sup>111</sup> The scheme should be capable of being made by the court hearing the application. The Lord Advocate, and (when established) the Office of the Scottish Charity Regulator in relation to charities, should continue to be notified and given an opportunity to intervene for the public interest.

5.54 We therefore propose that:

- 24. (1) The Outer House of the Court of Session and the sheriff courts should have concurrent jurisdiction in relation to applications:**
- (a) under the Trusts (Scotland) Act 1921;**
  - (b) relating to endowments under Part VI of the Education (Scotland) Act 1980;**
  - (c) dealing with the administration of trusts or the office of trustee, including *cy prè*s applications; and**
  - (d) by trustees for directions in relation to their administration of the trust.**

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<sup>110</sup> Appendix A, paras 85 – 86.

<sup>111</sup> Trusts (Scotland) Act 1921, s 26, see para 5.46 above.

- (2) **Petitions under section 1 of the Trusts (Scotland) Act 1961 (variation of trusts) should be presented to the Outer House rather than, as at present, to the Inner House.**
- (3) **The part of section 26 of the Trusts (Scotland) Act 1921 which requires the Inner House to settle a draft scheme by the Lord Ordinary for administration of a charitable or permanent endowment should be repealed.**

### **Geographical jurisdiction of sheriff courts**

5.55 We turn now to consider which sheriff court should have jurisdiction to deal with a particular case. At present the appointment and removal of trustees and completion of title under sections 22, 23 and 24 of the Trusts (Scotland) Act 1921 may be dealt with by an "appropriate sheriff court" defined in section 24A. In the case of a trust other than a marriage contract trust, it is the sheriff court of the sheriffdom in which the truster was domiciled when the trust came into operation or, if there is not sufficient information to determine which sheriff court is the appropriate court, the sheriff court at Edinburgh.<sup>112</sup> In the field of public trusts, section 9(5) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 empowers the Lord Advocate to make an order allowing applications for reorganising public trusts whose income is below a prescribed figure<sup>113</sup> to be made to a sheriff court. The sheriff court is to be that for the place with which the trust has its closest and most real connection and where there is no such place it is the place where any of the trustees reside. If none of the trustees is resident in Scotland then Edinburgh sheriff court would have jurisdiction. This power has not yet been exercised and so the Court of Session retains exclusive jurisdiction.

5.56 In the absence of any express new rules in relation to the new sheriff court jurisdiction proposed in Proposal 24 above, the general law contained in Schedules 8 and 9 to the Civil Jurisdiction and Judgments Act 1982 would apply. Rule 1 of Schedule 8 provides that persons are to be sued in the courts for the place where they are domiciled, while rule 2(g) provides that a person may also be sued ". . . in his capacity as settlor, trustee or a beneficiary of a trust domiciled in Scotland created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the Court of Session, or the appropriate sheriff court within the meaning of section 24A of the Trusts (Scotland) Act 1921." Rule 6 allows the trust deed to confer jurisdiction on a particular court which then has exclusive jurisdiction in any proceedings brought against a truster, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved. Finally, paragraph 13 of Schedule 9 excludes the Schedule 8 rules in proceedings "which are not in substance proceedings in which decree against any person is sought". It is not entirely clear what this provision means, but it may cover some types of application relating to trusts.

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<sup>112</sup> In the case of a marriage contract trust, it is the sheriff court of the sheriffdom in which either spouse was domiciled in life or at the time of death or if there is not sufficient information to make this determination, the sheriff court at Edinburgh.

<sup>113</sup> The amount is to be prescribed by the Scottish Ministers (formerly the Secretary of State). Very similar provisions appear in s 56 of the draft Charities and Trustee Investments (Scotland) Bill issued for consultation in June 2004.

5.57 We think it would be better to have an express provision on the geographical jurisdiction of sheriff courts in relation to the proposed new trust competences. Such a provision should disapply the Schedule 8 rules. The provision should however not apply where the trust deed specifies a sheriff court that is to have exclusive jurisdiction in relation to the trust. This preserves the role of rule 6(1) and (4) of Schedule 8. We are not in favour of retaining section 24A of the Trusts (Scotland) Act 1921 as the connecting factor. This provision uses the connecting link of the domicile of the truster (or spouse), with a fall-back provision of the sheriff court at Edinburgh if there is insufficient information to determine the domicile. Domicile here means the common law concept of domicile which in many situations is not something that can be easily established. This is particularly so where a domicile some time in the past has to be determined.

5.58 Our tentative preference is for the factors mentioned in section 9(5) of the 1990 Act.<sup>114</sup> The first factor, closest and most real connection, would be used where the trust was local in character such as a private trust involving a farm or a dwellinghouse or a public trust benefiting the residents of a particular area. The second and third factors - the place of residence in Scotland of a trustee and Edinburgh sheriff court as a long-stop - would come into play when it was not possible to establish a clear connection with any particular sheriff court. They would seem to be straightforward to operate.

5.59 We therefore propose that:

- 25. The appropriate sheriff court to deal with an application under the new jurisdiction for sheriff courts in Proposal 24 above should be:**
- (a) the court with which the trust has its closest and most real connection;**
  - (b) if there is no such court, the court for the place where any of the trustees resides;**
  - (c) where neither paragraph (a) nor (b) applies, Edinburgh sheriff court.**

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<sup>114</sup> See para 5.55 above.

# Part 6 Advances to Beneficiaries and Payments to Children in Need

## Introduction

6.1 Many testamentary family trust deeds grant the trustees power to advance to beneficiaries portions of their respective capital entitlements.<sup>1</sup> In making such an advance, trustees must be careful to stay within the scope of their authority set out in the trust deed.<sup>2</sup> In this Part we consider ways in which beneficiaries could be provided with money for their needs in advance of their entitlement under the trust deed and in the absence of any power to advance in the deed. We are not concerned with those cases where the trust deed contains an express or implied power to make advances and the court is involved either to elucidate or quantify the power or to interfere with the way in which the trustees have exercised or propose to exercise it.<sup>3</sup> We deal in Section A with advances of capital. Section B looks at payments to beneficiaries in need of income, while Section C examines the obligation on the trustees of a deceased parent's estate to aliment the children.

### A: ADVANCES OF CAPITAL

#### The current law

6.2 Authority to advance capital to beneficiaries may be obtained from the Court of Session:

- (a) under section 16 of the Trusts (Scotland) Act 1921; or
- (b) in the exercise of its *nobile officium*.

6.3 **Section 16 of the Trusts (Scotland) Act 1921.** Section 16 provides:

"The court may, from time to time under such conditions as they see fit, authorise trustees to advance any part of the capital of a fund destined either absolutely or contingently to beneficiaries who at the date of the application to the court are not of full age, if it shall appear that the income of the fund is insufficient or not applicable to, and that such advance is necessary for, the maintenance or education of such beneficiaries or any of them, and that it is not expressly prohibited by the trust deed, and that the rights of such beneficiaries, if contingent, are contingent only on their survivance."

This provision empowers the court to authorise trustees to advance any part of the capital of the trust to minor beneficiaries for the purpose of their education or maintenance if their income from the trust or elsewhere is insufficient or not available for these purposes and the

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<sup>1</sup> See Mackenzie Stuart, p 243; Wilson and Duncan, para 24-52.

<sup>2</sup> *Baird's Trs v Duncanson* (1892) 19R 1045; *Maclachlan's Trs v Gingold* 1928 SLT 409.

<sup>3</sup> See for example *Briggs' Trs* (1869) 8M 242; *Ritchie v Davidson's Trs* (1890) 17R 673.

trust deed contains no power to make advances. The court cannot grant such authorisation if the trust deed prohibits advances.<sup>4</sup>

6.4 The power granted by section 16 is quite narrowly drawn. First, the advance must be necessary for the maintenance or education of the beneficiaries and the income from the estate or elsewhere must be insufficient for these purposes. The necessity of an advance is treated as a question of degree to be judged by reference to the particular circumstances of the case in question.<sup>5</sup> This is equally true of applications to the *nobile officium* and was also the position under section 7 of the Trusts (Scotland) Act 1867, the precursor of section 16. Factors such as the financial position of the beneficiaries and the value of the estate are relevant considerations.<sup>6</sup> For example, in *Macfarlane v Macfarlane's Trustees*<sup>7</sup> the court authorised an advance of £300 per year to a beneficiary who had just entered an apprenticeship with a firm of chartered accountants, on account of the fact that his salary was negligible and his mother had no means of supporting him during his training. The case of *Clark's Trustees*<sup>8</sup> involved a large fortune. The court authorised an advance to minor beneficiaries on the basis that such an advance was necessary to enable the children to be educated in a manner befitting the status they would acquire. As Lord Justice-Clerk Macdonald observed:<sup>9</sup>

"Absolute necessity is not in question in the case; it is necessity in regard to the condition of the parties on whose behalf the application is made..."

6.5 The second limitation is that the right to capital enjoyed by the beneficiary must either be vested or, if contingent, then only if it is contingent purely on survivance. In other words an advance may only be made to a contingent beneficiary if, on surviving a prescribed event, the beneficiary will hold the only valid right and interest in the fund.<sup>10</sup> Thirdly, the beneficiary to whom an advance is made must be a minor when the advance is authorised. Authorisation may be granted where the beneficiary is in minority even though the advances may continue after majority.<sup>11</sup> However, the court will not authorise advances for a long period because the beneficiary's circumstances may change and remove the need for further advances.<sup>12</sup> Finally, only future advances can be authorised. Past advances have to be retrospectively approved by the Court of Session under the *nobile officium*.<sup>13</sup>

6.6 ***Nobile officium***. The court will exercise this jurisdiction only where an application under section 16 of the Trusts (Scotland) Act 1921 is incompetent,<sup>14</sup> where there has been some unforeseen and unprovided for (by the truster) circumstance, and where the advance is necessary for the education or maintenance of a beneficiary.<sup>15</sup> The power of the court to

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<sup>4</sup> Such an exclusion will be effective only if it amounts to "a clear and specific provision that advances of capital shall not be made to a minor beneficiary", *Paton's Trs* 1953 SLT 276, Lord Guthrie at 277. See also *Anderson's Trs* 1957 SLT (Notes) 5.

<sup>5</sup> Wilson and Duncan, para 24-61; cf Mackenzie Stuart, p 245 only "relief from destitution".

<sup>6</sup> Mackenzie Stuart, p 245.

<sup>7</sup> 1931 SC 95.

<sup>8</sup> (1895) 22R 706.

<sup>9</sup> *Ibid* at 710.

<sup>10</sup> *Ross's Trs* (1894) 21R 995; *Martin* (1904) 6F 592 (concerning the attainment of majority).

<sup>11</sup> *Macfarlane v Macfarlane's Trs* 1931 SC 95.

<sup>12</sup> *Paton's Trs* 1953 SLT 276 where an advance for a period of eleven years was refused.

<sup>13</sup> *Christie's Trs* 1932 SC 189.

<sup>14</sup> See for example *Craig's Trs, Petrs* 1934 SLT 49 where the beneficiary was over 21.

<sup>15</sup> *Stewart v Brown's Trs* 1941 SC 300, Lord Jamieson at 308.

grant authority for an advance is carefully circumscribed.<sup>16</sup> As Lord President Clyde observed in *Anderson's Trustees*:<sup>17</sup>

"...the *nobile officium* has never been invoked, and I do not think it could be used, for the simple purpose of enabling a beneficiary to enjoy a larger interest in the testator's estate than the testator has seen fit to give. The only exercise of the *nobile officium* which approaches anything of this sort is that by which trustees are given power to make necessary advances for the maintenance and education of the truster's children out of that part of the estate which is already vested in them...But this power is exercised only when the maintenance and education of the children is unprovided for in the settlement, or hampered by a direction to accumulate, or the like. The situation is really in the nature of a *casus improvisus*, in which the legal right of the testator's children to be maintained out of his estate has been unintentionally defeated or left unprovided for."

6.7 Advances may be authorised even where the beneficiary in question has no vested right in the trust estate.<sup>18</sup> For example, in *Sinclair's Trustees*<sup>19</sup> the testator's estate was not due to vest in the beneficiaries (his four daughters) until their mother died and the youngest of them reached 25. The will had provided for an annual allowance for the daughters until the youngest of them reached 25, but made no provision for them if their mother was still alive then. Two of the daughters were completely reliant on their income from the trust so a petition was lodged seeking the authority of the court for an advance. Despite the daughters not having a vested right, the advance was authorised subject to its being deducted from the share of the residue which might be payable to them later.<sup>20</sup>

6.8 When a share is advanced to a beneficiary, the advance is normally deducted from the prospective share so that the beneficiary eventually receives the balance.<sup>21</sup> But this is not always the case. For example, in *Bett's Trustees*<sup>22</sup> the court authorised advances to be taken from the whole estate. The testator's widow had been given an annuity for the maintenance of herself and her children. The trust deed authorised the trustees to make advances to the children, who were fiars of the estate, but directed that such advances were to be charged against their respective shares. The annuity proved insufficient to maintain the whole family and advances had to be made to provide extra support. However, the younger children would have been disadvantaged as compared to the older children if advances had been made and charged against their respective shares. The court therefore ordered the advances to be taken from the whole estate because they deemed it to have been the testator's intention to treat all of his children equally and because, in any event, the children were entitled to aliment from their father's estate.<sup>23</sup>

6.9 Advances under the *nobile officium* may be made to persons over the age of majority. For example, in *Stewart v Brown's Trustees*<sup>24</sup> a testator had directed his trustees to pay to two of his housekeepers a legacy by instalments until a specified date, upon which it was expected that the estate would have vested providing the housekeepers with a share of the

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<sup>16</sup> Cf *Stewart v Brown's Trs* 1941 SC 300.

<sup>17</sup> 1932 SC 226 at 231.

<sup>18</sup> *Robertson's Trs* 1909 SC 236; see review of cases in *Craig's Trs, Petrs* 1934 SLT 49 at 50.

<sup>19</sup> 1921 SC 484.

<sup>20</sup> See also *Frew's Trs* 1932 SC 501.

<sup>21</sup> Mackenzie Stuart, p 247.

<sup>22</sup> (1921) 2 SLT 246.

<sup>23</sup> See paras 6.26 - 6.28 below.

<sup>24</sup> 1941 SC 300.

residue. However, the vesting of the estate was unforeseeably delayed and the legacy of one of the housekeepers (the other having died) was exhausted before she became entitled to her share of the residue. That housekeeper, being 71 years old and in impecunious circumstances, asked the court to authorise the trustees to advance to her for the remainder of her life, or until the date of payment of her share of the residue, the whole free annual income accruing on her prospective share of the residue, or such annual sum as might appear reasonable from this fund. The court authorised initially two annual payments of a fixed amount.

## Proposals for reform

6.10 The existing law on advances of capital seems to us to be unduly restrictive. The statutory power under section 16 of the Trusts (Scotland) Act 1921 is limited in the following ways:

- The application must be made while the potential recipient is under 18;
- The advance is only for the applicant's education or maintenance;
- The advances have to be judged necessary; and
- The applicant must be vested or would be vested if he or she survived a specified event.

The common law power under the *nobile officium* is available only where the situation that has arisen was not envisaged by the truster. In our view there should be a new wider legislative provision which would render resort to the *nobile officium* unnecessary. We consider below options for new provisions which would, of course, apply only where the trust deed contained no express prohibition of advances.<sup>25</sup>

6.11 Section 16 of the 1921 Act limits authorisation of advances to those who are not at the date of the application to the court "of full age". This used to mean 21, but since 1969 it has meant 18.<sup>26</sup> We think this restriction is unjustified; applications for advances to adult beneficiaries are competent under the *nobile officium*. The need for young people to be maintained and educated possibly up to 25 is recognised by the Family Law (Scotland) Act 1985.<sup>27</sup> Also adult or elderly beneficiaries may need advances to keep them from want if they are unable to work or have insufficient other income of their own. In Australia, England and Wales and South Africa advances are not limited to minor beneficiaries.<sup>28</sup>

6.12 The existing statutory power is limited to advances for the education or maintenance of the beneficiary and the common law power is probably also so limited. We think it should be possible to make an advance in order to set the beneficiary up in life or otherwise assist the beneficiary. For example, a young woman might need capital to expand her flourishing business or an elderly man might require his home to be altered so that he could continue to live there. In England and Wales advances "for the advancement or benefit" of a beneficiary

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<sup>25</sup> See para 7.17 – 7.19 for transitional provisions.

<sup>26</sup> Age of Majority (Scotland) Act 1969, s 1(2).

<sup>27</sup> S 1(5).

<sup>28</sup> See Appendix A, paras 88 – 90 and 99.

may be made and these terms have been construed generously.<sup>29</sup> South Africa allows for variation of trust purposes if the trust deed contains a provision that has consequences that the truster did not foresee and which prejudices the interest of the beneficiary. This can be used for advances to beneficiaries in need. We favour adding the criterion of benefit so that an advance could be made if it was for the maintenance, education or benefit of the beneficiary.<sup>30</sup> It might be thought that an advance would always benefit a beneficiary in that he or she would receive money earlier than the trust deed otherwise provided, so that the addition of this criterion means that there would be no effective restriction on the power to advance. We do not think this would be the result. An advance could not be said to be for the benefit of a beneficiary who was too young, a spendthrift or a drug addict.

6.13 In England and Wales it has been held that the trustees' power under section 32 of the Trustee Act 1925 to advance capital for the advancement or benefit of a beneficiary includes power to put the advanced sum into a new trust for that beneficiary. It is no objection to such a resettlement that others may benefit incidentally.<sup>31</sup> We think that this would be a useful additional power. It should be competent for the trustees to exercise this power in the absence of consent by the beneficiary in question as long as they reasonably believe resettlement is in that beneficiary's interest. The new trust should be treated as being part of the original trust otherwise the rules in section 9 of the Trusts (Scotland) Act 1921 and section 18 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 against the duration of liferents or the creation of a long succession of liferents could be circumvented.

6.14 At present the law requires that the advance must be "necessary", a standard which we think is inappropriately high. The power of trustees in England and Wales to make advances is not confined to necessary payments. In South Africa a variation authorising an advance may be ordered if the existing trust provisions prejudice the applicant beneficiary. This is a less stringent requirement than necessity. We think that the degree of the beneficiary's need should be left to the discretion of those dealing with the application for an advance.

6.15 Section 16 of the Trusts (Scotland) Act 1921 allows advances to contingent beneficiaries but only if their rights to capital are contingent upon their survivance. This has been held to include a right to a share of a capital fund which would be payable only if and when the beneficiary attained 21 years of age.<sup>32</sup> We think that it is correct that a beneficiary to whom an advance is made should have to have a vested or contingent right to capital. In the absence of any such right, an advance amounts to a gift from the other beneficiaries. Accordingly, payments out of capital cannot be made to a needy liferenter unless there is an express provision to this effect in the trust deed. Similarly, beneficiaries of a discretionary trust should not be entitled to apply under a statutory provision for advances of capital. A beneficiary whose right is vested at the time of the application for an advance but is subject to defeasance wholly or partially by some subsequent event (such as the emergence of further issue or the exercise of a power of appointment) falls within the terms of section 16 and should be within the scope of the proposed new statutory provision. The possibility that

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<sup>29</sup> See Appendix A, para 92.

<sup>30</sup> The term "advancement" has a somewhat archaic ring to it and is likely to be confused with the advances themselves.

<sup>31</sup> *In re Pilkington's Will Trusts* [1964] AC 612.

<sup>32</sup> *Martin* (1904) 6F 592.

the beneficiary's interest in the trust estate would be defeated so that the trustees would have to pay it to a different beneficiary would be a factor to be considered.<sup>33</sup> In England and Wales trustees may make advances to any beneficiary who is entitled to capital whether:<sup>34</sup>

"absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs."

The current Scottish formula, unlike that for England and Wales, prevents an advance to a beneficiary whose interest vests on the occurrence of an event such as his or her marriage or graduation. But such vesting provisions are unusual. Our tentative view is that contingent vesting should not be limited to the contingency of survivance.

6.16 By whom should the power of making advances be exercised? Currently the Court of Session may authorise trustees to advance capital. Judicial control ensures that the truster's wishes are respected and that the other beneficiaries have an opportunity to object and have their needs and rights taken fully into account. South Africa also adopts the judicial route. In Australia and England and Wales trustees have a statutory power to make advances of capital. Arguably, trustees are best placed to assess the beneficiary's needs and the effects of making a known advance on the other beneficiaries. Giving trustees a direct power avoids legal proceedings which could be seen as a mere formality when there is general agreement that an advance should be made. Also the expense may inhibit applications to the court for modest advances. The main disadvantage is the absence of control that the courts provide. Their role would be limited to a review of the exercise by the trustees of their discretionary power to make the advance.<sup>35</sup> Our tentative preference is that the new statutory power to make advances should be conferred on trustees.

6.17 In England and Wales, trustees may not advance capital where such advance would prejudice any person entitled to a prior life or other interest unless that person is of full age and consents in writing. In Scotland, when the court is considering whether to authorise an advance to a capital beneficiary, the diminution of the liferenter's income is a factor to be borne in mind in the light of the liferenter's other financial circumstances.<sup>36</sup> There are advantages and disadvantages in each approach. If, as we have suggested, advances are to be authorised by the trustees rather than the court, then perhaps the balance comes down on requiring the consent of the liferenter and others with prior interests. At present the court is able to consent on behalf of a liferenter etc. who is underage or incapacitated and may authorise an advance even if the liferenter opposed it being made. We consider that these powers should continue to be exercisable by the courts.

6.18 Should there be any statutory limit on the amount that can be advanced? In England and Wales trustees may not advance more than one half of the beneficiary's share.<sup>37</sup>

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<sup>33</sup> Trustees might have to protect themselves from this risk of personal liability by insurance or binding the beneficiary to whom the advance was made to repay it.

<sup>34</sup> Trustee Act 1925, s 32.

<sup>35</sup> See para 6.6 - 6.9 above.

<sup>36</sup> *Paton's Trs* 1953 SLT 276.

<sup>37</sup> Underhill and Hayton, p 717.

Further advances cannot be made once this limit is reached, even if the trust estate thereafter increases in value.<sup>38</sup> In Scotland there is no statutory limit but any advance has to be authorised by the courts who have always approached the question of advances with great caution. Trustees would, we think, adopt the same prudent attitude because advancing a large portion of a prospective beneficiary's share might lead to a breach of trust claim should the non-vested right become payable to other beneficiaries. A statutory limit might be thought arbitrary and could be unduly restrictive, as for example where the beneficiary is due to be paid in the near future but is in urgent need of money. We seek views on the need for a limit and the size of any limit from those with experience in this area.

6.19 Summing up, we therefore put forward the following proposals and questions:

**26. (1) Section 16 of the Trusts (Scotland) Act 1921 and the Court of Session's common law powers to authorise advances of capital should be replaced by a new statutory provision along the following lines:**

**Trustees should have power to advance capital to a beneficiary where:**

- (a) the trust deed does not expressly prohibit an advance;**
  - (b) at the date of the advance the beneficiary has a right to all or part of the capital of the trust estate which is vested, is vested subject to defeasance or diminution by the occurrence of some uncertain future event, or will vest provided some uncertain future event occurs.**
  - (c) the advance would be, in their view, for the maintenance, education or benefit of the beneficiary.**
  - (d) every person with a prior life or other interest who would be prejudiced by the advance consents.**
- (2) The trustees should be entitled to place the sum advanced in a new trust for the beneficiary, although others may also gain incidental benefit.**
- (3) The court should continue to have power, on application, to authorise an advance where a person with a prior life or other interest who would be prejudiced by the advance:**
- (i) is incapable of consenting; or**
  - (ii) is withholding consent unreasonably.**

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<sup>38</sup> *In Re Marquess of Abergavenny's Estates Act Trs* [1981] 1 WLR 843.

**(4) Should the trustees' power to advance be limited to a specified proportion of the value of the beneficiary's prospective share and, if so, what should that proportion be?**

**B: PAYMENT OF INCOME**

6.20 There are no statutory provisions authorising trustees to pay income for the maintenance or education of beneficiaries. However, in the exercise of its *nobile officium*, the Court of Session may authorise trustees to make such payments.<sup>39</sup> Application has to be made where the beneficiary's share is not vested and/or the income is to be accumulated until the date of payment of the share arrives.

6.21 In *Latta*<sup>40</sup> a truster directed his trustees to accumulate the income of his estate during his widow's lifetime and hold it and the capital for his children who survived their mother (his widow), with the issue of a predeceasing child taking that child's share. One daughter was in undoubted poverty, with four young children and an unemployed husband. The judicial factor on the trust estate petitioned at common law for authority to make payments out of the income from the daughter's prospective share. The court authorised the judicial factor to spend a specified sum from the income for each of the daughter's children on its education and clothing but only for one year as the husband's prospects ought to have improved by then. *Colquhoun*<sup>41</sup> and *Walker*<sup>42</sup> similarly involved payments out of the income of a fund prospectively due to, but not vested in, a beneficiary. These payments had to be sought under the *nobile officium* as the then existing statutory provision<sup>43</sup> required the beneficiaries to have a vested interest and to be descendants of the truster (which they were not). In *Duncan's Trustees*<sup>44</sup> the provisions for children were held not to have vested in each child because that occurred only if and when the child attained 25 years of age. With some hesitation the court authorised the income to be used for the maintenance and education of the children as the fund was vested in the children as a class, there were no other directions as to the income, and the truster had placed himself in *loco parentis* to the children, having helped with their aliment while their mother was alive.

6.22 Other cases dealing with income payments have involved beneficiaries who had vested shares. In *Normand's Trustees v Normand*<sup>45</sup> a testator left a sum to be liferented by his three grandchildren with the fee going to the great grandchildren or their issue. When a grandchild died leaving issue, his or her share was to be divided amongst the issue with payments on the earlier of their majority or marriage. The trustees had paid a considerable sum over 10 years to the widow of one of the testator's grandsons for the maintenance and education of her children. The widower of another recently deceased granddaughter applied to the trustees for similar payments to be made for his children. The court held that the great grandchildren's shares had vested on their respective parent's death. The capital therefore

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<sup>39</sup> Wilson and Duncan, paras 24-70 and 24-72.

<sup>40</sup> (1880) 7R 881.

<sup>41</sup> (1894) 21R 671.

<sup>42</sup> (1905) 13 SLT 141.

<sup>43</sup> Trust (Scotland) Act 1867, s 7.

<sup>44</sup> (1877) 4R 1093.

<sup>45</sup> (1900) 2F 726. See also *Mackintosh v Wood* (1872) 10M 933.

belonged to them and the trustees had been and were entitled to apply the income for their maintenance and education before the date of payment of the capital.

6.23 In England and Wales section 31 of the Trustee Act 1925 empowers trustees to make payments out of income for the maintenance, education or benefit of contingent beneficiaries. Similar provisions can be found in the legislation of various states of Australia.<sup>46</sup>

6.24 We proposed in the previous section<sup>47</sup> that trustees should have a fairly generous statutory default power to advance capital for the maintenance, education and benefit of beneficiaries, whether vested or contingently vested. Standing this, it might be thought that new statutory provisions authorising payments of income are unnecessary. All of the Scottish cases mentioned in this section could have been dealt with by the trustees making periodic advances of capital under our proposal; the income being left to accrue to the eventual share. Nevertheless, there are situations where a power to pay income to a prospective beneficiary in need would be useful. One situation would be where the trustees were prevented from advancing further capital because they had already advanced all the proportion allowed by statute. We consider that the power to pay income should in general be exercisable by trustees but the court should have to authorise payments when the trust deed directed accumulation of the income. Trustees should not have a statutory power conferred on them to disregard the plain terms of the trust deed. The broad criteria that we proposed should apply to an advance of capital (that it is for the maintenance, education or benefit of the beneficiary) should also apply to a payment of income.

6.25 We therefore propose that:

- 27. (1) There should be new statutory provisions authorising trustees to pay to a beneficiary income arising from his or her prospective share where they consider the payment is required for the beneficiary's maintenance, education or benefit. At the date of payment the beneficiary's prospective share should have to be vested, be vested subject to defeasance or diminution by the occurrence of some uncertain future event, or would vest provided some uncertain future event occurred.**
- (2) Trustees should have no statutory authority to pay if the trust deed directs that income be accumulated, but should be entitled to apply to the court for authority to make payments.**

## C: ALIMENT OF TRUSTER'S CHILDREN

6.26 The children of a deceased person are entitled to claim aliment out of their parent's estate if their other rights of succession do not make adequate provision for them.<sup>48</sup> A widow may also claim from her late husband's estate in the same circumstances.<sup>49</sup> This obligation

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<sup>46</sup> See Appendix A, para 99.

<sup>47</sup> Proposal 26, para 6.19.

<sup>48</sup> *Beaton v Beaton's Trs* 1935 SC 187.

<sup>49</sup> *Anderson v Grant* (1899) 1F 484.

of aliment, termed aliment *jure representationis*, is owed by the deceased's executors or trustees while the estate is held by them. They are not bound to hold up the distribution or retain sufficient money to meet any future claim or future payments under an existing claim. After distribution the obligation of aliment transmits against those who succeed to the estate.

6.27 The Family Law (Scotland) Act 1985 abolished most of the common law obligations of aliment but aliment *jure representationis* was retained pending a review of the law of succession.<sup>50</sup> The obligation on the deceased parent's estate and the successors is not more onerous than that of the parent had he or she survived.<sup>51</sup> Aliment *jure representationis* is therefore limited to children up to the age of 18 unless they are reasonably and appropriately undergoing further education or training, in which case the age limit is 25.<sup>52</sup>

6.28 Children may also have a claim for aliment against the trustees of a trust established by their deceased parent even though the trust estate did not form part of the parent's estate. In *Spalding v Spalding's Trustees*<sup>53</sup> a man conveyed virtually all his estate to trustees some five months before his death. The trustees were to pay him the income after paying his present debts. On his death, the trustees were to pay his widow an annuity and aliment his three named children to whom the estate would eventually be conveyed. It was held that a posthumous child had a good claim for aliment, being a natural obligation that arose out of the relationship.

6.29 In our Report on *Succession* we recommended the replacement of legal rights, which are exigible out of the net moveable estate, by legal share which would be exigible out of the whole net estate, heritable and moveable.<sup>54</sup> In view of that change we recommended the abolition of aliment *jure representationis*.<sup>55</sup> Subsequently we were invited to reconsider our recommendations for legal share, particularly for children, in view of strong opposition by farmers and landowners to substantial lump sum claims from heritage. After a further limited consultation we came to the view that as far as children were concerned legal rights should be replaced by an aliment-based claim. Under this scheme a child would be entitled to claim a lump sum based on the cumulative value of the deceased's obligation of aliment had he or she survived. The obligation would be quantified assuming the child would have been alimented at home and there would be a ceiling, being a prescribed percentage of the estate, on the child's claim. A claim could not be made if the deceased's surviving spouse was liable to aliment the child. Usually couples with young children leave their estates to each other. In such a situation the children would have no claim as the survivor would be their other natural parent or accepting step-parent with an obligation to aliment them.

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<sup>50</sup> Section 1(3); *Greig v Greig's Exs* 1990 GWD 15-834, which deals with a claim by a widow; Report on *Aliment and Financial Provision* (Scot Law Com No 67, 1981), para 2.153.

<sup>51</sup> A B Wilkinson and K McK Norrie, *Parent and Child* (2<sup>nd</sup> edn, 1999), para 13.21.

<sup>52</sup> Family Law (Scotland) Act 1985, s 1(1), (5).

<sup>53</sup> (1874) 2R 237.

<sup>54</sup> Scot Law Com No 124 (1990), Recommendations 6 and 7, paras 3.8 - 3.16.

<sup>55</sup> *Ibid*, Recommendation 55, para 9.5.

Finally, fully adult children would have no claim as the age limits in the Family Law (Scotland) Act 1985 were to apply.

6.30 We make no proposals in relation to aliment *jure representationis* or similar claims against a deceased parent's trust estate in this discussion paper. However, if an aliment-based scheme as outlined above were to be implemented then aliment *jure representationis* could safely be abolished.

# Part 7 Miscellaneous

## Overview

7.1 In this final Part we look at a number of miscellaneous topics. The first deals with provisions in the Trusts (Scotland) Act 1921 relating to investment in heritable securities and bearer securities. If trustees are given the wide general power of investment that we have previously recommended<sup>1</sup> we think these provisions should be repealed as unnecessary. The second is about the choice of applicable law in relation to trusts and trustees. The final concerns transitional provisions regulating the extent to which any proposed changes in the law would affect trusts created, and acts carried out by trustees, before the commencement of any new legislation.

## A: MISCELLANEOUS INVESTMENT ISSUES

### Introduction

7.2 In 1999 we published a Report on *Trustees' Powers and Duties* jointly with the Law Commission. The joint sections of the report recommended reform in England and Wales and in Scotland of the law governing trustees' powers to invest trust funds. Where the trust deed does not otherwise provide, the trustees' investment powers are as set out in the Trustee Investments Act 1961. The main recommendation was that trustees should be entitled to make any kind of investment as if they were beneficially (or absolutely) entitled to the assets of the trust unless the trust deed expressly restricted their investment powers.<sup>2</sup> However, the trustees would have to consider the suitability for the trust of a proposed investment and the need for diversification of investments<sup>3</sup> and should normally obtain and consider appropriate advice.<sup>4</sup> In making any investments the trustees would be under a duty of care.<sup>5</sup> We also recommended that trustees should have power to purchase land, whether or not as an investment. As a consequence of these reforms, sections 12, 13 and 14 of the Trusts (Scotland) Act 1921 were to be repealed. Section 12 permits investment on charges under the Improvement of Land Acts, while section 13 empowers trustees to buy, or lend on security over, land subject to a prior charge under the Improvement of Land Act 1864.<sup>6</sup> Section 14 contains definitions for the purposes of sections 12 and 13.<sup>7</sup>

7.3 The Report's recommendations have been implemented for England and Wales by the Trustee Act 2000, but there is as yet no implementing legislation for Scotland.<sup>8</sup> In this section we look at some miscellaneous investment issues which the Report could not deal with because prior consultation was limited to the main principles.

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<sup>1</sup> See para 7.2 below.

<sup>2</sup> Paras 2.26 and 2.52.

<sup>3</sup> Para 2.31.

<sup>4</sup> Para 2.34.

<sup>5</sup> Paras 2.35 - 2.38.

<sup>6</sup> S 13 has been repealed by the Abolition of Feudal Tenure (Scotland) Act 2002, Sch 13, Part I.

<sup>7</sup> And for ss 10 and 11 which were repealed by the Trustee Investments Act 1961.

<sup>8</sup> The draft Charities and Trustee Investments (Scotland) Bill issued for consultation in June 2004 contains provisions implementing our recommendations in the Report.

## Investment in heritable securities

7.4 Section 29 of the Trusts (Scotland) Act 1921 provides that where a trustee has improperly advanced trust money on a heritable security which would, at the time of the investment, have been a proper investment if it had been for less than the actual money advanced, then the security is deemed an authorised investment for this lesser sum. This means that if the investment proves bad the trustee will only be held liable for the difference between the sum that would have been proper and the actual sum advanced and interest on the difference.

7.5 Section 30 of the 1921 Act grants relief to trustees lending money on security of any property in certain circumstances. Trustees are not liable for a breach of trust where they lent money on security of any property provided they acted on a valuation by a valuer instructed and employed independently of the owner of the property and that the amount of the trust loan together with any prior or *pari passu* loans did not exceed two thirds of the valuation. This section has been held not to impose a duty on trustees to obtain such an independent valuation.<sup>9</sup>

7.6 We think that if the joint report's recommendations are implemented for Scotland sections 29 and 30 should be repealed. Loans secured on property used to be the main type of trustee investment in the 19<sup>th</sup> and early 20<sup>th</sup> centuries so that special provisions relating to them were justified. Nowadays trustees have a much wider choice of investments, lending on property by trustees is relatively uncommon and it seems unnecessary to have detailed provisions about one type of investment. As mentioned in paragraph 7.2 above, in considering any proposed investment the trustees would have to consider its suitability for the trust and the need for diversification of investments. Section 6(7) of the Trustee Investments Act 1961 provides that the requirement to take advice does not include advice on the suitability of a particular loan secured on property, but this is without prejudice to section 30 of the 1921 Act and its English equivalent, section 8 of the Trustee Act 1925. The joint report recommended the repeal of most of the provisions of the Trustee Investments Act 1961 and their replacement by the new general power of investment summarised in paragraph 7.2 above.<sup>10</sup> Among the provisions recommended for repeal was section 6. The trustees were to be under a duty to obtain and consider proper advice about an investment unless they reasonably considered that it was unnecessary or inappropriate to do so. A loan over property would not be a small or simple investment in respect of which trustees could reasonably dispense with proper advice. What constitutes proper advice would depend on the subject matter of the investment. For loans over property proper advice would include advice about the current value of the property and its likely resale value in a forced sale.

7.7 Sections 8 and 9 of the Trustee Act 1925 were the respective equivalents for England and Wales of sections 30 and 29 of the 1921 Act. They were repealed by the Trustee Act 2000<sup>11</sup> implementing the Law Commission's view that they were outdated and were not required under the recommended new investment regime.

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<sup>9</sup> *Palmer v Emerson* [1911] 1 Ch 758 construing s 8 of the Trustee Act 1893 which was in similar terms.

<sup>10</sup> See Part II, paras 2.19 - 2.34.

<sup>11</sup> Sch 4, Part II repealing Part I of the Trustee Act 1925 which contains ss 8 and 9, but these sections remain in effect in respect of pre-commencement loans.

7.8 We therefore propose that:

**28. Sections 29 and 30 of the Trusts (Scotland) Act 1921 (dealing with trustees lending money on heritable security) should be repealed.**

**Bearer securities**

7.9 In terms of section 15(1) of the Trusts (Scotland) Act 1921, unless authorised by the trust deed, trustees must not purchase, acquire or hold beyond a reasonable time for realisation or conversion into registered or inscribed stock any certificate to bearer or debenture or other bond or document payable to bearer. Section 15(2) relieves the Bank of England and other issuers of bearer securities of any obligation to inquire whether acquirers of such securities are trustees and of any liability for issuing them to persons who turn out to be trustees.

7.10 We think that these provisions should be repealed on the ground that they are inconsistent with the recommendation in our joint report that trustees should be entitled to make any investment provided they consider its suitability, the need for diversification and take appropriate advice. Although bearer securities are riskier than registered securities we do not think that they are so risky that trustees should be forbidden to invest in them. The risks can be minimised by having them held in safe custody in a bank or other similar organisation.

7.11 In England and Wales investment in bearer securities is allowed subject to certain conditions. Section 7 of the Trustee Act 1925 provided that trustees could (unless expressly prohibited by the trust instrument) invest in securities payable to bearer that were otherwise authorised investments provided they were deposited for safe custody and collection of income with a banker or banking company. Section 18 of the Trustee Act 2000 replaced this and provides that:

- "(1) If trustees retain or invest in securities payable to bearer, they must appoint a person to act as a custodian of the securities.
- (2) Subsection (1) does not apply if the trust instrument or enactment or provision of subordinate legislation contains provision which (however expressed) permits the trustees to retain or invest in securities payable to bearer without appointing a person to act as a custodian.
- (3) An appointment under this section must be in or evidenced in writing.
- (4) This section does not apply to any trust having a custodian trustee or in relation to any securities vested in the official custodian for charities."

7.12 We doubt the need for such detailed provisions. The need to keep bearer securities in safe custody is well known and would be adopted by prudent persons in relation to their

own securities. Trustees would therefore be in breach of their duty of care for any loss arising from their failure to keep bearer securities safe. Accordingly we simply propose that:

**29. Section 15 of the Trusts (Scotland) Act 1921 (trustees not to hold certificates or bonds payable to bearer) should be repealed.**

**B: CHOICE OF APPLICABLE LAW**

7.13 The Recognition of Trusts Act 1987, which implements the Hague Convention on the law applicable to trusts and on their recognition, deals with the applicable law and recognition of express voluntary trusts. Article 6 of the Convention allows the truster to select, either expressly or impliedly, the law which is to govern the trust he or she creates. The chosen law need not have any objective connection with the trust. Where no choice is made by the truster, Article 7 of the Convention provides that the trust shall be governed by the objectively determined applicable law – ie the law which objectively has the closest connection to the trust. It provides a non-exhaustive<sup>12</sup> list of factors which are particularly relevant to the determination of the "applicable law". These are: (a) the place of administration of the trust designated by the truster, (b) the situs of the trust assets, (c) the place of residence or business of the trustees, and (d) the objects of the trust and the places where they are to be fulfilled.

7.14 Article 8 provides that the applicable law governs not only the validity and effects of the trust but also its administration. The article then lists matters that the applicable law is in particular to govern. Three such matters, set out in paragraphs (a), (c) and (d), are potentially relevant to this paper. Paragraph (a) concerns "the appointment, resignation and removal of trustees, the capacity to act as a trustee and the devolution of the office of trustee."; (c) deals with "the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers"; and the first section of (d) relates to "the power of trustees to administer or to dispose of trust assets..." Further, in circumstances where certain trustees have taken steps to exclude their personal liability, paragraph (b), "the rights and duties of the trustees among themselves", could become relevant. Article 9 deals with *dépeçage*, ie where a severable aspect of the trust, particularly matters of administration, is to be governed by a different law from that applicable to other aspects. As Harris states<sup>13</sup> "In the absence of *dépeçage*, it is important to note that the vast body of law that is administration of trusts is subjected to the law applicable to the trust."

7.15 It would be possible for the legislation implementing our proposals to be circumvented by trusters providing in the trust deed that the governing law should not be Scots law but that of another jurisdiction whose internal trust law did not contain any such rules. There seems to be nothing in the Convention that would prevent trusters pursuing this course of action<sup>14</sup> and it could not be legislated against without the United Kingdom

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<sup>12</sup> Other relevant considerations are for example, the current residence of the beneficiaries and the domicile of the truster, see Norrie and Scobbie, p 42.

<sup>13</sup> J Harris, *The Hague Trusts Convention*, (Oxford – Portland, Oregon, 2002), p 245.

<sup>14</sup> The von Overbeck Report on the Hague Convention (set out in Harris, Appendix 3) para 65, notes a Greek proposal made at the Fifteenth Session of the Special Commission. The Commission considered the suggestion that the choice of applicable law be disregarded where no connection to the trust existed but this was ultimately rejected in favour of free choice.

breaching the Convention. Article 15 does set out mandatory rules which cannot be departed from voluntarily. These are fundamental issues such as the protection of creditors, the transfer of title to property and the indefeasibility of fixed succession rights of spouses and issue. None of our proposals touches on matters that could be regarded as being the subject of mandatory rules. We take a similar view of Article 18. This provides that, where the applicable law of the trust in question is that of another state, the court may disregard a provision of that law if it is manifestly incompatible with the public policy of the *lex fori*. The proposals in this discussion paper would therefore apply only to trusts where the applicable law relating to the subject matter of the proposal is, in terms of the Recognition of Trusts Act 1987, that of Scotland.

7.16 We doubt whether the kind of circumvention described in the previous paragraph would occur to any great extent. Our proposals are not such as would drive Scottish trusters to adopt another law and there are practical disadvantages in having trusts that are closely connected with Scotland governed by a foreign law.

## C: TRANSITIONAL PROVISIONS

7.17 We consider that any legislative reform of trustees' powers and duties and of trust administration implementing this discussion paper's proposals should be prospective in effect. In other words, the new rules should apply only to acts or omissions after the date of commencement of the legislation in question. This avoids invalidating acts already done and retrospectively imposing liability on trustees. The existing law should also continue to apply to legal proceedings that were pending at the date of commencement. However, the question whether the new rules should apply to trusts created before commencement as well as to trusts created afterwards is more difficult. In general we think they should as it would be undesirable to have two different sets of rules, especially as this situation could persist for a very long time. The Trusts (Scotland) Act 1921 and the Trusts (Scotland) Act 1961 adopt this general approach.<sup>15</sup>

7.18 Many of our recommendations bring the law into line with existing practice and provisions in current trust deeds. Others deal with matters, such as the powers of the courts, that could not be excluded by trusters. Nevertheless, we have identified four proposals that would confer substantial new statutory default powers on trustees. These are: the appointment of nominees, a general power of administration, the advancement of capital and the payment of income. Trusters creating a pre-commencement trust might have wished to limit or exclude one or more of these powers but would not have known that they would be implied by future legislation. We note that sections 31 and 32 of the Trustee Act 1925, dealing respectively with payment of income and advancement of capital by trustees, were applied only to trusts created after commencement.<sup>16</sup> The lack of power to appoint nominees to hold trust property is, we understand, a matter of considerable concern to trustees. We doubt whether trusters would wish to exclude this facility. It seems to us that reform would be incomplete if the proposed new power was restricted to post-commencement trusts. In the Report on *Trustees' Powers and Duties* the Law Commission did not recommend any such restriction and section 27 of the Trustee Act 2000 applies the

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<sup>15</sup> 1921 Act, s 35(1), 1961 Act, s 7(2). The 1921 Act contains some minor exceptions to the general rule relating to the effect of pre-commencement actions or deeds: for example, s 8 (conveyances to non-existing or unidentifiable persons) does not apply to conveyances coming into operation before the passing of the Act.

<sup>16</sup> Ss 31(5) and 32(3).

provisions relating to the appointment of agents, nominees and custodians to trusts whether created before or after commencement.

7.19 We therefore propose that:

- 30. The legislation implementing the proposals in this discussion paper should apply:**
  - (a) to trusts whether or not created before its date of commencement, with the exception of the following proposals: Proposal 9A (general management power), Proposal 26 (advance of capital) and Proposal 27 (payment of income). These three proposals should apply only to trusts created on or after the date of commencement;**
  - (b) only in relation to any acts or decisions of the trustees occurring or made on or after the date of commencement;**
  - (c) only in relation to legal proceedings started on or after the date of commencement.**

## Part 8 List of proposals and questions

1. Legislation should be enacted providing that before a decision which binds the trustees can be made all the trustees must be given so far as is reasonably practicable:
  - (a) adequate prior notice of the matters to be decided, and
  - (b) an opportunity to put forward their views, either by attending a meeting of the trustees or in any other manner.

The above rules should apply in the absence of any contrary provision in the trust deed.

(Para 2.11)

2. There should be new statutory provisions in place of section 3(c) of the Trusts (Scotland) Act 1921 along the following lines:
  - (a) For a decision to bind the trustees it must be made by a number of trustees at least equal to the majority of the trustees then acting, but a trustee who has a personal interest in a decision is not to be counted as an acting trustee and is to be disqualified from participating for the purposes of making that decision.
  - (b) The above rule should apply in the absence of any contrary provision in the trust deed.

(Para 2.22)

3. Section 4(1)(f) of the Trusts (Scotland) Act 1921 should be replaced by a provision empowering trustees to appoint agents and pay them suitable remuneration.

(Para 3.5)

4. Is the existing common law on the extent to which trustees may delegate their powers to agents satisfactory or would it be better to have new statutory provisions?

(Para 3.15)

5. Should legislation be introduced authorising a trustee to delegate his or her discretionary functions on a temporary basis? If so, what restrictions, if any, should be imposed?

(Para 3.19)

6. Trustees should, unless the trust deed provides otherwise, have a new statutory power to transfer ownership of trust property to a person who would hold it as a nominee of the trustees

7. Should such a nominee be restricted to one providing nominee services in the normal course of its business? Should there be any other restrictions and if so what?

(Para 3.31)

8. Should any changes be made to the existing law in relation to the custody of trust documents and other valuables, and if so what changes should be made?

(Para 3.33)

9. A (1) Section 4(1) of the Trusts (Scotland) Act 1921 should be replaced by a power to administer, invest and generally deal with the trust estate as if the trustees were the beneficial owners, subject to any contrary provisions in the trust deed. In the exercise of this power the trustees would be bound by their duty of care, their fiduciary duties and the terms and purposes of the trust.

(2) Should legislation conferring a general power expressly confer, for the avoidance of doubt, any specific powers, and, if so, what powers should be conferred?

(3) Should legislation conferring a general power exclude specific powers, and, if so, what powers should be excluded?

OR

9. B The list of powers set out in section 4(1) of the Trusts (Scotland) Act 1921 should be amended by the inclusion of additional powers. We invite views on what additional powers should be added to the present list.

(Para 3.51)

10. Is there a need to clarify the law on the power of *ex officio* trustees to assume new trustees? If so, should there be legislation expressly giving trustees such power?

(Para 4.4)

11. The powers of the courts to appoint new trustees at common law or under section 22 of the Trusts (Scotland) Act 1921 should be reformulated in a new statutory provision along the following lines:

The court should have power, on the application of one or more of the trustees or any person with an interest in the trust estate, to appoint a trustee where this is necessary for the administration of the trust.

(Para 4.8)

12. The Lord Advocate's power to appoint new trustees under section 13(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 should be extended to non-charitable public trusts.

(Para 4.9)

13. (1) The present law should continue whereby beneficiaries are not entitled to appoint new trustees, unless such power is conferred by the trust deed.
- (2) Should exceptions be made to this general rule where the sole trustee:
- (a) has died,
  - (b) has been certified as being incapable, or
  - (c) has been convicted of a crime involving dishonesty;
- and there is no other person entitled to act as trustee and no other person is entitled under the trust deed to appoint a new trustee?
- (3) If any such appointment by beneficiaries were to be introduced should it have to be made by a deed executed by all of them?

(Para 4.12)

14. Proviso (2) to section 3 of the Trusts (Scotland) Act 1921 (a trustee who has accepted a legacy, bequest or annuity conditional on accepting office and a trustee who was appointed on a remunerated basis are not entitled to resign without prior judicial approval) should be repealed.

(Para 4.20)

15. Section 23 of the Trusts (Scotland) Act 1921 (removal of trustees on specified grounds) and the common law grounds for the removal of trustees should be replaced by new statutory provisions. These should provide that a trustee may be removed by the court, on application, if it is satisfied that:

- (a) the trustee is unfit or unable to continue to act as trustee in the trust; or
- (b) the trustee has neglected his or her duties as trustee.

The application should be capable of being made by one or more of the trustees, any beneficiary or any other person with an interest in the trust estate.

16. Should the court also have power to suspend a trustee from office on the above grounds for a definite period or until further order?

(Para 4.38)

17. There should be no automatic termination of trusteeship by reason of the trustee's insanity, incapacity, bankruptcy, conviction of a crime involving dishonesty, or any other event indicative of unfitness for office.
18. The beneficiaries should not be empowered to remove (or to direct the trustees to remove) a trustee from office.
19. Trustees should be given a discretionary power to remove a trustee on becoming aware that the trustee:
  - (a) has been certified as being mentally disordered or mentally incapable of acting as a trustee, or is the subject of an order grounded on certified mental disorder; or
  - (b) has been convicted of a crime involving dishonesty or imprisoned.

Views are sought on whether there should be any other situations, such as bankruptcy, in which the trustees should have the power to remove a trustee.

20. The power to remove a trustee should be exercisable by a deed executed by at least a majority of the other trustees (if more than two).

(Para 4.52)

21. There should be no change to the law on the powers of the courts to review decisions made by trustees in the exercise of their discretionary functions.

(Para 5.8)

22.
  - (1) The court should be empowered, on application by the trustees or others with an interest in the trust estate, to grant an order authorising the trustees to make payments from the estate on the footing that a specified event has or has not happened or will not happen. The court may make an order subject to such conditions as it thinks fit.
  - (2) Trustees who act in accordance with the authorising order should not be personally liable should the footing on which the court made the order turn out not to be correct, unless they concealed facts or acted fraudulently in the application. The freeing of the trustees from personal liability should not prejudice any right of the true beneficiaries to recover the trust estate from those to whom it had been distributed.
  - (3) Should any other changes be made to the law or procedure relating to petitions for directions or special cases, and if so what changes should be made?

(Para 5.28)

23. (1) The court should be empowered, on application by the trustees, to grant an order conferring additional administrative and managerial powers in relation to the trust estate on them, if satisfied that the order would be of benefit to the future administration of the trust estate.
- (2) The application should be intimated to all the beneficiaries who would have an opportunity to object. An order should be capable of being granted notwithstanding the objections of some beneficiaries.
- (3) The court should have power to attach such conditions to the order as it thinks fit.

(Para 5.38)

24. (1) The Outer House of the Court of Session and the sheriff courts should have concurrent jurisdiction in relation to applications:
- (a) under the Trusts (Scotland) Act 1921;
  - (b) relating to endowments under Part VI of the Education (Scotland) Act 1980;
  - (c) dealing with the administration of trusts or the office of trustee, including *cy près* applications; and
  - (d) by trustees for directions in relation to their administration of the trust.
- (2) Petitions under section 1 of the Trusts (Scotland) Act 1961 (variation of trusts) should be presented to the Outer House rather than, as at present, to the Inner House.
- (3) The part of section 26 of the Trusts (Scotland) Act 1921 which requires the Inner House to settle a draft scheme by the Lord Ordinary for administration of a charitable or permanent endowment should be repealed.

(Para 5.54)

25. The appropriate sheriff court to deal with an application under the new jurisdiction for sheriff courts in Proposal 24 above should be:
- (a) the court with which the trust has its closest and most real connection;
  - (b) if there is no such court, the court for the place where any of the trustees resides;
  - (c) where neither paragraph (a) nor (b) applies, Edinburgh sheriff court.

(Para 5.59)

26. (1) Section 16 of the Trusts (Scotland) Act 1921 and the Court of Session's common law powers to authorise advances of capital should be replaced by a new statutory provision along the following lines:

Trustees should have power to advance capital to a beneficiary where:

- (a) the trust deed does not expressly prohibit an advance;
  - (b) at the date of the advance the beneficiary has a right to all or part of the capital of the trust estate which is vested, is vested subject to defeasance or diminution by the occurrence of some uncertain future event, or will vest provided some uncertain future event occurs.
  - (c) the advance would be, in their view, for the maintenance, education or benefit of the beneficiary.
  - (d) every person with a prior life or other interest who would be prejudiced by the advance consents.
- (2) The trustees should be entitled to place the sum advanced in a new trust for the beneficiary, although others may also gain incidental benefit.
- (3) The court should continue to have power, on application, to authorise an advance where a person with a prior life or other interest who would be prejudiced by the advance:
- (i) is incapable of consenting; or
  - (ii) is withholding consent unreasonably.
- (4) Should the trustees' power to advance be limited to a specified proportion of the value of the beneficiary's prospective share and, if so, what should that proportion be?

(Para 6.19)

27. (1) There should be new statutory provisions authorising trustees to pay to a beneficiary income arising from his or her prospective share where they consider the payment is required for the beneficiary's maintenance, education or benefit. At the date of payment the beneficiary's prospective share should have to be vested, be vested subject to defeasance or diminution by the occurrence of some uncertain future event, or would vest provided some uncertain future event occurred.
- (2) Trustees should have no statutory authority to pay if the trust deed directs that income be accumulated, but should be entitled to apply to the court for authority to make payments.

(Para 6.25)

28. Sections 29 and 30 of the Trusts (Scotland) Act 1921 (dealing with trustees lending money on heritable security) should be repealed.

(Para 7.8)

29. Section 15 of the Trusts (Scotland) Act 1921 (trustees not to hold certificates or bonds payable to bearer) should be repealed.

(Para 7.12)

30. The legislation implementing the proposals in this discussion paper should apply:

- (a) to trusts whether or not created before its date of commencement, with the exception of the following proposals: Proposal 9A (general management power), Proposal 26 (advance of capital) and Proposal 27 (payment of income). These three proposals should apply only to trusts created on or after the date of commencement;
- (b) only in relation to any acts or decisions of the trustees occurring or made on or after the date of commencement;
- (c) only in relation to legal proceedings started on or after the date of commencement.

(Para 7.19)

# Appendix A Comparative Law

## PART 2<sup>1</sup>

1. **England and Wales.** In private trusts with more than one trustee, the trustees hold the office jointly. Trustees must therefore execute the duties of the office in their joint capacity.<sup>2</sup> Where the trustees fail to act in their joint capacity, the retrospective assent of the non-consulted trustee will serve to validate the act.<sup>3</sup> Accordingly, the general rule in England and Wales is that trustees must act unanimously in the exercise of their powers: "the act of a majority of private...trustees cannot bind either a dissenting minority, or the trust estate".<sup>4</sup>

2. There are, however, a number of exceptions to this general rule. First, a provision in the trust deed may allow for trust administration to be carried out by a number less than the whole body of trustees.<sup>5</sup> Trustees of charitable trusts have always been able to act by majority<sup>6</sup> and the same is now true of trustees of pension trust schemes unless the scheme expressly provides otherwise.<sup>7</sup> Where the matter in question is one which may lawfully be delegated, trustees obviously need not act jointly. They may delegate the decision to one of their number or to an independent agent.<sup>8</sup> Additionally, a majority of trustees have a statutory power to pay money into court.<sup>9</sup> Finally, although trustees must generally join in the receipt of capital, the body may lawfully delegate the collection of income (eg rents) to one or more of their number.<sup>10</sup>

3. Where the requirement of unanimity leads to deadlock in the administration of the trust, the court has jurisdiction to resolve the deadlock.<sup>11</sup>

4. **Commonwealth jurisdictions.** In a number of Commonwealth jurisdictions unanimous decision-making is the norm. For example, in India where there is more than one trustee they represent a single body in the eyes of the law. All trustees must therefore concur in acts of trust administration and a majority cannot bind the minority.<sup>12</sup> This general rule can be obviated by a contrary direction in the trust deed.<sup>13</sup>

5. In Australia, a corollary of the rule that trustees must fulfil their duties personally is that trustees must decide unanimously where there is more than one of them.<sup>14</sup> As with much Australian trust law, this rule is derived from English Chancery Court decisions.<sup>15</sup> The

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<sup>1</sup> These headings refer to the Parts in the main text.

<sup>2</sup> Lewin, para 29-24; Underhill and Hayton, p 644.

<sup>3</sup> *Messeena v Carr* (1870) LR 9 Eq 260; *Libby v Kennedy* (1998) OPLR 213.

<sup>4</sup> Underhill and Hayton, p 645.

<sup>5</sup> Lewin, para 29-28; Underhill and Hayton, p 644.

<sup>6</sup> *Re Whiteley* [1910] 1 Ch 600.

<sup>7</sup> Pensions Act 1995, s 32.

<sup>8</sup> Underhill and Hayton, p 645.

<sup>9</sup> Trustee Act 1925, s 63.

<sup>10</sup> Underhill and Hayton, p 647.

<sup>11</sup> *Cowan v Scargill* [1985] Ch 270, Megarry VC at 297.

<sup>12</sup> R Nath, "Trusts in India" in A Kaplan (ed), *Trusts in Prime Jurisdictions*, p309.

<sup>13</sup> *Shanti Vijay and Co v Princess Fatima Fouzia* (1979) 4 SCC 602.

<sup>14</sup> Ford and Lee, para 9380; *Re Billington* [1949] St R Qd 102.

<sup>15</sup> *Luke v South Kensington Hotel Co* (1879) 11 Ch D 121, Jessel MR at 125.

office of trustee in trusts having Australia as the applicable law is therefore joint.<sup>16</sup> The point was well elucidated by Jacobs J in *Estate of William Just (No 1)*:<sup>17</sup>

"In the case of co-trustees of a private trust, the office is a joint one. Where the administration of the trust is vested in co-trustees, they all form, as it were, but one collective trustee and therefore must execute the duties of the office in their joint capacity. Sometimes, one of several trustees is spoken of as the active trustee, but the court knows of no such distinction: all who accept the office are in the eyes of the law the active trustees. If any one refuses or is incapable to join, it is not competent for the other to proceed without him, and if for any reason they are unable to appoint a new trustee in his place, the administration of the trust must devolve upon the court."

This onerous rule of unanimity has the consequence that trust business cannot be transacted other than at a meeting during which all trustees, or representatives of all trustees, are present.<sup>18</sup> The meeting need not, however, be face to face.

6. Where the trustees cannot unanimously agree to a course of action the status quo must prevail.<sup>19</sup> The only circumstances in which the court may intervene is where the inactivity caused by the failure to reach agreement amounts to a breach of trust in itself or where the disagreements are so frequent as to present an impediment to the efficient administration of the estate.<sup>20</sup>

#### PART 3: Section A

7. **England and Wales.** Sections 11 to 15 of the Trustee Act 2000 confer more extensive powers to appoint agents and to delegate administrative and some discretionary functions to appointed agents. These powers are subject to any terms to the contrary in the trust deed.<sup>21</sup> For trusts other than charitable trusts, section 11(2) authorises the trustees to nominate agents to exercise any of their functions except:

- "(a) any function relating to whether or in what way any assets of the trust should be distributed,
- (b) any power to decide whether any fees or proper payment due to be made out of the trust funds should be made out of income or capital,
- (c) any power to appoint a person to be a trustee of the trust, or
- (d) any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian."

In the case of a bare trust, the trustees' power to insure trust property is not a delegable function once the beneficiaries have given a direction as to insurance.<sup>22</sup>

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<sup>16</sup> The corollary of this rule being that trustees' liability is joint and several: Ford and Lee, para 9390; *Bahin v Hughes* (1886) 31 Ch D 390, Cotton LJ at 396.

<sup>17</sup> (1973) 7 SASR 508 at 513 - 514, quoted by Ford and Lee, para 9380.

<sup>18</sup> Ford and Lee, para 9380.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Re Consiglio Trusts (No 1)* (1973) 36 DLR (3d) 658.

<sup>21</sup> Trustee Act 2000, s 26.

<sup>22</sup> Trustee Act 1925, s 19(4) substituted by Trustee Act 2000, s 34.

8. At common law trustees have the power to delegate both their administrative and discretionary functions in relation to foreign property. This rule was enacted by section 23(2) of the Trustee Act 1925, which in turn has been repealed by the Trustee Act 2000.<sup>23</sup> The Law Commission intended that the special rules in relation to foreign property should be abolished as they considered the new regime for delegation should apply to all property.<sup>24</sup> However the view has been expressed that the common law has revived.<sup>25</sup>

9. The trustees have a duty of care in appointing agents and must also monitor their performance.<sup>26</sup> Section 14 prohibits the trustees from agreeing to certain terms unless it is reasonably necessary for them to do so in appointing agents. The terms are the appointment of a substitute by the agent, the agent restricting liability and the agent acting in conflict of interest situations. There are further detailed provisions relating to delegation of asset management functions, which involve the drawing up of a written policy statement giving guidance to the agent as to how the functions are to be exercised.<sup>27</sup> Trustees are not liable for any losses due to acts or omissions by their agent if they complied with the various statutory provisions.<sup>28</sup>

10. **Guernsey.** Section 29(1) of the Trust (Guernsey) Law 1989 prohibits trustees from delegating their functions (administrative and discretionary) unless permitted by the trust deed or other provisions of the law. In practice most trust deeds contain wide powers to delegate to agents and managers. Section 29(2) allows the trustees to delegate the management of trust property to investment managers and to appoint professional persons to act in relation to the affairs of the trust, unless specifically prohibited by the trust deed.

11. **Australia.** In all states except South Australia, Tasmania and the Northern Territory there is legislation allowing trustees to employ agents. For example section 54 of the Queensland Trustee Act 1973 provides that a trustee may:

"employ and pay an agent, whether a solicitor, accountant, banker, trustee corporation, stockbroker or other person, to transact any business or do any act required to be transacted or done in the execution of the trust or the administration of the trust property".

Trustees are not liable for the default of an agent appointed in good faith and without negligence. New South Wales expressly limits the employment of agents to those situations where ordinary prudent people would employ someone in relation to their own affairs.<sup>29</sup>

12. Decisions relate to the execution of the trust or the exercise of the trustees' powers and discretions where they require considerations relative to the trust as such to be borne in mind. Such decisions may not be committed to an agent, but must be made by trustees or their delegates.<sup>30</sup> These include decisions affecting the beneficiaries' entitlements,<sup>31</sup> variation of the trust's investment portfolio, whether to appoint new trustees, applying to the

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<sup>23</sup> Sch 2, Pt II, paras 23 and 24; Sch 4, Pt II.

<sup>24</sup> Report on *Trustees' Powers and Duties*, para 4.13.

<sup>25</sup> Lewin, para 36-10C.

<sup>26</sup> Trustee Act 2000, s 22.

<sup>27</sup> *Ibid*, s 15.

<sup>28</sup> *Ibid*, s 23(1).

<sup>29</sup> Trustee Act 1925, s 53.

<sup>30</sup> Ford and Lee, para 9460.

<sup>31</sup> For example, the payment of maintenance or advances of capital.

court for advice and appointing agents. In *Buckby v Speed*<sup>62</sup> the distinction was drawn between an attorney exercising the trustees' power to lease trust property and the attorney executing a formal lease to implement the trustees' decision. The former was regarded as an improper delegation of discretion.

13. **United States of America.** Section 807 of the Uniform Trust Code provides that a trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee has a duty of care in selecting the agent and the terms of the agency and monitoring performance. Providing due care is taken the trustee is not liable for any default of the agent.

14. **Ontario.** Section 20 of the Trustee Act contains narrow powers of delegation. It mirrors the Trustee Acts of 1888 and 1893 in England which allowed solicitors and bankers to be appointed agents to receive and grant discharges for money and other property due to the trust. The Ontario Law Reform Commission recommended that trustees should have an unlimited power to delegate administrative tasks but no power in relation to dispositive discretions. Section 5(1) of the draft Bill annexed to their Trust Report is in the following terms:

"Where it is reasonable and prudent in the circumstances so to do, trustees may employ one or more persons as agents within or outside Ontario to carry out any act requiring to be done in the administration of the trust, including the execution of documents, the payment, transfer and receipt of money or other property, and the giving of discharges for receipts, but excluding the exercise of any express or statutory discretion as to the transfer or distribution of trust property to or among beneficiaries of the trust."

15. **British Columbia.** Section 7 of the Trustee Act confers a very limited power on trustees to appoint solicitors and bankers as agents to receive trust property and money and grant receipts and discharges. There is also a much wider common law power to appoint agents to carry out administrative tasks where a reasonable prudent person would do so. Non-delegation is not confined to dispositive discretions but it has been held that the decision to exercise a power of sale is non-delegable.<sup>33</sup>

16. The British Columbia Law Institute in its Report on *Statutory Powers of Delegation by Trustees* recommended legislation in almost exactly the same terms as section 5 of the Ontario Law Commission's draft Bill set out in paragraph 14 above.<sup>34</sup>

17. **South Africa.** A trustee can appoint subordinates to attend to humdrum aspects of trust administration and even pass on everyday aspects of running the trust to an outside agency or company.<sup>35</sup> Discretionary powers however have to be exercised by the trustee.<sup>36</sup> In *Hoosen NNO v Deeda*<sup>37</sup> the Supreme Court of Appeal interdicted a person from acting under a power of attorney in which the trustee employed the person to act in his place at any meeting of the trustees. The court said<sup>38</sup> that the "fundamental decisions relating to a trust

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<sup>32</sup> [1959] Qd R 30.

<sup>33</sup> *McLellan Properties Ltd v Roberge* [1947] SCR 561.

<sup>34</sup> Appendix F, clause 7.1.

<sup>35</sup> Honoré, p 326.

<sup>36</sup> *Erlank's Trs v Allan* 1909 TS 303.

<sup>37</sup> 1999 (4) SA 425 (SCA).

<sup>38</sup> Para 24 of the opinion.

need to be taken by the trustees; the implementation of such decisions may be delegated to others, although the ultimate responsibility remains with the trustees".

#### PART 3: Section C

18. **England and Wales.** Sections 16 to 23 of the Trustee Act 2000 deal, among other things, with nominees. Section 16 provides that trustees may appoint a person to act as their nominee in relation to such trust assets as they may determine, ensuring that the assets are vested in the nominee. The appointment has to be in writing or evidenced in writing. A nominee has to be a person carrying on a business which consists of or includes acting as a nominee, a corporate body controlled by the trustees or a body corporate recognised (under section 9 of the Administration of Justice Act 1985) by the Law Society as providing professional services such as those provided by solicitors or multi-national partnerships.<sup>39</sup> One of the trustees may be appointed nominee but only if it is a trust corporation. Two or more trustees may be appointed provided they are to act as joint nominees.<sup>40</sup>

19. Trustees should not allow a nominee to appoint a substitute, restrict its liability or act in a conflict of interest situation unless it is reasonably necessary for them to do so – ie: the nominee's services cannot be obtained otherwise.<sup>41</sup> Once appointed, the nominee's performance must be kept under review and, if necessary, the appointment terminated. Trustees are not to be liable for the acts or default of the nominee if they exercise due care in its appointment and subsequent review.<sup>42</sup>

20. **Guernsey.** Section 29(2)(b) of the Trusts (Guernsey) Law 1989 provides that the trustees have the power to "appoint professional persons...to hold any trust property". This is a statutory default power which may be amended or negated by the terms of the trust deed.

21. **United States of America.** Article 816(7) of the Uniform Trust Code authorises a trustee to hold stocks and securities in the name of a nominee.

#### PART 3: Section D

22. **England and Wales.** Sections 17 to 23 of the Trustee Act 2000 deal, among other things, with custodians. Section 17 provides that trustees may appoint a person to act as custodian of such trust assets as they may determine. The appointment has to be in writing or evidenced in writing. However, a custodian ought to be appointed for bearer securities unless the trust deed provides otherwise or the trust has a custodian trustee.<sup>43</sup> A custodian has to be a person carrying on a business which consists of or includes acting as a custodian, a corporate body controlled by the trustees or a body corporate recognised (under section 9 of the Administration of Justice Act 1985) by the Law Society as providing professional services such as those provided by solicitors or multi-national partnerships.<sup>44</sup>

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<sup>39</sup> Trustee Act 2000, s 19(1),(2).

<sup>40</sup> *Ibid*, s 19(5).

<sup>41</sup> *Ibid*, s 20.

<sup>42</sup> *Ibid*, s 23.

<sup>43</sup> Trustee Act 2000, s 18.

<sup>44</sup> *Ibid*, s 19(1),(2).

One of the trustees may be appointed custodian but only if it is a trust corporation. Two or more trustees may be appointed provided they are to act as joint custodians.<sup>45</sup>

23. Trustees should not allow a custodian to appoint a substitute, restrict its liability or act in a conflict of interest situation unless it is reasonably necessary for them to do so, i.e. the custodian's services cannot be obtained otherwise.<sup>46</sup> Once appointed, the custodian's performance must be kept under review and, if necessary, the appointment terminated. Trustees are not to be liable for the acts or default of the custodian if they exercise due care in its appointment and subsequent review.<sup>47</sup>

24. **Australia.** In New South Wales,<sup>48</sup> Queensland,<sup>49</sup> Victoria<sup>50</sup> and Western Australia<sup>51</sup> a trustee may deposit any trust documents with a bank or with any incorporated company whose business it is to undertake the safe custody of documents. Any charges for custody may be paid out of the trust income.

25. **United States of America.** Article 816(7)(D) of the Uniform Trust Code empowers trustees to deposit trust securities with a depository or any other regulated financial service institution. This is an aspect of the general power to exercise any power over the trust property which a competent owner could exercise subject to the fiduciary duties and the terms of the trust.<sup>52</sup>

#### PART 3: Section E

26. **England and Wales.** The Trustee Act 2000 which implements the joint recommendations of our report with the Law Commission<sup>53</sup> gives trustees and personal representatives power to make any kind of investment as if "absolutely entitled to the assets of the trust".<sup>54</sup> Various other powers in relation to the administration of the trust estate are conferred by the Trustee Act 1925 and the Trustee Act 2000. In relation to trusts of land, trustees have all the powers of absolute owners<sup>55</sup> but must have regard to the rights of the beneficiaries<sup>56</sup> and must exercise reasonable skill and care when exercising this general power.<sup>57</sup> Trustees' powers may be extended by agreement of the trust beneficiaries (as extended by the Variation of Trusts Act 1958), under the court's inherent power in cases of emergency or under section 57 of the Trustee Act 1925. Section 57 allows the court, if it is in its opinion expedient, to confer upon the trustees a power not contained in the trust instrument or implied by law. In practice, it is now common for settlers expressly to confer in the trust deed the powers of an absolute owner on their trustees.<sup>58</sup>

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<sup>45</sup> *Ibid*, s 19(5).

<sup>46</sup> *Ibid*, s 20.

<sup>47</sup> *Ibid*, s 23.

<sup>48</sup> Trustee Act 1925, s 50.

<sup>49</sup> Trusts Act 1973, s 49.

<sup>50</sup> Trustee Act 1958, s 25.

<sup>51</sup> Trustees Act 1962, s 48.

<sup>52</sup> Art 815(a).

<sup>53</sup> *Trustees' Powers and Duties*.

<sup>54</sup> Section 3(1).

<sup>55</sup> Trusts of Land and Appointment of Trustees Act 1996, s 6(1). The position of 'settled land' is different, see Lewin, ch 37.

<sup>56</sup> 1996 Act, s 6(5).

<sup>57</sup> Trustee Act 2000, s 1.

<sup>58</sup> See Lewin, para 36-03.

27. **Commonwealth jurisdictions.** The legislation in Canadian and Australian jurisdictions and also that of New Zealand has been influenced by the approach in England and Wales. The common law Canadian jurisdictions give various default administrative powers to trustees.<sup>59</sup> Trustees are able to extend these powers either through the inherent jurisdiction of the court in cases of emergency, or by an equivalent of the Variation of Trusts Act 1958. Many jurisdictions also have a provision modelled on section 57 of the Trustee Act 1925.<sup>60</sup> The Australian jurisdictions and New Zealand<sup>61</sup> also give various default powers to trustees, which include virtually unlimited powers of investment. However, in Queensland many of the powers are not default powers – they are not subject to contrary provision in the trust instrument. All Australian jurisdictions and New Zealand have a provision modelled on section 57 of the Trustee Act 1925. Most have also adopted the Variation of Trusts Act 1958.

28. **United States of America.** The Uniform Trust Code provides that a trustee shall have all the powers over the trust property which an unmarried competent owner has over individually owned property, except as limited by the terms of the trust.<sup>62</sup> Trustees are also given any other powers appropriate to achieve the proper investment, management and distribution of the trust property and any other powers conferred by the Code.<sup>63</sup> It then lists 26 specific powers a trustee may exercise, stating that these do not limit the general authority already conferred.<sup>64</sup> The intention behind these provisions is to grant trustees the broadest possible powers, subject to the trust deed and the fiduciary duties of a trustee. The specific powers were taken from powers commonly included in trust deeds and in trustee powers legislation.

29. **Quebec.** The Civil Code contains generally expressed powers of administration. Thus articles 1306 - 7 provide:

1306 A person charged with full administration shall preserve the property and make it productive, increase the patrimony or appropriate it to a purpose, where the interest of the beneficiary or the pursuit of the purpose of the trust requires it.

1307 An administrator may, to perform his obligations, alienate the property by onerous title, charge it with a real right or change its destination and perform any other necessary or useful act, including any form of investment.

By contrast, the Code specifies in detail the investments that are presumed to be sound.<sup>65</sup>

30. **South Africa.** The common law does not confer adequate powers on trustees. As a result well-drafted trust deeds will contain wide powers. There is no list of statutory powers

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<sup>59</sup> See for example Ontario (Trustee Act, R.S.O. 1990, c. T. 23), British Columbia (Trustee Act, R.S.B.C. 1996, c. 464), Alberta (Trustee Act, R.S.A. 2000, c. T-8), Manitoba (Trustee Act, C.C.S.M. c. T160), New Brunswick (Trustees Act, R.S.N.B. 1973, c. T-15), Nova Scotia (Trustee Act, R.S.N.S. c. 317), Northwest Territories (Trustee Act, R.O.N.W.T. 1988, c. T-8), Yukon Territory (Trustee Act, R.S.Y. 2002, c.223).

<sup>60</sup> See for example Alberta (Trustee Act, s 21), Manitoba (Trustee Act, s 58), New Brunswick (Trustees Act, s 25), Nova Scotia (Trustee Act, s 51), Northwest Territories (Trustee Act, s 18) and Yukon Territory (Trustee Act, s21).

<sup>61</sup> For the position in Australian jurisdictions and New Zealand, see Ford and Lee, ch 12.

<sup>62</sup> S 815(a)(2)(A).

<sup>63</sup> S 815(a)(2)(B) and (C).

<sup>64</sup> S 816.

<sup>65</sup> Art 1339.

that apply unless otherwise indicated by the trust deed. If trustees consider that they need a power that they do not have they must apply to the court for an order granting it to them.<sup>66</sup>

#### PART 4: Section A

31. **England and Wales.** Under section 20 of the Trusts of Land and Appointment of Trustees Act 1996, the beneficiaries of a trust may give a direction for the appointment of a new trustee to replace a trustee who is incapable by reason of mental disorder.<sup>67</sup> The direction must be unanimous<sup>68</sup> and the beneficiaries must be of full age and capacity and (taken together) absolutely entitled to the trust property.<sup>69</sup> They can exercise this power only where there is no one who is both willing and able to appoint a replacement trustee under section 36(1) of the Trustee Act 1925.<sup>70</sup> It is therefore likely to be used only to replace an incapable sole trustee and then only where no trustee can be appointed by the truster or a person nominated to appoint new trustees. The beneficiaries' direction is given to the incapable trustee's receiver, attorney acting under an enduring power of attorney,<sup>71</sup> or authorised person under Part VII of the Mental Health Act 1983.<sup>72</sup> It is assumed, though not specifically outlined in the statute, that this direction confers an obligation to appoint the specified trustee.<sup>73</sup>

32. The beneficiaries, if of full age and capacity and (taken together) absolutely entitled to the trust estate and acting unanimously, may give one or more directions under section 19 of the Trusts of Land and Appointment of Trustees Act 1996. These include the appointment of an additional trustee or trustees. The direction to appoint a new trustee or trustees is addressed to the existing trustees or if none to the personal representatives of the last trustee. The addressees then have to execute a deed of appointment of the person or persons specified in the direction. Although the Act contains no enforcement provisions, the view has been expressed that the beneficiaries could apply to the court for an order compelling the addressees to act.<sup>74</sup>

33. **Northern Ireland.** Sections 34 - 36 of the Trustee Act (Northern Ireland) 2001 are almost identical to sections 19 and 20 of the Trusts of Land and Appointment of Trustees Act 1996.

34. **United States of America.** Section 704 of the Uniform Trust Code provides for the appointment of new trustees. In a case where one or more co-trustees remain in office, a new trustee need not be appointed. There is an obligation to fill a vacancy only where the trust has no remaining trustee.<sup>75</sup> Should a vacancy require to be filled section 704(c) lays down the order of priority of people to be appointed. The order is: first, a person designated

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<sup>66</sup> Honoré, p 314.

<sup>67</sup> Trusts of Land and Appointment of Trustees Act 1996, s 20(1)(a).

<sup>68</sup> *Ibid*, s 21(1)(a).

<sup>69</sup> *Ibid*, s 20(1)(c).

<sup>70</sup> *Ibid*, s 20(1)(b).

<sup>71</sup> Created by an instrument which is registered under section 6 of the Enduring Powers of Attorney Act 1985.

<sup>72</sup> Trusts of Land and Appointment of Trustees Act 1996, s 20(2).

<sup>73</sup> Lewin, para 16-15.

<sup>74</sup> Lewin, para 13-32.

<sup>75</sup> S 704(b).

in the trust deed to act as successor; second, a person appointed by unanimous agreement of the qualified beneficiaries;<sup>76</sup> and third a person appointed by the court.

35. **South Africa and Australia.** There are no statutory provisions relating to the appointment of trustees by beneficiaries in either South Africa or Australia.

PART 4: Section B

36. **England and Wales.** In England and Wales a trustee may resign office in one of four ways:<sup>77</sup>

- (1) under an express or necessarily implied power in the trust deed;
- (2) under the power conferred by section 39 of the Trustee Act 1925;
- (3) with the consent of all the beneficiaries where they are *sui juris*;
- (4) if authorised by the court.

There appears to be no distinction between gratuitous and non-gratuitous trustees for the purposes of resignation under English law. Each of the four options above is open to any trustee regardless of any receipt of legacies or remuneration.

37. Section 36(1) of the Trustee Act 1925 provides that a trustee who wishes to resign may be replaced by a new trustee or new trustees. The appointment of a replacement is made by the person with power to appoint new trustees in terms of the trust deed, or if there is no such person, the existing trustees or personal representatives of the last surviving trustee. Section 39(1) provides for resignation without replacement as long as there will be at least two individual trustees or a trust corporation left to act. The trustee requires the consent of the other trustees and the person (if any) with power to appoint new trustees in terms of the trust deed.

38. The third method of resignation is utilised where the beneficiaries are, between them, the sole owners of the trust property. The sanctioning of a resignation by the beneficiaries is valid even where only one individual trustee would remain following any resignation(s). However, Underhill and Hayton doubt whether the beneficiaries may permit a trustee to retire if his co-trustees withhold their consent.<sup>78</sup>

39. Finally, if circumstances are such that resignation by any of the other means is impractical, the trustee may apply to the court for the appointment of a replacement trustee under section 41 of the Trustee Act 1925. Alternatively, the trustee may make an application for the administration of the trust. In administration proceedings the court can authorise resignation without appointing new trustees.<sup>79</sup>

40. **South Africa.** Trustees could not resign at common law unless authority to do so was granted by the court which had to be satisfied that there was a good reason. Trustees

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<sup>76</sup> Qualified beneficiaries do not include remote or contingent beneficiaries, s 103(12).

<sup>77</sup> Underhill and Hayton, p 743.

<sup>78</sup> Underhill and Hayton, p 746. Similar doubts are expressed in Lewin, para 13-15, footnote 31.

<sup>79</sup> Lewin, para 13-12.

could resign without judicial authority if they were permitted to do so by an express provision in the trust deed.

41. Section 21 of the Trust Property Control Act 1988 now entitles a trustee to resign irrespective of whether the trust deed expressly provides such a power. The exercise of this power is subject to the trustee intimating his resignation to both the Master of the High Court and the ascertained beneficiaries who have legal capacity or to the tutors of the beneficiaries under tutorship or curatorship. Neither the Master nor the court can veto the trustee's proposed resignation. However, the fiduciary obligations undertaken by the trustee on accepting office means that he or she cannot simply resign at any time regardless of the needs of the trust or the interests of the beneficiaries. If resignation would prejudice the trust, the policy of giving effect to validly constituted trusts must at least temporarily prevail, and until a suitable successor is available, override considerations of private convenience.<sup>80</sup>

42. **Canada.** In Quebec a trustee may resign by giving written notice to the beneficiary and his co-trustees or the person empowered to appoint an alternative administrator. Where there are no such persons or where it is impossible to give notice to them, the notice is given to the Public Curator who, if necessary, assumes provisional administration of the property and causes a new administrator to be appointed in place of the administrator who has resigned. The administrator of a private trust or social trust shall also notify the resignation to the person or body designated by law to supervise the administration.<sup>81</sup> If the resignation of a trustee causes prejudice to the trust and has been submitted without a serious reason and at an inopportune moment or where it amounts to a failure of duty then the trustee must repair the prejudice caused.<sup>82</sup> There would appear to be no distinction between gratuitous and non-gratuitous trustees as far as the power to resign is concerned.

43. Section 2 of the Trustee Act of Ontario<sup>83</sup> provides that where there are more than two trustees and by deed one of them declares a desire to be discharged, then, so long as the co-trustees and any other person empowered to appoint trustees consent by deed to the discharge of the trustees and to the vesting of the property in the co-trustees alone, the trustee desirous of discharge shall be deemed to have retired from the trust without the need for the appointment of a replacement. At common law, the court has an inherent jurisdiction to make an order allowing a trustee to resign. The Ontario Law Reform Commission has suggested that section 2 should be reformulated to include the power to resign not only where at least two trustees will remain but also where a trust corporation will remain.<sup>84</sup> The Commission has also suggested that trustees should be able to resign non-judicially from part of the trust while remaining active in another part, provided that "the parts of the trust reflect separate property held on distinct trust terms".<sup>85</sup> Finally, the Commission has recommended that clauses excluding the statutory right to resign from the terms of the trust should be invalid for all purposes.<sup>86</sup>

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<sup>80</sup> Honoré, p 228.

<sup>81</sup> Quebec Civil Code, art 1357.

<sup>82</sup> *Ibid*, art 1359.

<sup>83</sup> RSO 1990, c.T-23.

<sup>84</sup> Trust Report, Vol I, p 90.

<sup>85</sup> *Ibid*, p 91.

<sup>86</sup> *Ibid*.

## PART 4: Section C

44. **England and Wales.** A trustee may be removed under an express power in the trust deed by the truster or other person authorised to exercise it.<sup>87</sup> The beneficiaries, if absolutely entitled to the trust estate and acting unanimously, may give one or more directions under section 19 of the Trusts of Land and Appointment of Trustees Act 1996.<sup>88</sup> These include: (a) the retirement of a trustee or trustees, (b) the retirement of a trustee or trustees and the appointment of another or others, or (c) the appointment of an additional trustee or trustees. The direction to retire is addressed to the trustee concerned, while the direction to appoint a new trustee or trustees is addressed to the existing trustees or, if none, to the personal representatives of the last trustee. The addressees then have to execute a deed of retirement or a deed of appointment for the person or persons specified in the direction. Where a trustee is directed to retire, section 19(3) provides that reasonable provisions have to be made for protecting any of the trustee's rights in connection with the trust, there must remain after retirement either a trust corporation or two trustees in office and the remaining trustees must consent to the retirement unless a new trustee or trustees are being appointed at the same time. If these conditions are met the trustee is to execute a deed of retirement. Although the Act contains no enforcement provisions, the view has been expressed that the beneficiaries could apply to the court for an order compelling the trustee to retire.<sup>89</sup>

45. There is a special procedure in section 20 of the 1996 Act whereby the beneficiaries can replace an incapable trustee. The beneficiaries must act unanimously and there must be no person who is both able and willing to appoint a replacement under section 36(1) of the Trustee Act 1925.<sup>90</sup> In terms of section 20(2) the beneficiaries' direction is to be given to the incapable trustee's receiver, enduring attorney or person authorised for the purpose by the authority having jurisdiction under Part VII of the Mental Health Act 1983.<sup>91</sup> A receiver or an attorney can execute the necessary deed, but the "authorised person" will have to apply to the court for authority to do so.

46. Another statutory power of replacement is to be found in section 36 of the Trustee Act 1925. The person with power under the trust deed to appoint new trustees, or if there is no such person or that person is unwilling or unable to act, the existing trustees or the personal representatives of the last surviving trustee, may appoint one or more trustees to replace an existing trustee. The trustee sought to be replaced cannot demand to be a party to the appointment of the replacement.<sup>92</sup> This statutory power is limited to the following situations: where the trustee sought to be replaced is dead or remains out of the United Kingdom for more than 12 months; or where the trustee wishes to retire, refuses or is unfit to act or is incapable of acting as trustee, or is an infant. Section 36(3) provides that a corporate trustee which is dissolved is deemed to be incapable of acting.

47. Finally, trustees may be removed or replaced judicially. Section 41 of the Trustee Act 1925 empowers the court to appoint a new trustee either in substitution for or in addition

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<sup>87</sup> Lewin, para 13-41.

<sup>88</sup> Ss 34 - 36 of the Trustee Act (Northern Ireland) 2001 are almost identical to ss 19 - 20 of the 1996 Act.

<sup>89</sup> Current Law Statutes Annotated, commentary on s 19 by Prof and Mrs Kenny; Lewin, para 13-32.

<sup>90</sup> A person empowered by the trust deed to nominate a new trustee, the present trustees or the personal representatives of the last surviving trustee.

<sup>91</sup> The Court of Protection, for example.

<sup>92</sup> *In Re Stoneham Settlement Trusts* [1953] Ch 59.

to existing trustees or in circumstances where there are no existing trustees. This power is expressed to be available in particular to substitute a new trustee for one who is mentally incapable of acting, is a bankrupt or is a corporation in liquidation or dissolved. This statutory power is to be used only when other non-judicial powers are inexpedient, difficult or impractical. Section 41 can be used to replace a trustee who refuses to resign. The court also has an inherent jurisdiction to remove a trustee.<sup>93</sup> This tends to be resorted to when it is not desired to appoint a replacement. The inherent jurisdiction is exercised in much the same way as the Court of Session exercises its common law power to remove trustees.

48. **South Africa.** The trustor may reserve power in the trust deed to remove trustees or confer this power on others.<sup>94</sup> The court has a statutory power to remove a trustee if satisfied that this "will be in the interests of the trust and its beneficiaries". The application may be made by the Master of the High Court or any person having an interest in the trust property.<sup>95</sup> The court also has an inherent common law power to remove a trustee if his or her continuance in office would prejudice the future welfare of the trust. This power has been exercised in at least one case since the passing of the 1988 Act.<sup>96</sup> The common law power may be exercised by the court on its own motion and perhaps also on the application of any member of the public as well as by those interested in trust property.<sup>97</sup>

49. Under the statutory power to remove in the interests of the trust and its beneficiaries insolvency is not an automatic ground for removal but save in exceptional cases an insolvent trustee will be removed.<sup>98</sup> Instead of removing a trustee, the court may order suspension for a limited period.<sup>99</sup> It may also appoint an additional trustee or trustees as a way of providing extra expertise in the administration of the trust.<sup>100</sup>

50. The Master has an independent power to remove a trustee on one or more of the grounds specified in section 21 of the Trust Property Control Act 1988. These are:

- (a) conviction of a crime involving dishonesty or being sentenced to imprisonment;
- (b) failure to provide security to the satisfaction of the Master;
- (c) the trustee's personal estate being sequestrated, liquidated or placed under judicial management;
- (d) the trustee is incapable of managing his or her own affairs, is mentally ill or is detained under the mental health legislation; and
- (e) the trustee fails to perform satisfactorily any duty or to comply with a request from the Master.

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<sup>93</sup> *Re Harrison's Settlement Trusts* [1965] 1 WLR 1492, Cross J at 1497; Lewin, paras 13-44 to 13-54.

<sup>94</sup> Honoré, p 232.

<sup>95</sup> Trust Property Control Act 1988, s 20(1).

<sup>96</sup> *Fey NO v Serfontein* 1993 (2) SA 605.

<sup>97</sup> Honoré, p 232.

<sup>98</sup> *Ibid*, p 233. The trustee of an insolvent estate who becomes insolvent "shall vacate his office" and an insolvent may not be appointed trustee, Insolvency Act 1936.

<sup>99</sup> *Ibid*, p 235.

<sup>100</sup> *Bonsma NO v Meaker NO* 1973 (4) SA 526 (R).

There is no mention of who may apply but at least any person with an interest in the trust property may do so.<sup>101</sup>

51. **Australia.** A trustee may be removed by a person with power to do so under the trust deed.<sup>102</sup> The court has an inherent jurisdiction to remove a trustee which is exercised along much the same lines as that of the English courts.<sup>103</sup> There is also a statutory judicial power to appoint a new trustee in addition to or in substitution for an existing trustee. However, it exists only where it is inexpedient, impractical or difficult to make the appointment extra-judicially.<sup>104</sup>

52. **Ontario.** Section 3 of the Trustee Act provides for non-judicial replacement of a trustee in certain circumstances. It is similar to section 36 of the Trustee Act 1925 (England and Wales) discussed in paragraph 46 above.

53. Section 5(1) of the Trustee Act provides for replacement by the court in the following terms:

"The Supreme Court may make an order for the appointment of a new trustee or trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is an existing trustee."

The Supreme Court also has an inherent power to remove a trustee without appointing a substitute.<sup>105</sup>

54. **Guernsey.** Section 63(1)(a)(ii) of the Trusts (Guernsey) Law 1989 provides that the court may on application remove "a trustee (if, for example, he refuses or is unfit to act, or is incapable of acting, or is bankrupt or if his property becomes liable to arrest, saisie or similar process of law)".

55. **United States of America.** Section 706(b) of the Uniform Trust Code empowers the court to remove a trustee if:

- (1) the trustee has committed a serious breach of trust;
- (2) lack of co-operation between co-trustees substantially impairs the administration of the trust;
- (3) because of unfitness, unwillingness or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
- (4) there has been a substantial change in circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available.

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<sup>101</sup> Honoré, p 236.

<sup>102</sup> Ford and Lee, para 8360.

<sup>103</sup> *Ibid*, para 8370.

<sup>104</sup> *Ibid*, para 8280; see, for example, Trustee Act 1958 (Victoria), s 48.

<sup>105</sup> Trust Report, pp 112 and 119, citing the Privy Council case of *Letterstedt v Broers* [1884] 9 AC 371.

PART 5: Section A

56. **England and Wales.** The courts are similarly reluctant to interfere with trustees' discretionary powers.<sup>106</sup> In *Tempest v Lord Camoys*<sup>107</sup> the court held that if one of two trustees *bona fide* declines to exercise powers of purchasing an estate and raising money on mortgage the court will not compel him to do so. The same principle was applied in *Costabadie v Costabadie*<sup>108</sup> where the court held that if a fund is applicable to the maintenance of children at the discretion of trustees, the court will not take it upon itself to regulate the maintenance, but will leave that to the trustees. This principle was again put into practise in *Edge v Pensions Ombudsman*<sup>109</sup> where trustees of a pension fund were entitled, in the exercise of the discretions given to them by the scheme, to decide to increase benefits payable to one class of beneficiaries but not another.<sup>110</sup>

57. The courts in England will intervene where the donee of the power is under a duty to exercise it. Here, the court will always intervene to ensure its exercise. In *Klug v Klug*<sup>111</sup> the court held that there may also be interference when one trustee is willing to exercise the discretion and the other has refused to exercise it. The rationale for the courts' intervention in these cases is based on the rule that a trust shall not fail for want of a trustee. If trustees for whatever reason do not exercise the power (as for example where trustees die in the testator's lifetime<sup>112</sup> or decline the office<sup>113</sup>) the court will substitute itself in the place of the trustees and will exercise the power retrospectively.<sup>114</sup> This must be the case whatever difficulties or impracticalities may stand in the way.<sup>115</sup> The court in *Brown v Higgs*<sup>116</sup> stated very clearly that the rule was that if the trust can at all be exercised by the court, the non-execution by the trustee shall not prejudice the beneficiary. Precisely how the court is to exercise this discretion will vary according to the circumstances of the case. When the discretion is one into which the court can inquire as effectively as a private person, it can simply substitute its own judgment for that of the trustee.<sup>117</sup> Where, however, the settlor has given no guidance, the court cannot exercise its discretion capriciously. Instead, it will have to execute the power by the most reasonable and intelligible rule that the circumstances of the case will admit.<sup>118</sup> The normal guiding maxim is that equality is equity<sup>119</sup> but the court is by no means limited to an equal distribution even when the settlor has indicated no principle of distribution. In *Richardson v Chapman*<sup>120</sup> the court exercised the power when the property

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<sup>106</sup> Charitable trusts are governed by the same principle. See, for example, *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440; *Rooke v Dawson* [1895] 1 Ch 480; *Re Devlin's Estate* (1889) 23 LR Ir 516; *Tempest v Lord Camoys* (1882) 21 Ch D 571, Jessel MR at 578.

<sup>107</sup> (1882) 21 Ch D 571.

<sup>108</sup> (1847) 6 Hare 410.

<sup>109</sup> [1998] Ch 512, affd [1999] 4 All ER 546.

<sup>110</sup> See also *Train v Clapperton* [1908] AC 342.

<sup>111</sup> [1918] 2 Ch 67.

<sup>112</sup> *Att.-Gen v Hickman* (1732) 2 Eq Ca Ab 193.

<sup>113</sup> *Doyley v Att.-Gen* (1735) 2 Eq Ca Ab 194.

<sup>114</sup> *Re Locker's Settlement Trusts* [1977] 1 WLR 1323.

<sup>115</sup> *Brown v Higgs* (1800) 5 Ves Jr 495, Arden MR at 504.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Hewett v Hewett* (1762) 2 Eden 332.

<sup>118</sup> Lewin, para 29-96.

<sup>119</sup> *McPhail v Doulton* [1971] AC 424.

<sup>120</sup> (1706) 7 Bro PC 318.

was incapable of division while in *McPhail v Doulton*<sup>121</sup> the power was exercised even though the number of objects made an equal division impossible.<sup>122</sup>

58. The courts will intervene when they consider that the trustees have not given proper consideration to the possible exercise of their power. In these cases, the court will interfere whether the failure arises from a refusal to do their duty<sup>123</sup> or a misapprehension<sup>124</sup> or an inability to do it.<sup>125</sup> The court may remove the trustees,<sup>126</sup> or direct them to carry out their duty of consideration.<sup>127</sup> Where these options are impracticable, the court may order the preparation of a scheme for the exercise of the power or order its exercise directly.<sup>128</sup>

59. As a general rule, trustees' powers of management are discretionary. It is, however, open to a settlor to impose a mandatory requirement on trustees and in these cases, the court will see that it is enforced. In *Beauclark v Ashburnham*<sup>129</sup> trustees were "authorised and required" with the consent and direction of the tenant for life, to invest in leaseholds: the court held that the clause was imperative upon the tenant's demand. This was the case despite the fact that the leaseholds imposed personal liabilities upon the trustees because, by being party to the settlement, they had engaged to do it.<sup>130</sup> This rule has been relaxed in certain cases. In *Boss v Godsall*<sup>131</sup> trustees were required to lend money to a husband on his bond. When he took benefit of the Insolvent Debtors Act, the court held that in the altered circumstances, the trustees were justified in refusing a loan to the husband.

60. Finally, the courts in England will intervene where there has been some sort of impropriety. In *Scott v National Trust* Robert Walker J<sup>132</sup> considered that "to impose too stringent a test may impose intolerable burdens on trustees who often undertake heavy responsibilities for no financial reward" and that "it may also lead to damaging uncertainty as to what has and has not been validly decided".

61. Where a power is given to trustees to do or not to do a particular thing at their absolute discretion, the court will not restrain or compel the trustees in their exercise of that power, provided that their conduct is informed, *bona fide* and uninfluenced by improper motives.<sup>133</sup> The corollary of this is that if the course pursued by trustees is within the letter of the power, the onus is on the persons challenging the conduct to show that their discretion has been improperly exercised. Lewin<sup>134</sup> outlines a number of examples of impropriety. First, trustees must only exercise a power for the purpose for which it was conferred. Thus, in *Re Pauling's Settlement Trusts*,<sup>135</sup> the court held that a power of advancement or a similar power is not properly exercised if the purpose of the payment is not to benefit the recipient but to benefit someone else. Second, the court will interfere if trustees are actuated by

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<sup>121</sup> [1971] AC 424 HL.

<sup>122</sup> See also *Moseley v Moseley* (1673) Rept Finch 53.

<sup>123</sup> *Re Gestetner Settlement* [1953] Ch 672.

<sup>124</sup> *Turner v Turner* [1984] Ch 100.

<sup>125</sup> *Mettoy Pension Trs Ltd v Evans* [1990] 1 WLR 1587.

<sup>126</sup> *Re Gestetner Settlement* [1953] Ch 672, Harman J at 688.

<sup>127</sup> *Re Hay's Settlement Trusts* [1982] 1 WLR 202.

<sup>128</sup> *Mettoy Pension Trs Ltd v Evans* [1990] 1 WLR 1587.

<sup>129</sup> (1845) 8 Beav 322.

<sup>130</sup> See also *Cadogan v Earl of Essex* (1854) 2 Drew 227.

<sup>131</sup> (1843) 1 Y & C Ch 617.

<sup>132</sup> [1998] 2 All ER 705, at 718.

<sup>133</sup> Lewin, para 29-87.

<sup>134</sup> Lewin, para 29-100.

<sup>135</sup> [1964] Ch 303.

caprice<sup>136</sup> or spite.<sup>137</sup> Third, the exercise of a power pursuant to an underhand bargain<sup>138</sup> or corruption or partiality<sup>139</sup> will result in the intervention of the court. Fourth, trustees must not act perversely which means that they must not take a decision to exercise their powers at which no reasonable body of trustees could arrive.<sup>140</sup> However, a court cannot judge a decision perverse merely because it would have reached a different decision. Fifth, trustees are bound to act fairly in exercising their powers in an even-handed manner among all beneficiaries. However, Lewin comments<sup>141</sup> that a challenge on this ground could succeed only if it could be brought under one of the other heads. Sixth, where a discretionary power is exercised in a manner dangerous to the trust the court will interfere. Seventh, a trustee will not normally be able to exercise a fiduciary dispositive power conferred upon him in his own favour, unless the terms of the trust clearly make allowance for this. Eighth, even when trustees consider a matter without impropriety, if they have failed to take into account considerations which they should have taken into account or have taken into account considerations which they should not have taken into account, the exercise of the power may be vitiated.<sup>142</sup> Thus, in *Re Abrahams' Will Trusts*<sup>143</sup> the court held that the exercise of the power was invalid. There the trustees purported to exercise a power of advancement by way of settlement in ignorance of the fact that significant limitations contained in the settlement were void for perpetuity.

62. Trustees exercising a discretionary power are not bound to disclose their reasons. In *Beloved Wilkes' Charity*,<sup>144</sup> Lord Truro L.C. advised that it would be "most prudent and judicious" for trustees not to give reasons because the court has then no means of saying that they have failed in their duty or to consider the accuracy of their conclusion.<sup>145</sup> Documents in the trustees' possession which set out or refer to their reasons are also protected even if they are documents which a beneficiary would otherwise be entitled to see as of right.<sup>146</sup> If trustees volunteer reasons, obviously it is easier for the courts to enquire whether there is any ground upon which they could interfere but the court is not given any more extensive power to review a decision which lies within their discretion.<sup>147</sup>

63. **United States of America.** The starting point is that the court will not substitute its own judgment for that of the trustee. However, where the trustees have discretion, the court will not permit them to abuse it. Scott explains that trustees must act in good faith and from proper motives but also within the bounds of a reasonable judgment.<sup>148</sup> The court will intervene and substitute its decision in cases involving what the court considers to be an unreasonable exercise of discretion on the part of trustees.

64. The court may intervene when trustees fail to exercise their judgment under a discretionary power, even where what is done by the trustees or what they fail to do would have been proper if they had exercised the requisite judgment. By way of illustration,

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<sup>136</sup> *Ibid.*

<sup>137</sup> *Klug v Klug* [1918] 2 Ch 67.

<sup>138</sup> *Richardson v Chapman* (1760) 7 Bro PC 318.

<sup>139</sup> *Potter v Chapman* (1750) Amb 98.

<sup>140</sup> *Harris v Lord Shuttleworth* [1995] OPLR 79 at 86 - 87.

<sup>141</sup> Para 29-100.

<sup>142</sup> *Re Hastings-Bass (Deceased)* [1975] Ch 25.

<sup>143</sup> [1969] 1 Ch 463.

<sup>144</sup> (1851) 3 Mac. & G 440.

<sup>145</sup> *Ibid.*, 448.

<sup>146</sup> *Re Londonderry's Settlement* [1965] Ch 918.

<sup>147</sup> See, for example, *R v Archbishop of Canterbury* (1812) 15 East 117.

<sup>148</sup> Scott, p 368.

trustees are not properly exercising a discretionary power if they decide the matter by tossing a coin or by delegating to a third person.<sup>149</sup>

65. A number of factors may be relevant in determining whether the trustee is acting within the bounds of a reasonable judgment. First, the extent of discretion intended to be conferred upon the trustee by the terms of the trust; second, the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; third, the circumstances surrounding the exercise of the power; fourth, the motives of the trustee in exercising or refraining from exercising the power; fifth, the existence or non-existence of an interest in the trustee conflicting with that of the beneficiaries.<sup>150</sup>

66. The prohibition on dishonesty on the part of the trustee applies even in cases where it can be shown that the settlor intended to confer on the trustee a power to act in bad faith. The court has intervened where: a trustee received a bribe for making an investment,<sup>151</sup> where a trustee received consideration for making payment to a beneficiary even though the trustee was authorised to distribute the trust property among the beneficiaries,<sup>152</sup> and when an executor refused to consent to the sale of land on the ground that the intending purchaser was likely to use the land as a graveyard to the detriment of the executor's own land situated nearby.<sup>153</sup>

## PART 5: Section B

### England and Wales

67. **Directions from the court.** Where the rights of the parties entitled under the trust fund are not clear trustees may apply to the court for directions or, where relevant, pay the trust fund into court for distribution. Such applications should not be made in relation to purely future or hypothetical questions: the procedure is only relevant where the trustee is in "immediate difficulty in knowing how to apply capital or income or to exercise any power or discretion vested in him".<sup>154</sup> If the application for directions is reasonable, the trustee may claim the expenses incurred by him in making the application. However, if there is no question of real doubt as to the rights of the beneficiaries the trustee must pay his own costs irrespective of whether he acted fraudulently or maliciously in making the application.<sup>155</sup>

68. A trustee may obtain protection from the court by a claim commenced in the Chancery Division or the county court in terms of Civil Procedure Rules, Part 64 and Practice Directions, Pt 64 and 64b.<sup>156</sup> Part 64 of the Rules allows the court to determine any question arising in the administration of the estate of a deceased person or in the execution of a trust. The Civil Procedure Rules also allow the court to make "an order for the administration of the estate of a deceased person, or the execution of a trust, to be carried

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<sup>149</sup> *Ibid*, p 372.

<sup>150</sup> *Ibid*, p 368.

<sup>151</sup> *Ibid*, p 373.

<sup>152</sup> *Ibid*.

<sup>153</sup> *Ibid*.

<sup>154</sup> Lewin, para 27-14.

<sup>155</sup> *Ibid*, para 27-01.

<sup>156</sup> These replace RSC Order 85 and the requisite practice direction. The combined effect of the new rules and practice directions is broadly similar to the combined effect of the old rules and practice direction.

out under the direction of the court".<sup>157</sup> Practice direction 64 provides that the types of claims which may be made under rule 64.2 include: any question as to who is included in any class of persons having a claim against the estate of a deceased person, a beneficial interest in the estate of such a person, or a beneficial interest in any property subject to a trust; any question as to the rights or interests of any person claiming to be a creditor of the estate of a deceased person, to be entitled under a will or on the intestacy of a deceased person, or to be beneficially entitled under a trust; an order approving any sale, purchase, compromise or other transaction by a trustee; an order directing any act to be done which the court could order to be done if the estate or trust in question were being administered or executed under the direction of the court; an order requiring a trustee to provide and verify accounts, to pay into court money held as trustee, or to do or not do a particular act; and an order approving any sale, purchase, compromise or other transaction by a trustee.

69. The effect of directions given by the court is to protect the trustee who acts in accordance with such directions, provided the trustee has made full disclosure of all the relevant circumstances in obtaining the directions.

70. **Approval of legal opinion.** Section 48 of the Administration of Justice Act 1985 allows the High Court, on the application of the trustees or their personal representatives, to authorise the applicants to take steps in accordance with a written opinion given by a person with a ten year High Court qualification on a question of construction arising out of the terms of a will or trust. An order will only be made under section 48 where it appears that there is no dispute which would make hearing proper argument appropriate.

71. The overriding benefit of this procedure is its usefulness in saving time and money, as in simple cases the entire procedure is conducted on paper. In particular, cases where there is no dispute (eg where it is the interests of persons unborn or incapax which are affected), where one of two competing constructions is obviously wrong, or where the matter is of purely minor significance may be conveniently dealt with using this procedure.

72. **Payment into court.** In addition to all of this, section 63 of the Trustee Act 1925 empowers trustees to pay into court for distribution trust money or securities under their control. Once trustees have paid such assets into court this acts as a discharge of their liabilities in relation to them – the trustees may retire from the trust. However, payment into court by trustees is discouraged, particularly in view of the convenience of the power to seek directions and the procedure embodied in section 48 of the Administration of Justice Act 1985, and is generally only justified in cases where a sufficient discharge cannot be obtained in respect of a certain beneficiary.<sup>158</sup>

73. **Benjamin orders.** A further aspect of the court's power to give advice and directions to trustees is *Benjamin* orders. These orders are particularly convenient in cases where it is not possible actually to prove death. A *Benjamin* order is an order that the trustee may distribute the estate on the footing that a particular person is dead or died without issue.<sup>159</sup> These orders have the dual advantage of protecting the trustees but also preserving the missing person's right to follow the trust property should he or she reappear at some later

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<sup>157</sup> Civil Procedure Rules, r 64.2(b).

<sup>158</sup> Lewin, para 27-27.

<sup>159</sup> *Re Benjamin* [1902] 1 Ch 723. See also *Re Newson-Smith's Settlement* [1962] 1 WLR 1478; *Re Taylor's (Eleanor) Will Trusts* [1969] 2 Ch 245; *Re Green's Will Trusts* [1985] 3 All ER 455.

stage.<sup>160</sup> The court, therefore, may require the recipient to give security to refund if the need arises. Alternatively, the trustees may insure against the person not being dead and in *Re Evans*<sup>161</sup> the court held that where the cost of an application would be disproportionate, the cost of insurance may be paid out of the trust estate.

74. The courts have also authorised trustees to administer their trust on the footing that a woman is past bearing children. In *Re Westminster Bank Ltd's Declaration of Trust*<sup>162</sup> the court held that factors which could be taken into account are the woman's age and matrimonial history, the dates on which any children had been born, the evidence regarding any possibility of the birth of further children and any medical evidence pointing to the practical certainty that she will not have a child in the future. However, the court did note that no fixed rule existed about the cut off point for age and that medical evidence will be required unless the inference from age is obvious.<sup>163</sup>

75. *Benjamin* orders may also be sought by beneficiaries. In *Figg v Clark*<sup>164</sup> the court held that if trustees are unwilling either to apply to the court or to make a distribution without such an application, the beneficiaries could themselves seek a direction for the trustees to distribute. Similarly, in cases where trustees have reasonable reservations as to whether the case is a proper one for distribution, the beneficiaries, when making their application to the court, may also consider the inclusion of an alternative claim for approval of an arrangement under the Variation of Trusts Act 1958 eliminating the interest of unborn persons.

76. **Beddoe orders.** The courts may also give guidance to trustees on the question of whether they should instigate litigation on behalf of the trust. An affirmative answer to this question gives trustees the authority to commence litigation and grants them personal immunity from responsibility for the costs incurred in the course of the litigation.<sup>165</sup>

## British Columbia

77. The Trustee Act 1996,<sup>166</sup> section 86, provides:

"86 (1) A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the court, or by summons on a written statement to a Supreme Court judge in chambers, for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property or the assets of a testator or intestate.

(2) The application under subsection (1) must be served on, or the hearing attended by all persons interested in the application, or by those that the court thinks expedient.

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<sup>160</sup> *Woodhouselee (Lord) v Dalrymple* (1817) 2 Mer 419; *Monckton v Braddell* (1872) 7 Ir R Eq 30; *Re Evans* [1999] 2 All ER 777.

<sup>161</sup> [1999] 2 All ER 777.

<sup>162</sup> [1963] 1 WLR 820.

<sup>163</sup> In *Bullas v Public Trustee* [1981] 1 NSWLR 641 the woman in question had undergone a hysterectomy and the court held that this physical impossibility equated with the unlikelihood of a woman having children because of her age. Lewin notes that there seems to be no reason against the admission for the same purpose of evidence that a man is incapable of fathering children (Lewin, para 26-38).

<sup>164</sup> [1997] STC 247.

<sup>165</sup> Lewin, paras 21-106 to 21-109.

<sup>166</sup> RSBC 1996, ch 464.

(3) The costs of an application under subsection (1) are in the discretion of the court."<sup>167</sup>

78. Trustees who subsequently act on the advice, opinion or direction given by the court are deemed to have discharged their individual responsibility as trustees in the subject matter of the application.<sup>168</sup> However, the trustees will not be protected if they have engaged in fraud, wilful concealment or misrepresentation in obtaining the advice, direction or opinion.<sup>169</sup>

## South Africa

79. A trustee is broadly bound to exercise his or her own discretion in administering the trust and so may not approach the court for advice on every issue in this connection. However, a trustee may certainly ask the court's advice on matters of law, so long as the question is not hypothetical, and on issues touching the interests of minor beneficiaries.<sup>170</sup> There does not have to be a pre-existing dispute for the trustees to go to the court for advice but there must be an issue which can be presented for a ruling<sup>171</sup> and there must be a party interested in the issue.<sup>172</sup>

## PART 5: Section C

80. **England and Wales.** Trustees may depart from the terms of the trust deed, including the exercise of a power not granted, with the consent of all the beneficiaries if they are of full age. Unanimous consent is generally required.<sup>173</sup> In addition, the court in England and Wales has an inherent jurisdiction to confer emergency powers of administration. This allows the court to authorise the trustees to exercise otherwise unauthorised powers of administration where "an emergency arises connected with the trust property".<sup>174</sup> There are a number of conditions which must be satisfied before the court will exercise its inherent jurisdiction. The emergency must be one which may reasonably be supposed was not foreseen or anticipated by the settlor, the trustees must be embarrassed by the emergency, the trustees must be unable to obtain the consent of the beneficiaries to the course proposed<sup>175</sup> and it must be necessary to deal with the emergency immediately.<sup>176</sup>

81. However, these powers are to some extent subsidiary to the court's power to authorise the exercise of additional powers in terms of section 57 of the Trustee Act 1925. Section 57(1) provides:

"Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law,

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<sup>167</sup> A very similar provision is included in the Ontario Trustee Act 1990 (c T 23), s 60.

<sup>168</sup> Trustee Act 1996, s 87(1).

<sup>169</sup> *Ibid*, s 87(2).

<sup>170</sup> Honoré, p 329.

<sup>171</sup> *Horowitz v Brock* 1988 (2) SA 160 (A).

<sup>172</sup> *Ex parte Nell* 1963 (1) SA 754 (A).

<sup>173</sup> Lewin, para 45-03.

<sup>174</sup> *Ibid*, para 45-05.

<sup>175</sup> *Re New* [1901] 2 Ch 534; *Chapman v Chapman* [1954] AC 429.

<sup>176</sup> *Re Tollemache* [1903] 1 Ch 955.

the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income."

82. For a power to be granted under section 57, the transaction for which it is necessary must be one in the management or administration of the trust property. Moreover the power must be one which does not already exist under the trust deed or by law. Finally, the transaction must be expedient in the interests of the trust as a whole. An order under section 57 may be varied or rescinded by the court.<sup>177</sup>

83. **Canada.** A provision similar to section 57 of the English Trustee Act 1925 exists, for example, in the laws of Alberta<sup>178</sup> and New Brunswick.<sup>179</sup> In addition, the Ontario Law Reform Commission in its Trust Report recommended the introduction of a power modelled on section 57 of the English Trustee Act 1925.<sup>180</sup> This was intended to complement the proposed list of statutory powers of administration recommended<sup>181</sup> by the Commission in so far as it would allow trustees to exercise powers not included in either the trust deed or the statutory list where the circumstances so required. Clause 63(1) of the Commission's draft Bill<sup>182</sup> provided that such additional powers were to be authorised by the court where they were considered to be expedient and subject to such provisions and conditions as the court thought fit. Further, the order for additional powers could be later varied.

84. **Australia.** Australian law follows the approach of English law very closely in this area. Accordingly, trustees are under a duty to "adhere rigidly to the terms of the trust".<sup>183</sup> This general rule may be modified where the beneficiaries, being *sui juris* and absolutely entitled to the trust property, unanimously direct the trustee to depart from the strict terms of the trust. Moreover, the court has an inherent jurisdiction to sanction deviations from the terms of the trust in exceptional circumstances requiring urgent action.<sup>184</sup> All the Australian states have also enacted section 57 of the English Trustee Act 1925.<sup>185</sup>

#### PART 5: Section D

85. **England and Wales.** Jurisdiction over all causes and matters relating to the execution of trusts is enjoyed by the High Court.<sup>186</sup> All causes and matters relating to the execution of trusts by the High Court are assigned to the Chancery Division<sup>187</sup> as are all matters brought in the High Court under the Trustee Act 1925.<sup>188</sup> In addition, the county court has the same jurisdiction as the High Court on trust matters, such matters falling within its equity jurisdiction,<sup>189</sup> provided the value of the estate or fund subject, or alleged to be

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<sup>177</sup> S 57(2).

<sup>178</sup> Trustee Act R.S.A. 2000, c.T-8, s 21.

<sup>179</sup> Trustees Act, R.S.N.B. 1973, c.Y-15, s 25.

<sup>180</sup> Vol I, pp 250 – 252.

<sup>181</sup> *Ibid*, pp 236 – 250.

<sup>182</sup> Vol II, p 513.

<sup>183</sup> Jacobs, para 1704.

<sup>184</sup> *Re New* [1901] 2 Ch 534.

<sup>185</sup> Jacobs, para 1706.

<sup>186</sup> See generally, *Halsbury's Laws of England*, paras 532 - 540.

<sup>187</sup> Supreme Court Act 1981, s 61(1), Sch 1, para 1(c).

<sup>188</sup> CPR Sch 1, RSC Ord 93 r 4.

<sup>189</sup> County Court Act 1984, s 23(b).

subject, to the trust does not exceed the "county court limit".<sup>190</sup> However, although matters or causes concerning trust funds which exceed the county court limit must ordinarily go to the Chancery Division of the High Court, section 24(1) of the County Court Act 1984 provides a mechanism whereby the parties to an action can, by joint memorandum, agree that a specific county court will have jurisdiction, regardless of the value of the trust fund or estate in question.<sup>191</sup>

86. In particular, the High Court and the county courts share jurisdiction over a number of matters under the Trustee Act 1925, viz:<sup>192</sup> the appointment of new trustees,<sup>193</sup> the authorisation of a corporation appointed as trustee to charge remuneration,<sup>194</sup> the making of vesting orders as to stock and things in action,<sup>195</sup> the authorisation of dealings with trust property,<sup>196</sup> the making of orders as to the costs incident to applications for orders appointing new trustees or vesting orders,<sup>197</sup> the relief of trustees from personal liability<sup>198</sup> and the power to order a beneficiary<sup>199</sup> in certain circumstances to indemnify a trustee for breach of trust. Moreover, where the land or the contingent right or interest in land which is to be dealt with in an action, forms part of a trust estate which does not exceed in value the county court limit, the county court has jurisdiction to make vesting orders of land,<sup>200</sup> orders as to contingent rights in land of unborn persons<sup>201</sup> and orders as to interests<sup>202</sup> of mortgagees who are minors.<sup>203</sup> Where the value of the estate or fund in question does not exceed the county court limit, the county court also has automatic jurisdiction under sections 47, 48, 50, 53, 56 and 63 of the Trustee Act 1925.<sup>204</sup> However, none of this is to the prejudice of the general jurisdiction conferred on the county court over trust matters by the County Court Act 1984, section 23.

## PART 6

87. **South Africa.** In the absence of a specific provision in the trust deed, a trustee has no power to spend capital or advance it to a beneficiary.<sup>205</sup> Such provisions are often expressly or impliedly included in trust instruments constituting trusts for the maintenance or education of the beneficiaries. For example, the trust deed may confer upon the trustees a wide discretion in determining what is best for the proper maintenance, comfort and welfare of the beneficiary.<sup>206</sup> Where a power of advancement is expressly granted the trustees

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<sup>190</sup> *Ibid.* The current limit is set at £30,000, County Courts Jurisdiction Order 1981, SI 1981/1123, art 2, Table col 3.

<sup>191</sup> The proceedings to which this provision applies are set out in section 24(2) of the County Court Act 1984.

<sup>192</sup> *Halsbury's Laws of England*, Vol 48, paras 532 and 542; Trustee Act 1925, s 67. The county courts' jurisdiction is specifically provided for in relation to proceedings under that Act by the Trustee Act, s 63A.

<sup>193</sup> Trustee Act 1925, s 41.

<sup>194</sup> *Ibid.*, s 42.

<sup>195</sup> *Ibid.*, s 51.

<sup>196</sup> *Ibid.*, s 57.

<sup>197</sup> *Ibid.*, s 60.

<sup>198</sup> *Ibid.*, s 61.

<sup>199</sup> *Ibid.*, s 62.

<sup>200</sup> *Ibid.*, s 44.

<sup>201</sup> *Ibid.*, s 45.

<sup>202</sup> *Ibid.*, s 46.

<sup>203</sup> *Ibid.*, s 63A(2).

<sup>204</sup> *Ibid.*, s 63A(3).

<sup>205</sup> Honoré, p 318; *Ex parte Steyl* 1951 (1) SA 275 (O).

<sup>206</sup> *Ex parte Thompson NO* 1972 (1) SA 528 (NC).

should do everything possible to maintain a fair balance between capital and income beneficiaries in its exercise.<sup>207</sup>

88. When a beneficiary is in need and no express or implied power to make an advance exists, the trustee may apply to the court for a variation of the trust. The variation may be effected either under common law or under section 13 of the Trust Property Control Act 1988. Section 13 of the 1988 Act allows the court to vary the terms of a trust instrument where it contains a provision which has consequences which the founder of the trust did not contemplate or foresee and which:

- (i) hampers the achievement of the trust; or
- (ii) prejudices the interests of the beneficiaries; or
- (iii) is in conflict with the public interest.

The court may carry out such a variation on the application of a trustee or any other person with a sufficient interest in the trust property and the variation may include deletion or variation of a term of the trust or any other such order as the court deems just.<sup>208</sup> Section 13 provides quite a rigorous test in that both subjective (the settlor's lack of foresight or contemplation) and objective (prejudice to the trust object, beneficiaries or public interest) criteria have to be satisfied.

89. Variation at common law is now rare under South African law as most cases where common law variation, which will only be sanctioned on grounds of necessity, would previously have been sought are now covered by section 13 of the 1988 Act.<sup>209</sup> However, one important circumstance in which section 13 will not apply is where the testator foresaw or contemplated the event which requires the trust to be varied. Causes which are deemed to be "necessary" at common law tend to fall into three categories, one of which is the maintenance of minors<sup>210</sup> or other needy beneficiaries.<sup>211</sup> In these cases, contingent beneficiaries may be supported as well as those with vested rights.<sup>212</sup> Applications for increased maintenance have been granted special status at common law in the past<sup>213</sup> on the basis that the maintenance of minor children is always chargeable on the estate of a deceased parent since the duty of support overrides any restrictive provision in a trust.<sup>214</sup>

90. **England and Wales.** In England and Wales a power of advancement allows trustees to apply the whole or a specified proportion of the trust property for the "advancement" of the beneficiary concerned. This power can be granted expressly and on any terms by the trust deed and is also a default power under section 32 of the Trustee Act 1925. In addition, the court has a limited common law power to direct an advancement to be made out of personal estate to which a minor is absolutely entitled.<sup>215</sup> In most cases, the

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<sup>207</sup> Honoré, p 318.

<sup>208</sup> *Ibid*, p 517.

<sup>209</sup> *Ibid*, p 524.

<sup>210</sup> Eg, *Ex parte Strauss* 1949 (3) SA 929 (O); *Ex parte Hutchinson* 1952 (2) SA 219 (O).

<sup>211</sup> The other two are legal obligations imposed on the founder and the founder's estate and the upkeep and maintenance of trust assets.

<sup>212</sup> *Ex parte Admason* 1960 (3) SA 204 (N).

<sup>213</sup> *Christie NO v Estate Christie* 1956 (3) SA 659.

<sup>214</sup> Honoré, p 548.

<sup>215</sup> Lewin, paras 32-06 to 32-10.

section 32 power negatives any need to include an express power of advancement in the trust deed itself<sup>216</sup> or to seek a direction from the court. Section 32 provides:

"(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs:

Provided that –

- (a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property; and
- (b) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share; and
- (c) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application.

91. "Advancement" in this context "strictly connotes the application of trust property for the *advancement* of the beneficiary"<sup>217</sup> rather than allowing a beneficiary to take money in advance of when that would otherwise be possible, although this is essentially what happens. Section 32 provides trustees with the power to advance up to one half of capital money held on trust for a beneficiary. The section allows money to be advanced to beneficiaries with contingent interests as well as vested interests. Moreover, money may be advanced to a beneficiary whose interest is vested subject to a power of appointment, notwithstanding the fact that this beneficiary's interest may be divested by the exercise of this power of appointment. As always, the power exists subject to the expression of a contrary intention in the trust instrument.<sup>218</sup> This may be express, or implied by providing trustees with a power of advancement on different terms from those of section 32.

92. The payment under section 32 must be made "for the advancement or benefit" of the beneficiary. These are very broad criteria, with "benefit" in particular being held to include indirect benefit, for example where an advance was given to a beneficiary to donate to a charity he felt obliged to support and where it would have been a great burden on him to do so out of his ordinary income.<sup>219</sup> "Advancement" has also been widely construed to mean

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<sup>216</sup> However, this section has no application to capital money arising under the Settled Lands Act 1925. As such an express power may still be required in some cases.

<sup>217</sup> Riddall, p 366.

<sup>218</sup> Trustee Act 1925, s 69(2).

<sup>219</sup> *Re Clore's Settlement Trusts* [1966] 2 All ER 272.

"any use of the money which will improve the material situation of the beneficiary".<sup>220</sup> It should not be confused with paying a share of a beneficiary's legacy to him in advance. The power under section 32 may also be used to create a new settlement in favour of the object of the power, utilising the capital to which he is entitled.<sup>221</sup> Despite the breadth of these criteria, however, the trustees are still expected to apply their minds to the question of whether the payment or application of money truly is to the benefit or advancement of the beneficiary.<sup>222</sup> The money should not be paid simply to put funds in the beneficiary's pocket. It should contribute to the beneficiary's establishment in life.<sup>223</sup>

93. When an advance is to be made, trustees may either pay the money to the beneficiary directly or apply it on his behalf. The trustees may only pay the money directly to the beneficiary where they reasonably believe that he can be trusted to carry out the purposes for which it is paid.<sup>224</sup> In such cases, the trustees are therefore under a duty to stipulate the purpose for which the money has been advanced and a duty to ensure that the money is properly applied by the beneficiary. Where the beneficiary defaults in applying the money for the correct purpose, the trustees must make no further advance. Any further advances made in these circumstances would render them liable for breach of trust and they may be required to account for the sums improperly advanced.<sup>225</sup> The trustees may apply a maximum of one half of the beneficiary's prospective share. It has been suggested that once a payment of this amount has been made, the power ceases to be exercisable in respect of the particular beneficiary, even where a subsequent appreciation of the assets renders the payment made less than one half of the new value of the estate.<sup>226</sup> The power may not be exercised where it would prejudice any person entitled to any prior life or other interest in the money paid or applied unless the person so entitled is of full age and consents in writing to the payment or application.

94. Section 32 confers a power to advance, not a duty to advance. Therefore, unlike in Scotland and South Africa, the beneficiaries have no right to force the trustees' hand in this matter. The beneficiaries cannot petition the court to compel the trustees to make an advance because the decision to make an advance is in the "absolute discretion" of the trustees. Indeed, it would seem that an advance may be made by way of a resettlement without the consent of the beneficiary.<sup>227</sup>

95. Section 32 deals only with the payment of capital for the advancement of beneficiaries. Payments of income for the maintenance of contingent beneficiaries are subject to different rules, set out in section 31 of the Trustee Act 1925. The statutory power allows trustees, where there is no expression to the contrary in the trust deed, to pay to the beneficiary's parent or guardian "or otherwise apply for or towards his maintenance, education, or benefit" the whole or part of any income of any property held in trust for that beneficiary, so long as the property attracts intermediate income.<sup>228</sup> In other words, the

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<sup>220</sup> *Re Pilkington's Will Trusts* [1964] AC 612, Viscount Radcliffe at 635.

<sup>221</sup> Lewin, para 32-16.

<sup>222</sup> Underhill and Hayton, p 701.

<sup>223</sup> Lewin, para 32-02.

<sup>224</sup> *Re Pauling's Settlement* [1964] Ch 303.

<sup>225</sup> Riddall, p 370.

<sup>226</sup> Underhill and Hayton, p 699.

<sup>227</sup> Lewin, para 32-16; *Re Pilkington's Will Trusts* [1964] AC 612, Viscount Radcliffe at 637.

<sup>228</sup> Where the income which accrues to the legacy is in fact payable to someone other than the eventual recipient of the legacy, the final recipient of the legacy cannot receive the income for his maintenance.

income from the property due in question must be such that, in the ordinary course, it would accumulate for the benefit of the contingent beneficiary.<sup>229</sup>

96. The decision whether to make an advance of income under section 31 is again at the "sole discretion" of the trustees on condition that:<sup>230</sup>

"...in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes..."

97. The trustees must therefore exercise their discretion prudently and in good faith. Again, as under section 32, section 31 merely confers a discretionary power over which the beneficiaries have no control.

98. The power under section 31 is generally intended to be exercised in favour of minors (ie those under 18). However, if a beneficiary's right has not vested by the time he reaches the age of 18, it would seem anomalous to cut off his support until his right does vest. To remedy this, section 31(1)(ii) provides that in such circumstances the trustees may continue paying income to him until his right is vested or he dies or his interest fails.

99. **Australia.** A power of advancement may be conferred upon trustees by an express provision in the trust deed. As in England, this was standard practice up until the enactment of specific statutory powers negated the need for such clauses. In addition, the court has an inherent jurisdiction to authorise the maintenance, education or advancement of the beneficiaries out of the income or capital of the estate.<sup>231</sup> However, all states (with the exception of Tasmania) have now enacted statutory provisions conferring on trustees extensive powers of maintenance and advancement. The provisions enacted in the Australian states confer very similar powers to those granted by sections 31 and 32 of the Trustee Act 1925. For example, section 43 of the Trustee Act 1925 of New South Wales allows trustees to apply income for the maintenance, education and benefit of an infant and to accumulate the balance of such income, while section 44 allows trustees to apply capital for the advancement or benefit of any beneficiary.<sup>232</sup> "Advancement" and "benefit" are assigned similar meanings to those developed under English law. Similar, but not identical, provisions exist in Victoria,<sup>233</sup> Queensland,<sup>234</sup> South Australia<sup>235</sup> and Western Australia.<sup>236</sup>

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<sup>229</sup> Riddall, pp 371 – 373.

<sup>230</sup> Trustee Act 1925, s 31(1).

<sup>231</sup> Jacobs, para 2057.

<sup>232</sup> See further, Jacobs, paras 2060 – 2063.

<sup>233</sup> Trustee Act 1958, s 37.

<sup>234</sup> Trusts Act 1973, ss 61 - 63.

<sup>235</sup> Trustee Act 1936 ss 33 and 33A.

<sup>236</sup> Trustees Act 1962, ss 58 - 60.

Perhaps of particular note are sections 63 of the Queensland Trusts Act 1973 and section 60 of the Trustees Act 1962 of Western Australia which allow trustees to impose conditions when applying trust property towards the maintenance, education, advancement or benefit of a beneficiary.

## Appendix B Existing Regulation Of Pension Fund Trustees

1. The primary and subordinate legislation relating to pension fund trusts is drafted on the basis that, in general, trustees will meet to transact trust business. Thus section 32(2)(a) of the Pensions Act 1995 states that "the trustees may...require not less than the number of trustees specified in the determination to be present when any decision is so taken". In addition, all trustees to whom it is reasonably practicable to give notice of an "occasion at which a decision is to be taken" should be so informed prior to the decision being taken.<sup>1</sup> Decisions of the trustees of a pension trust scheme may, unless the scheme provides otherwise, be taken by agreement of a majority of the trustees.<sup>2</sup> The trustees are to keep written records of their meetings, noting among other things the decisions reached at the meetings.<sup>3</sup> But they must also note any decision made by the trustees since a previous meeting.<sup>4</sup>

2. Section 34(2) of the 1995 Act permits pension scheme trustees to delegate any discretion they have to make decisions about investments to a fund manager,<sup>5</sup> or to two or more of their number.<sup>6</sup> In the latter case, the trustees have full vicarious liability. A trustee is prohibited from being an auditor or an actuary of a scheme.<sup>7</sup>

3. There are detailed provisions in the Pensions Act about the appointment and removal of pension scheme trustees. Section 7 provides for the appointment by the Occupational Pensions Regulatory Authority of trustees in various circumstances, for example to replace trustees who have been removed<sup>8</sup> or to ensure that the trustees as a whole have the relevant expertise.<sup>9</sup> There are certain persons who are prohibited from taking up office as a trustee, such as a person convicted of any offence involving dishonesty or deception,<sup>10</sup> an undischarged bankrupt<sup>11</sup> or an individual who is subject to disqualification as a company director.<sup>12</sup> Also the Authority may disqualify a person who is incapable by reason of a mental disorder or a company that has gone into liquidation.<sup>13</sup>

4. The Authority has the power to make orders removing trustees from a pension scheme.<sup>14</sup> An order can be made where a person has been in serious or persistent breach

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<sup>1</sup> Pensions Act 1995, s 32 (2)(b). S 32(3) provides that notice under subsection 32(2)(b) must be given in a prescribed manner and not later than the beginning of a prescribed period. Further details of notification are to be found in the Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, regs 9 and 10.

<sup>2</sup> Pensions Act 1995, s 32(1).

<sup>3</sup> Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 13.

<sup>4</sup> *Ibid*, reg 13(1)(f).

<sup>5</sup> See s 36 for more detailed information concerning fund managers and their role.

<sup>6</sup> Pensions Act 1995, s 34(5).

<sup>7</sup> *Ibid*, s 27, see also reg 7 of the 1996 Regulations.

<sup>8</sup> *Ibid*, s 7(1).

<sup>9</sup> *Ibid*, s 7(3)(a).

<sup>10</sup> *Ibid*, s 29(1)(a).

<sup>11</sup> *Ibid*, s 29(1)(b).

<sup>12</sup> Under the Company Directors Disqualification Act 1986.

<sup>13</sup> Pensions Act 1995, s 29(4).

<sup>14</sup> *Ibid*, s 3(1),(3).

of his duties<sup>15</sup> or where a person has been removed as a trustee of another scheme.<sup>16</sup> Where a director of a company has been removed as trustee, the company to which he or she belongs is also prohibited from being a trustee.<sup>17</sup> There is a similar provision relating to partners of Scottish partnerships.<sup>18</sup> The Authority may suspend a trustee pending consideration of a removal order.<sup>19</sup> The Authority can also suspend those against whom proceedings for an offence involving dishonesty or deception have been instituted but not concluded<sup>20</sup> and those against whom a petition has been presented to the court for an order declaring the trustee bankrupt or for the sequestration of the trustee's personal estate.<sup>21</sup> A suspension order can also be sought where an application has been made to disqualify the trustee from being a company director but this has not yet been concluded,<sup>22</sup> or where a company or Scottish partnership is already a trustee and one of the trustees is a director of that company or partner of that partnership.<sup>23</sup>

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<sup>15</sup> Such as the duty of care in relation to investment, s 33.

<sup>16</sup> *Ibid*, s 3(2)(b).

<sup>17</sup> *Ibid*, s 3(2)(c).

<sup>18</sup> *Ibid*, s 3(2)(d).

<sup>19</sup> *Ibid*, s 4(1)(a).

<sup>20</sup> *Ibid*, s 4(1)(b).

<sup>21</sup> *Ibid*, s 4(1)(c) concerning natural persons, and s 4(1)(d) concerning companies.

<sup>22</sup> *Ibid*, s 4(1)(e).

<sup>23</sup> *Ibid*, s 4(1)(f).

## Appendix C Advisory Group on Trust Law

Mr Alan Barr	University of Edinburgh, Solicitor, Edinburgh
Mr Robert Chill	Solicitor, Edinburgh
Mr Andrew Dalglish	Solicitor, Edinburgh
Mr Frank Fletcher	Solicitor, Glasgow
Mr A F McDonald	Solicitor, Dundee
Mr Simon A Mackintosh	Solicitor, Edinburgh
Mr James McNeill QC	Advocate, Edinburgh
Mr Allan Nicolson	Solicitor, Edinburgh
Professor Kenneth Norrie	University of Strathclyde
Mr Scott Rae	Solicitor, Edinburgh
Mr Mark Stewart	Secretary, Society of Trust and Estate Practitioners (Scotland)
Mr Alister Sutherland	Consultant Solicitor
Dr David Nichols (Secretary)	Scottish Law Commission





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