

ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION  
NOT FOR PUBLICATION OR BROADCAST  
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## **TRUST LAW REVIEW: THE NATURE AND THE CONSTITUTION OF TRUSTS**

The Scottish Law Commission today publishes Discussion Paper No 133 on The Nature and the Constitution of Trusts.

The Discussion Paper is the fifth paper in the Commission's Trust Law Review Programme. It puts forward proposals to clarify the juridical nature of a trust and to establish when a trust is created.

### **1. The Nature of a Trust**

In Scotland the trustees own and manage the trust property for the benefit of the beneficiaries. The beneficiaries have no rights to the property itself but can compel the trustees to perform their trust duties and claim damages from them should they fail to do this properly. One of the key features of a trust is that the trust property, although owned by the trustees, is ring-fenced from claims by their personal creditors. The most convincing way of explaining this is that a trustee holds the trust property in a separate patrimony, distinct from his or her own private patrimony. A trustee therefore has two patrimonies and personal creditors of the trustee can claim against only the private patrimony.

A trust could be thought of as a legal person, like a company. On this model the trust itself would own the property which would be managed for the benefit of the beneficiaries by the trustees as directors or agents of the trust. The Commission rejects changing over to this model as it results in more complex relationships between the trust, the trustees and the beneficiaries than the present law. Instead it proposes that the separate patrimony theory should be put on a statutory footing. This would give trust law a firm theoretical foundation and help its development in other areas, such as the liability of trustees to third parties.

## 2. The Constitution of a Trust

The present law does not provide a clear-cut answer as to when a trust is created. Is it when the trust deed is delivered to the trustees and they agree to act, or is it only when the trust property is made over to the trustees? Is the position different for a trust set up by a living trustor (an "inter vivos trust") from that where the trust is to come into effect only after the trustor's death (a "mortis causa trust")? The Commission proposes to clarify the law by suggesting that there should be a statutory rule that an inter vivos trust is created as between the trustor and the trustees and the beneficiaries once the trustor has delivered the trust deed to the trustees and at least one of them has agreed to act. However, property that is to become trust property should continue to be secure from the claims of the trustor's personal creditors only after it has been made over to the trustees. On the other hand a mortis causa trust, for example a trust in a will, would come into effect on the death of the trustor and the property would, as at present, continue to be liable for the deceased trustor's debts.

The Commission asks whether oral inter vivos trusts should in future be ineffective and also whether all trusts should have to be registered in an existing register of deeds or in a new Trust Register.

At present an owner of property can declare that he or she holds it in trust for specified trust purposes. The declaration of trust has to be in writing and be communicated to at least one beneficiary in order to create such a trustor-as-trustee trust. Property that is to become trust property becomes secure from the claims of the trustor's personal creditors only after the trustor tells the beneficiary what property is being held in trust. Because of their more private nature and consequential potential for defrauding creditors, the Commission asks whether trustor-as-trustee trusts should cease to be valid or should be valid only if registered in a public register.

Where a person owns land or other heritable property as a trustee but the title in the Land Register does not disclose this the trust is said to be latent. Latent trusts can prejudice creditors who are unaware that the property in question is actually trust property and hence not available for their debts. They also breach the important principle that the Land Register should reflect the true ownership. One suggestion for reform is that land registered in a person's own name without any indication that it is in fact held in trust should become available to that person's creditors. This rule might be general or be restricted to trustor-as-trustee trusts.

### NOTES TO EDITORS

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is the Hon Lord Eassie, a Court of Session judge. The other Commissioners are Professor George L Gretton, Professor Gerard Maher QC, Professor Joseph M Thomson and Mr Colin J Tyre QC. The Chief Executive is Mr Michael Lugton.

2. Further information can be obtained by contacting 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)).

3. The paper may also be viewed on our website at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk) or purchased from TSO Scotland Bookshop.