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# Trusts (Scotland) Bill

[REVISED DRAFT]

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# Trusts (Scotland) Bill

## [REVISED DRAFT]

An Act of the Scottish Parliament to make further provision as regards trusts; to amend the Court of Session Act 1988 in relation to trustees, executors and others obtaining directions of that court; and for connected purposes.

### PART 1

#### APPOINTMENT, ASSUMPTION, RESIGNATION, REMOVAL AND DISCHARGE OF TRUSTEES

##### *Appointment or assumption*

#### **1 Appointment of additional or new trustee by court: general**

- (1) The court may, as regards any trust—
  - (a) on the application of one or more of the trustees or of any person with an interest in the trust property, appoint an additional trustee if the court considers it expedient to do so for the administration of the trust, or
  - (b) if no capable trustee exists or is traceable, appoint a new trustee on the application of any person with an interest in the trust property.
- (2) The court ceases to have power at common law to appoint a trustee.
- (3) The making of an appointment under subsection (1)(b) removes any incapable or untraceable trustee from the office of trustee.
- (4) This section applies irrespective of when the trust was created.

#### **2 Appointment of new trustee by truster**

- (1) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise), if no capable trustee exists or is traceable the truster may appoint a new trustee.
- (2) The making of an appointment under subsection (1) removes any incapable or untraceable trustee from the office of trustee.
- (3) This section—
  - (a) applies irrespective of when the trust was created, but
  - (b) does not apply as respects a public trust.

#### **3 Assumption of additional trustee**

- (1) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise), the trustees may assume an additional trustee.

- (2) Subsection (3) applies where—
  - (a) a protector has been appointed in respect of the trust,
  - (b) there has been conferred on the protector, by virtue of paragraph (d) of section 49(3), the power to direct the assumption of an additional trustee, and
  - (c) the protector gives such a direction.
- (3) An additional trustee must, without delay, be assumed by the other trustees.
- (4) This section applies irrespective of when the trust was created.

#### **4 Operation of appointment or assumption as general conveyance of trust property**

- (1) The appointment under section 1(1)(a), or assumption under section 3, of an additional trustee operates as a general conveyance of the trust property in favour, jointly, of the additional trustee and the existing trustees.
- (2) The appointment, under section 1(1)(b) or 2(1), of a new trustee operates as a general conveyance of the trust property in favour of the new trustee.
- (3) The appointment of a trustee, on the application under section 62 of an *ex officio* trustee, operates as a general conveyance of the trust property—
  - (a) in favour, jointly, of the appointed trustee and the existing trustees (other than the applicant), or
  - (b) if there are no existing trustees (other than the applicant), in favour of the appointed trustee.
- (4) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as respects an assumption which takes place, or an appointment which is made, after the section comes into force.

#### *Resignation and removal*

#### **5 Resignation of trustee**

- (1) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise), a trustee has power to resign office.
- (2) But if the trustee is a sole trustee, the trustee may do so only after—
  - (a) an additional trustee is assumed or appointed, or
  - (b) a judicial factor is appointed to administer the trust.
- (3) Any resignation given in breach of subsection (2) is of no effect.
- (4) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as respects a resignation given after the section comes into force.

#### **6 Removal of trustee by court**

- (1) Where a trustee—

- (a) is unfitted to carry out the duties of a trustee,
- (b) purports to carry out those duties but does so in a way which is inconsistent with, or might be inconsistent with, a trustee's fiduciary duty,
- (c) has neglected the trustee's duties as trustee,
- (d) is incapable, or
- (e) is untraceable,

the court may, on the application of one or more of the other trustees, of a beneficiary or of any other person with an interest in the trust property, remove the trustee from office.

- (2) The court ceases to have power at common law to remove a trustee.
- (3) This section applies irrespective of when the trust was created.

## **7 Removal of trustee by co-trustees**

- (1) A trustee who is—
  - (a) incapable,
  - (b) untraceable,
  - (c) convicted of an offence involving dishonesty,
  - (d) sentenced to imprisonment on conviction of an offence, or
  - (e) imprisoned for contempt of court or for not having paid a fine,may be removed from office by a majority of the other trustees.
- (2) Subsection (3) applies where—
  - (a) a protector has been appointed in respect of the trust,
  - (b) there has been conferred on the protector, by virtue of paragraph (c) of section 49(3), the power to direct the removal of a trustee from office, and
  - (c) the protector gives such a direction.
- (3) The trustee to whom the direction relates must, without delay, be removed from office by the other trustees.
- (4) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) paragraphs (c) to (e) of subsection (1) are to be disregarded in relation to, respectively, a conviction obtained, a sentence passed or an imprisonment effected before the section comes into force.

## **8 Removal of trustee by beneficiaries**

- (1) A trustee may, subject to subsection (2), be removed from office by the beneficiaries provided that the removal is agreed to by them all and that at the time of reaching such agreement—
  - (a) they are absolutely entitled to the trust property, and
  - (b) each of them—
    - (i) has attained the age of 18 years, and

- (ii) is capable.
- (2) Subsection (1) does not apply while there subsists—
  - (a) a trust purpose which cannot be secured, or
  - (b) a right to be indemnified which cannot be preserved,
 without the retention of some or all of the trust property.
- (3) Where subsection (1) does apply—
  - (a) a beneficiary who is capable may require the trustees to make over the trust property (or as the case may be that part) to the beneficiary or to a person nominated by the beneficiary, and
  - (b) if the beneficiary is incapable, the beneficiary’s guardian may require the trustees to make over the trust property (or as the case may be that part) to the beneficiary or to a person nominated by the requirer.
- (4) This section—
  - (a) does not apply as respects a private purpose trust, but
  - (b) applies as respects any other trust irrespective of when the trust was created.

*Saving as respects liability of trustees*

**9 Saving as respects liability of trustees**

The appointment, or as the case may be the assumption, resignation or removal, of a trustee under any of sections 1 to 3, 5 to 8 and 62 does not affect liability incurred by the trustee or by any other trustee prior to the appointment, assumption, resignation or removal.

*Discharge*

**10 Discharge where trustee has resigned, died or been removed from office**

- (1) Where a trustee—
  - (a) resigns, the remaining trustees or the beneficiaries may discharge that trustee or that trustee’s representatives,
  - (b) dies, the remaining trustees or the beneficiaries may discharge that trustee’s representatives,
  - (c) is removed from office under section 6 or 7, the remaining trustees or the beneficiaries may discharge that trustee or that trustee’s representatives,
  - (d) is removed from office under section 8, the beneficiaries may discharge that trustee or that trustee’s representatives,
 of that trustee’s acts and intromissions.
- (2) If—
  - (a) discharge under subsection (1)(a), (b) or (c) cannot be obtained from the remaining trustees, and
  - (b) the beneficiaries of the trust refuse, or are unable for any reason, to grant it,

the court may, on the application of that trustee or as the case may be of that trustee's guardian or representatives and after such intimation and inquiry as the court thinks necessary, grant it.

- (3) If the beneficiaries of the trust refuse, or are unable for any reason, to grant discharge under subsection (1)(d), the court may, on the application of that trustee or as the case may be of that trustee's guardian or representatives and after such intimation and inquiry as the court thinks necessary, grant it.
- (4) In this section, the references to beneficiaries are, in relation to any beneficiary who has not attained the age of 16 years or is incapable, to be construed as references to the guardian of the beneficiary.
- (5) This section applies irrespective of when the trust was created.

## PART 2

### DECISION-MAKING BY TRUSTEES

#### 11 Decisions: preliminary

- (1) This section applies in relation to any decision of the trustees which is to bind them.
- (2) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise), in so far as is reasonably practicable a trustee—
  - (a) must receive adequate notice of the matter as regards which the decision is to be made, and
  - (b) must be afforded an opportunity (whether or not at a meeting of the trustees) to express an opinion in the matter before the decision is taken.
- (3) But a decision invalid by virtue of subsection (2) may be homologated by the trustee in question.
- (4) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as regards a decision taken after the section comes into force.

#### 12 Making of decision

- (1) A decision binds the trustees only if made by a majority of those for the time being able to make it.
- (2) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise), for the purposes of subsection (1) a trustee is not to be regarded as able to make a decision who—
  - (a) has or might have a personal interest in the decision,
  - (b) is incapable, or
  - (c) is untraceable.
- (3) But subsection (2)(a) is to be disregarded if (either or both)—
  - (a) all the beneficiaries know of the personal interest and consent to the trustee acting,

- (b) the trustor appointed the trustee in the knowledge that such a decision might require to be taken and that the trustee would have a personal interest in it (or must be taken to have appointed the trustee in that knowledge).
- (4) In subsection (3)(a), the reference to beneficiaries is, in relation to any beneficiary who has not attained the age of 16 years or is incapable, to be construed as a reference to the guardian of the beneficiary.
- (5) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as regards a decision taken after the section comes into force.

### PART 3

#### POWERS AND DUTIES OF TRUSTEES

##### *Powers: general*

#### **13 General powers of trustees**

- (1) Except in so far as the trust deed expressly provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise) the trustees have in relation to the trust property all the powers of a natural person beneficially entitled to the property.
- (2) But this section is without prejudice to—
  - (a) a trustee's fiduciary duty (including a trustee's duty to fulfil the trust purposes),
  - (b) a trustee's duty of care, and
  - (c) any restriction or exclusion imposed by or under this Act or any other enactment.
- (3) This section applies irrespective of when the trust was created.

#### **14 Conferring of additional powers by court**

- (1) The court may, on the application of the trustees and after taking into account any objection timeously made by virtue of subsection (2), grant them additional powers of administration or management in relation to the trust property (being powers specified in the petition); but the court must be satisfied that their having the powers in question would benefit the future administration or management of the trust property.
- (2) An application under subsection (1) is to be intimated to the persons mentioned in subsection (3), any of whom may object to its being granted.
- (3) The persons are—
  - (a) any supervisor,
  - (b) any protector,
  - (c) any beneficiary who has a vested interest in the trust property,
  - (d) such other persons as the court may specify.
- (4) The court is to consider specifying under subsection (3)(d) any beneficiary who has a contingent interest, and any potential beneficiary, under the trust but—
  - (a) need not specify under that subsection any such beneficiary or potential beneficiary, and

- (b) may specify under it a person other than any such beneficiary or potential beneficiary.
- (5) The court may, in granting powers under subsection (1), impose such conditions as to the exercise of those powers as it thinks fit.
- (6) This section applies irrespective of when the trust was created.

## **15 Power to take out insurance**

- (1) Except in so far as the trust deed expressly provides otherwise, a trustee has power to take out such insurance as it is reasonable to take out against personal liability arising from the trustee's actings in carrying out the duties of a trustee.
- (2) In subsection (1), the reference to actings is to be construed as including intentionally not acting in some matter.
- (3) The expense of taking out the insurance is to be paid out of the trust property.
- (4) This section applies irrespective of when the trust was created.

### *Investment*

## **16 Power of investment**

- (1) The trustees have the power to make any kind of investment of trust property, including an investment in heritable property, except in so far as—
  - (a) the trust deed, expressly or by implication, provides otherwise, or
  - (b) in a case where there is no trust deed, the context requires or implies otherwise.
- (2) The power to act under subsection (1)—
  - (a) is subject to any restriction or exclusion imposed by or under any enactment, and
  - (b) is not conferred on trustees—
    - (i) of a pension scheme,
    - (ii) of an authorised unit trust, or
    - (iii) under any other trust who are entitled by or under another enactment to make investments of trust property.
- (3) A term—
  - (a) relating to the powers of a trustee and contained in a trust deed executed before 3rd August 1961, or
  - (b) restricting the powers of investment of a trustee to those conferred by the Trustee Investments Act 1961 and contained in a trust deed executed on or after that date,is not to be treated as restricting or excluding the power to act under subsection (1).
- (4) The reference, in paragraph (b) of subsection (3), to a trustee does not include a reference to a trustee under a trust constituted by a private or local Act of Parliament or a private Act of the Scottish Parliament; and in that paragraph “trust deed” is to be construed accordingly.
- (5) In this section—
  - “authorised unit trust” means a unit trust scheme in the case of which an order under section 243 of the Financial Services and Markets Act 2000 is in force, and

“pension scheme” means an occupational pension scheme (within the meaning of the Pension Schemes Act 1993) established under a trust.

- (6) This section applies irrespective of when the trust was created.

## **17 Exercise of power of investment**

- (1) Before acting under section 16(1) the trustees—
- (a) are to have regard to—
    - (i) the suitability to the trust of the proposed investment, and
    - (ii) the need for diversification of investments of the trust in so far as is appropriate to the circumstances of the trust, and
  - (b) are (except where subsection (3) applies) to obtain and consider proper advice about the way in which the power in question should be exercised.
- (2) When reviewing the investments of the trust, the trustees are (except where subsection (3) applies) to obtain and consider proper advice about whether the investments should be varied.
- (3) If the trustees reasonably conclude that in all the circumstances it is unnecessary or inappropriate to obtain such advice, they need not obtain it.
- (4) In this section, “proper advice” means the advice of a person who is reasonably believed by the trustees, on the basis of the person’s—
- (a) ability, and
  - (b) practical experience of financial and other matters relating to the proposed investment,
- to be qualified to give it.
- (5) This section applies irrespective of when the trust was created.

### *Delegation and the appointment of agents and nominees*

## **18 Delegation and the appointment of agents**

- (1) Subject to the provisions of this section and except in so far as the trust deed expressly provides otherwise, the trustees may delegate the exercise of any of their powers and in particular may—
- (a) appoint an agent,
  - (b) authorise a person so appointed to execute a deed or other document on behalf of the body of trustees.
- (2) Except in so far as the trust deed expressly provides otherwise, the trustees have (and are to be taken always to have had) the power to authorise an agent to exercise any of their investment management functions—
- (a) at the agent’s discretion, or
  - (b) in such other manner as the trustees may direct.
- (3) Without prejudice to the generality of subsections (1) and (2), a person who is a trustee may be—
- (a) appointed or authorised under subsection (1),

- (b) authorised under subsection (2).
- (4) Except in so far as the trust deed expressly provides otherwise, the trustees may remunerate any person appointed or authorised under subsection (1).
- (5) Except in so far as the trust deed expressly provides otherwise, the reference in subsection (1) to the trustee's powers does not include a reference to a power—
  - (a) relating to whether or in what way assets of the trust should be distributed,
  - (b) relating to whether any fee or other payment due to be made out of the trust funds should be made out of capital or income,
  - (c) to appoint a person to be a trustee of the trust, or
  - (d) which is conferred by any other enactment or by the trust deed and permits the trustees—
    - (i) to delegate any of their functions, or
    - (ii) to appoint a person to act as a nominee in relation to the trust property.
- (6) In subsection (2), “investment management functions” means functions relating to the management of investments of the trust property, heritable as well as moveable.
- (7) Subsections (1) and (2) are subject to any restriction or exclusion imposed by or under any enactment.
- (8) This section applies irrespective of when the trust was created.

## **19 Appointment of nominees**

- (1) Except in so far as the trust deed expressly provides otherwise, the trustees may, for the purpose of the exercise of any of their powers—
  - (a) appoint a person to act as their nominee in relation to such of the trust property, heritable as well as moveable, as they may determine (in this section referred to as the “determined assets”), and
  - (b) take such steps as are requisite to secure the transfer of title to the determined assets to the nominee.
- (2) Without prejudice to the generality of subsection (1), reference in that subsection to the powers of the trustees includes a reference to their investment management functions (as defined in section 18(6)).
- (3) Determined assets held by the nominee are held on trust for the trustees by the nominee (irrespective of any purported agreement to the contrary).
- (4) Determined assets title to which is transferred to the nominee may include clients' money.
- (5) Without prejudice to subsection (3), subsection (1) is subject to any restriction or exclusion imposed by or under any enactment.
- (6) A person is not to be appointed under subsection (1)(a) unless the trustees reasonably believe—
  - (a) the appointment is appropriate in the circumstances of the trust, and
  - (b) the person has the skills, knowledge and expertise it is reasonable to expect of one who is to act as a nominee.

- (7) An appointment under subsection (1)(a) is—
  - (a) to be made in writing,
  - (b) to be subject to the trustees obtaining, as soon as is reasonably practicable, the written acknowledgment of the nominee that the determined assets are held on trust for the trustees by the nominee,
  - (c) to be subject to the trustees' retaining power to—
    - (i) direct the nominee, and
    - (ii) revoke the appointment, and
  - (d) subject to subsection (8), otherwise to be on such terms as to suitable remuneration and other matters as the trustees may determine.
- (8) The trustees are not to appoint a nominee on any of the terms mentioned in subsection (9) unless they have good cause to do so.
- (9) The terms are—
  - (a) a term permitting the nominee to appoint a substitute,
  - (b) a term restricting the liability of the nominee, or of any substitute, to the trustees or to any beneficiary, and
  - (c) a term permitting the nominee, or any substitute, to act in circumstances capable of giving rise to a conflict of interest.
- (10) While a nominee continues to act for the trust, the trustees are—
  - (a) to keep under review—
    - (i) the arrangements under which the nominee acts, and
    - (ii) how those arrangements are being put into effect,
  - (b) to consider, if circumstances make it appropriate to do so, whether there is a need to exercise their power—
    - (i) to direct the nominee, or
    - (ii) to revoke the nominee's appointment.
- (11) The trustees are to exercise either or both of the powers mentioned in subsection (10)(b) if they consider that there is a need to do so.
- (12) This section applies irrespective of when the trust was created.

#### *Power of advancement*

### **20 Power to advance from capital**

- (1) Except in so far as the trust deed expressly provides otherwise (or, in a case where there is no trust deed, the context requires otherwise) the trustees may, provided that the requirements of subsections (4) and (5) are satisfied, advance all or part of the trust capital to a beneficiary for the benefit of the beneficiary.
- (2) The advance may be on such conditions (if any) as the trustees consider it reasonable to impose.
- (3) But the trustees may subsequently waive or vary any condition imposed under subsection (2) if they consider it appropriate to do so.

- (4) A right to the capital advanced must, as at the date on which the advance is made, be destined to vest in the beneficiary—
  - (a) unconditionally,
  - (b) subject, if an uncertain future event were to occur, to defeasance or diminution, or
  - (c) on the occurrence of an uncertain future event.
- (5) Either—
  - (a) the consent must have been obtained of any person who has a prior interest as respects the trust property, being an interest which would be prejudiced were the advance made, or
  - (b) authorisation to make the advance must have been obtained from the court—
    - (i) on an application to it in that regard by the trustees or by any person with an interest in the trust property, and
    - (ii) on its being satisfied that any person whose consent is (but for this paragraph) required by paragraph (a) is either withholding consent unreasonably or does not have capacity to give consent.
- (6) Authorisation under subsection (5)(b) may be granted subject to such conditions (if any) as the court thinks fit to impose.
- (7) Any amount advanced under this section (other than an amount which has been repaid) must be brought into account by the trustees as part of the share in the trust property to which the beneficiary is, or will become, entitled.
- (8) For the purposes of subsection (7), the value of the advance is its market value as at the date on which the advance is made (interest in relation to the advance being disregarded).
- (9) It is not an objection to an advance to the beneficiary under this section that the advance is made by setting up a new trust for the benefit of the beneficiary and transferring the capital advanced as assets to be held in that new trust (or, without setting up a new trust, by transferring the capital advanced to assets for the time being held in any trust for the benefit of the beneficiary).
- (10) Subsection (9) applies whether or not any third party gains incidental benefit from the transfer or as the case may be from the setting up of the new trust.
- (11) The trustees are not liable for any loss which the trust property may incur by virtue of—
  - (a) a condition imposed by them under subsection (2),
  - (b) a condition which might have been so imposed not having been so imposed,
  - (c) their exercising, or failing to exercise, powers under subsection (3).
- (12) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as respects an advance made after the section comes into force.

#### *Apportionment*

### **21 Exercise of power to apportion between or among beneficiaries**

- (1) Except in so far as the trust deed, expressly or by implication, provides otherwise, no exercise by a trustee of a power to apportion funds or other property between or among certain beneficiaries is invalid on the ground only that—

- (a) an insubstantial, illusory or nominal part is apportioned to (or left to devolve unapportioned upon) one of the beneficiaries, or
  - (b) one of the beneficiaries is not apportioned a part.
- (2) But subsection (1) is without prejudice to the grounds on which the court may grant a remedy under section 64.
- (3) This section applies irrespective of when the trust was created.

## **22 Time apportionment**

- (1) Except in so far as the trust deed expressly provides otherwise (or, in a case where there is no trust deed, the context requires otherwise), the trustees may determine that amounts mentioned in section 2 of the Apportionment Act 1870 (which provides for rents, dividends and other periodical payments to be apportionable in respect of time) are not to be apportioned as mentioned in that section but are instead to be apportioned in such manner as appears to them to be appropriate.
- (2) This section applies irrespective of when the trust was created.

## **23 Apportionment: disapplication of certain rules**

- (1) Any rule of law relating to the allocation and apportionment of trust receipts and outgoing ceases to have effect in relation to a trust, irrespective of when that trust was created.
- (2) Subsection (1) does not affect allocation and apportionment which falls to be made before this section comes into force,

### *Payments from income*

## **24 Power to make payments etc. from income**

- (1) Subject to subsection (8) and except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise) the trustees may, provided that the requirements of subsections (4) and (5) are satisfied, pay or otherwise apply all or part of the trust income (whether as it arises or after it has accumulated) to a beneficiary for the benefit of the beneficiary.
- (2) The paying or applying may be on such conditions (if any) as the trustees consider it reasonable to impose.
- (3) But the trustees may subsequently waive or vary any condition imposed under subsection (2) if they consider it appropriate to do so.
- (4) The income paid or applied must, as at the date on which it is paid or applied, be income from capital destined to vest in the beneficiary—
  - (a) unconditionally,
  - (b) subject, if an uncertain future event were to occur, to defeasance or diminution, or
  - (c) on the occurrence of an uncertain future event.
- (5) The trustees must be satisfied, as at the date mentioned in subsection (4), that no person other than the beneficiary is entitled to the income paid or applied.

- (6) Any amount paid or applied under this section (other than an amount which has been repaid) must be brought into account by the trustees as part of the share in the trust property to which the beneficiary is, or will become, entitled.
- (7) For the purposes of subsection (6), the payment or application is to be deemed to be for a consideration equal to the market value of the payment or application as at the date mentioned in subsection (4) (interest in relation to the payment or application being disregarded).
- (8) If the trust deed directs or permits the trustees to accumulate income, the authorisation of the court must be obtained under subsection (9) to any exercise of their power under subsection (1).
- (9) Such authorisation may be granted by the court on an application to it in that regard by the trustees or by any person with an interest.
- (10) Authorisation under subsection (9) may be granted subject to such conditions (if any) as the court thinks fit to impose.
- (11) The trustees are not liable for any loss which the trust property may incur by virtue of—
  - (a) a condition imposed by them under subsection (2),
  - (b) a condition which might have been so imposed not having been so imposed,
  - (c) their exercising, or failing to exercise, powers under subsection (3).
- (12) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as regards a payment, or application of income, made after the section comes into force.

*Duty to provide information*

**25 Trustees' duty to provide information other than on request**

- (1) It is the duty of the trustees, on becoming aware that a person is as described in subsection (2)—
  - (a) to inform the person (or if the person has not attained the age of 16 years, or is incapable, the person's guardian) accordingly, and
  - (b) to disclose with that information—
    - (i) the names of all the trustees, and
    - (ii) information sufficient to enable the person (or the person's guardian) to enter readily into correspondence with them.
- (2) The persons are—
  - (a) a beneficiary who has a vested interest in the trust property,
  - (b) any other beneficiary who the trustees reasonably consider ought to be informed under subsection (1), and
  - (c) a potential beneficiary, the imminence of whose becoming a beneficiary appears to the trustees to be such that it would be unreasonable not to inform that potential beneficiary under subsection (1).

- (3) For the purposes of this section, trustees must take such steps as appear to them to be appropriate in all the circumstances to ensure that beneficiaries and potential beneficiaries are identified and traced.
- (4) The information is to be provided within such period as is reasonable in all the circumstances; except that if the person to be informed is a beneficiary who has acquired an immediate interest in the trust property the information must be provided as soon as is reasonably practicable.
- (5) In providing information, or making a disclosure, to any person under subsection (1), the trustees need not—
  - (a) give any advice to that person, or
  - (b) comment upon the information or disclosure in question.
- (6) If information provided by virtue of subsection (1) ceases to be current, the trustees must without delay inform the beneficiary or potential beneficiary (or the guardian of the beneficiary or potential beneficiary) of such changes as are needed to update it.
- (7) This section—
  - (a) applies irrespective of when the trust was created, but
  - (b) except in the case of a beneficiary who has a personal interest in the trust property, does not apply as respects a private purpose trust.

## **26 Trustees' duty to provide information on request**

- (1) It is the duty of the trustees to disclose—
  - (a) to a beneficiary or potential beneficiary,
  - (b) where the beneficiary or potential beneficiary has not attained the age of 16 years, or is incapable, to that person's guardian,
  - (c) where the beneficiary or potential beneficiary has attained the age of 16 years and is capable but has instructed a solicitor to act on that person's behalf, to the solicitor, or
  - (d) where the beneficiary or potential beneficiary has (wholly or in part) assigned that person's interest in the trust, to the assignee,information requested by the beneficiary (or as the case may be by the potential beneficiary, guardian, solicitor or assignee) as regards the trust unless the trustees consider it would be inappropriate, in all the circumstances, to make the disclosure.
- (2) But subsection (1) is subject—
  - (a) to the express provisions of the trust deed, and
  - (b) to the following provisions of this section.
- (3) The disclosure—
  - (a) is to be made in such a way as is appropriate in all the circumstances, and
  - (b) may be conditional on payment of such expenses as are reasonably incurred by the trustees in making it.
- (4) Any duty arising by virtue of paragraph (d) of subsection (1) is without prejudice to any other duty under that subsection.

- (5) A disclosure under subsection (1) is to be made as soon as is reasonably practicable after receipt of the request.
- (6) It is to be presumed that the trustees will not ordinarily disclose under subsection (1) information requested in respect of—
  - (a) some other beneficiary or potential beneficiary,
  - (b) the trustees' deliberations or reasons for their decisions, or
  - (c) letters of wishes (that is to say documents in which an account is given, whether or not by the truster, of circumstances which are to be relevant to the exercise by them of a discretion).
- (7) The trustees may seek a direction from the court as to the fulfilment of their duty under subsection (1) in relation to a particular request.
- (8) The court may, on the application of any person to whom the trustees have declined to disclose information requested under subsection (1), direct the trustees to disclose the information (or such part of that information as may be specified by the court) to the person.
- (9) At any time after the trust is created, a person mentioned in subsection (11) may apply to the court for a determination as to whether a limitation on disclosure of information as respects the trust, imposed by virtue of subsection (2)(a), is reasonable in all the circumstances.
- (10) If, on an application under subsection (9) as respects such a limitation, the court determines that the limitation is not reasonable in all the circumstances it may—
  - (a) alter the limitation to such extent as it considers expedient having regard to the need for a beneficiary or potential beneficiary to be able to hold the trustees to account at an appropriate time, or
  - (b) rescind the limitation.
- (11) The persons are—
  - (a) the trustees,
  - (b) in the case of an *inter vivos* trust, the truster,
  - (c) a descendant of the truster,
  - (d) a beneficiary or potential beneficiary,
  - (e) a guardian, descendant or ancestor of a beneficiary or potential beneficiary,
  - (f) a judicial factor, and
  - (g) unless the trust deed expressly or impliedly excludes the possibility—
    - (i) a protector, and
    - (ii) a supervisor.
- (12) This section—
  - (a) applies irrespective of when the trust was created, but
  - (b) except in the case of a beneficiary who has a personal interest in the trust property, does not apply as respects a private purpose trust.
- (13) But subsection (12)(a) is subject to subsection (14).

- (14) In the first year after the day on which this section comes into force, it does not apply to a trust created before that day.

*Trustees' duty of care etc.*

**27 Trustees' duty of care etc.**

- (1) Subject to subsections (2) and (3), a trustee, in managing the affairs of the trust, is required to exercise such care and diligence as any person of ordinary prudence would exercise in managing the affairs of another person.
- (2) A person who in the course of business provides professional services in relation to managing the affairs of trusts is required, where appointed or assumed as a trustee and remunerated for carrying out the duties of that office, to exercise such skill, care and diligence as it is reasonable to expect from a member of the profession in question.
- (3) A natural person with professional qualifications who is appointed or assumed as a trustee but is not a person mentioned in subsection (2) is—
- (a) if expressly instructed by or on behalf of the trustees to provide professional services or advice to the trust, required (whether remunerated or not) to exercise such skill, care and diligence in providing those services or that advice as it is reasonable to expect from a member of the profession in question, and
  - (b) if not so instructed, required only to exercise such care and diligence as is mentioned in subsection (1).
- (4) A provision of a trust deed is of no effect in so far as the provision purports—
- (a) to lessen a requirement imposed by subsections (1) to (3),
  - (b) to relieve a trustee from liability arising from a failure to exercise the skill, care or diligence required of that trustee by subsection (2) or (3)(a),
  - (c) in the case of a trustee who is required only to exercise such care and diligence as is mentioned in subsection (1), to relieve the trustee from liability arising by virtue of the trustee's gross negligence,
  - (d) to exclude or restrict any right or remedy in relation to a liability arising as mentioned in paragraph (b) or (c),
  - (e) to indemnify a trustee for any liability arising as mentioned in either of those paragraphs,
  - (f) to subject a person to any prejudice in respect of pursuing such a right or remedy,
  - (g) to exclude or restrict any rule of evidence or procedure in its application to the pursuit of such a right or remedy, or
  - (h) to make a liability arising as mentioned in paragraph (b) or (c), or its enforcement, subject to restrictive or onerous conditions.
- (5) This section applies—
- (a) irrespective of when the trust was created, but
  - (b) only as respects managing the affairs of the trust after the section comes into force.

*Breach of duty etc.***28 Breach of fiduciary duty at instigation or request of beneficiary or with consent of beneficiary**

- (1) This section applies where a trustee is in breach of a fiduciary duty—
  - (a) at the instigation or request of a beneficiary, or
  - (b) with the written consent of a beneficiary.
- (2) The court may if it thinks fit make such order, assigning by way of indemnity all or part of the beneficiary's interest in the trust property to the trustee or (as the case may be) to any person claiming through the trustee, as seems to the court to be just.
- (3) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as respects a breach of a fiduciary duty occurring after the section comes into force.

**29 Order relieving trustee of consequences of actings which are *ultra vires***

- (1) This section applies where actings of a trustee are *ultra vires*.
- (2) On the application of the trustee the court may, if the condition mentioned in subsection (3) is satisfied, make such order relieving the trustee of the consequences of those actings as seems to the court to be just.
- (3) The condition is that the trustee believes (after taking all reasonable steps and making all reasonable enquiry) that it is within the trustee's powers to act as the trustee does.
- (4) Subsection (2) is without prejudice to any right of a beneficiary or trustee to recover trust property from a person, other than a trustee, to whom a payment would not have been made but for the actings in question.
- (5) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as respects actings occurring after the section comes into force.

**30 Provision purporting to limit liability for, or indemnify for, breach of fiduciary duty**

- (1) In so far as a provision of a trust deed purports generally to—
  - (a) limit any liability of a trustee for, or
  - (b) indemnify a trustee for,the trustee's breach of a fiduciary duty, the provision is of no effect.
- (2) But subsection (1) is without prejudice to any provision of a trust deed which authorises a particular transaction, or a particular class of transactions, which but for that authority would constitute a breach of a fiduciary duty.
- (3) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as respects a breach of duty occurring after the section comes into force.

**31 Order relieving trustee of consequences of entering into a transaction in breach of fiduciary duty**

- (1) This section applies where a trustee has entered into, or proposes to enter into, a transaction in breach of a fiduciary duty.
- (2) The court may, on the application of the trustee, if it thinks fit and if the conditions mentioned in subsection (3) are satisfied make such order, relieving the trustee of the consequences of breaching that duty, as seems to the court to be just.
- (3) The conditions are—
  - (a) that the transaction has benefited, or is likely to benefit, both the trust property and (collectively) the beneficiaries, and
  - (b) that the terms of the transaction are at least as favourable to the trust property as those likely to have been, or to be, obtained in a comparable commercial transaction at arms-length.
- (4) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as respects a transaction entered into, or to be entered into, after the section comes into force.

*Personal liability of trustees*

**32 Trustees' personal liability for beneficiary's loss**

- (1) Except in so far as the trust deed, expressly or by implication, provides otherwise, a trustee has personal liability for any loss to a beneficiary which results from—
  - (a) the trustee's own, unreasonable, acts or omissions, or
  - (b) a breach of trust, or of fiduciary duty, by a co-trustee if the trustee failed to take reasonable steps to ensure that the co-trustee did not commit the breach.
- (2) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as respects—
    - (i) an act,
    - (ii) an omission, or
    - (iii) a breach of trust or of fiduciary duty,
 occurring after the section comes into force.

**33 Errors in distribution: circumstances in which trustee not personally liable**

- (1) A trustee is not personally liable for any error in the distribution of any property, or the income of property, vested in the trustee as trustee if—
  - (a) the error was caused by the trustee not knowing (either or both)—
    - (i) of the existence, or non-existence, of a person,
    - (ii) of a person's relationship, or lack of relationship, to another person, and
  - (b) the distribution takes place—

- (i) in good faith and after such enquiries as any reasonable and prudent trustee would have made in the circumstances of the case, or
  - (ii) in accordance with an order of the court.
- (2) Subsection (1) does not affect any right which a person entitled to the property or income concerned has to recover it from another person.
- (3) Subsection (2) is without prejudice to section 24 of the Succession (Scotland) Act 2016.
- (4) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as respects distributions occurring after the section comes into force.

## PART 4

### CONTRACTUAL RIGHTS, DAMAGES AND THE VALIDITY OF CERTAIN TRANSACTIONS AND DOCUMENTS

#### *Contractual rights*

#### **34 Contractual rights**

- (1) Subsection (2) applies where, acting *intra vires*, the trustees enter into an onerous contract with a person who, at the time the contract is entered into, is aware (whether or not by virtue of having been so informed by the trustees) that they are entering into the contract in their capacity as trustees.
- (2) Subject to subsections (3) and (4) and except in so far as the contract otherwise provides, any rights of the person under the contract are enforceable against the trust property only.
- (3) Subsection (4) applies where—
  - (a) a person has a contractual right enforceable against the trustees' private property, but
  - (b) the trustees have a right of relief against the trust property in respect of any finding against the trustees' private property.
- (4) The person may elect to enforce the right against the trustees' private property or directly against the trust property (liability being joint and several).
- (5) Subsection (6) applies where, acting *ultra vires* (and whether or not purporting to be acting *intra vires*), the trustees enter into an onerous contract with a person.
- (6) Any rights of the person under the contract—
  - (a) are not enforceable against the trust property, but
  - (b) if the person enters into the contract in good faith, are enforceable against the trustees' private property.
- (7) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as respects a contract entered into after the section comes into force.

*Damages***35 Damages for loss resulting from trustee's act or omission in ordinary course of administration**

- (1) This section applies where—
  - (a) in consequence of a trustee's act or omission (or of an act or omission of a person for whom the trustees are responsible) a person other than a trustee suffers loss, and
  - (b) that act or omission arises in the ordinary course of administering the trust.
- (2) Subject to subsection (3), any damages awarded in respect of that loss are recoverable from the trust property only.
- (3) In making any award in respect of that loss the court may, if satisfied that the act or omission was in any way attributable to the trustee's failure to exercise such skill, care or diligence as is required of that trustee by section 27, determine that damages are recoverable—
  - (a) partly from the trust property, and
  - (b) to the extent of the trustee's failure, partly from the trustee's personal property.
- (4) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as respects an act or omission occurring after the section comes into force.

**36 Bringing of action for damages for loss resulting from trustee's act or omission**

- (1) This section applies where, in consequence of the act or omission of a trustee (in this section referred to as "T"), a person other than a trustee suffers loss.
- (2) Any action for damages in respect of that loss may be brought—
  - (a) against the body of trustees,
  - (b) on the basis of personal liability, against T, or
  - (c) jointly and severally, against both the body of trustees and T.
- (3) At any time before final judgement in proceedings brought as mentioned in subsection (2)(a), the court may, under rules of court, allow the body of trustees an amendment—
  - (a) adding T, as an additional defender, to the instance of the principal writ, and
  - (b) directing existing or additional conclusions or craves, averments and pleas-in-law against T.

**37 Delictual liability: trustee's right of relief against other trustees**

- (1) Subsection (2) applies where a body of trustees incurs delictual liability but none of them incurs personal liability as respects the delict.
- (2) Each trustee has a right of relief against the other trustees jointly and severally.
- (3) Subsection (2) is subject to section 3(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (which provides for contributions to be in such proportions as are deemed just).
- (4) This section applies—

- (a) irrespective of when the trust was created, but
- (b) only as respects liability incurred after the section comes into force.

### **38 Trustees' liability in relation to certain obligations**

- (1) This section applies where a body of trustees incurs liability in respect of an obligation under—
  - (a) environmental law, or
  - (b) the law relating to an occupier's ownership or control of heritable property, being liability incurred in the ordinary course of administering the trust.
- (2) Subject to subsection 27, any damages awarded in respect of that liability are recoverable from the trust property only.
- (3) In making any award in respect of that liability the court may, if satisfied that the liability was in any way attributable to a trustee's failure to exercise such skill, care or diligence as is required of that trustee by section 27, determine that damages are recoverable—
  - (a) partly from the trust property, and
  - (b) to the extent of the trustee's failure, partly from the trustee's personal property.
- (4) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as respects a liability incurred after the section comes into force.

#### *Validity of certain transactions and documents*

### **39 Validity of certain transactions entered into by trustees**

- (1) Subsection (2) applies where—
  - (a) the trustees enter into an onerous transaction with any person, and
  - (b) the transaction is one under which the trustees purport to exercise, in relation to the trust property, or to any part of the trust property, a power under section 13(1) or 16(1).
- (2) The validity of the transaction, and of any title acquired under the transaction by the second party, are not challengeable by that or any other person on the ground that—
  - (a) the exercise of the power is at variance with the terms or purposes of the trust, or
  - (b) on the part of the trustees, there has been some procedural irregularity or omission.
- (3) Except that, if the trustees are acting under the supervision of the accountant of court and the exercise of the power is under section 13(1), then subsection (2)(a) applies only if the accountant consents to the transaction.
- (4) Nothing in subsections (1) to (3) affects any question of liability as between the trustees.
- (5) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as respects a transaction entered into after the section comes into force.

**40 Validity of certain deeds and other documents bearing to be executed by trustees**

- (1) Except in so far as the trust deed expressly provides otherwise, a deed, or other document, bearing to be executed by the body of trustees is valid if executed by a majority of such of the body of trustees as are both capable and traceable.
- (2) Subsection (1) is without prejudice to section 18(1)(b).
- (3) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as respects a document executed after the section comes into force.

**PART 5**

## DURATION OF TRUST

**41 Abolition of restrictions on accumulation and on creation of future interests**

- (1) Subject to the provisions of any enactment or rule of law, a trust may be constituted of whatever duration the truster elects.
- (2) The following (which relate to restrictions on the accumulation of income) are repealed in relation to a trust—
  - (a) the Accumulations Act 1892,
  - (b) section 5 of the Trusts (Scotland) Act 1961, and
  - (c) section 6 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1966.
- (3) The following (which relate to restrictions on the creation of future interests) are repealed in relation to a trust—
  - (a) sections 47 to 49 of the Entail Amendment Act 1848,
  - (b) sections 8 and 9 of the Trusts (Scotland) Act 1921,
  - (c) section 45 of the Conveyancing (Scotland) Act 1924, and
  - (d) section 18 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968.
- (4) The following rules of common law do not apply in relation to a trust—
  - (a) the rule known as the rule in *Frog's Creditors* (which provides that a conveyance to a non-existent or unascertainable person, with the grant of a liferent to a living individual, results in that individual becoming owner), and
  - (b) the rule known as the rule in *Newlands* (which provides that a conveyance such as is mentioned in paragraph (a), but with the grant in question described as being for the liferent use allenerly of the living individual, results in that individual becoming fiduciary fiar and not owner).
- (5) This section does not apply—
  - (a) as respects a trust created before the section comes into force, or
  - (b) as respects a public trust which is a charitable trust.

**PART 6**

## PRIVATE PURPOSE TRUSTS

*Private purpose trusts: general***42 Private purpose trusts: general**

- (1) A private purpose trust exists where—
  - (a) the trust property is held by, or is vested in, a trustee for the furtherance of a specific purpose which is not a charitable or other public purpose, and
  - (b) the trust is not constituted for the benefit of the trustee alone.
- (2) That purpose must be lawful and must neither be—
  - (a) contrary to public policy, nor
  - (b) in terms so uncertain as to make it either unattainable or not reasonably attainable.
- (3) For the purposes of subsection (1), it is immaterial whether the trust property is also held by, or vested in, the trustee for the benefit of any person (whether or not a person yet ascertained or in existence).
- (4) This section applies irrespective of when the trust was created.

*Applications to the court***43 Application for order requiring fulfilment of purpose of private purpose trust**

- (1) Any person with an interest in the purpose of a private purpose trust (including, without prejudice to the generality of section 46(1)(a), any supervisor) may apply to the court for an order requiring steps to be taken for the fulfilment of that purpose.
- (2) This section applies irrespective of when the trust was created.

**44 Application to reform trust**

- (1) This section applies where property is held for the specific purpose of a private purpose trust.
- (2) If executing the trust in accordance with its terms becomes, whether in relation to all or only to part of the property—
  - (a) impossible or impracticable,
  - (b) unlawful or contrary to public policy, or
  - (c) inappropriate because, by reason of changed circumstances, to do so would no longer accord with the general intent of the trust,the trustees or (unless the trust deed expressly or impliedly excludes the possibility) a supervisor may apply to the court to reform the trust.
- (3) On such application the court—
  - (a) may direct that the trust property, or where the application relates only to part of the trust property the part in question, be held for such other purpose as it considers to be consistent with the spirit of the truster's directions, or
  - (b) if it is of the opinion that the trust cannot be reformed consistently with the spirit of those directions, may direct—

- (i) where the application relates to all of the trust property, that the trustees dispose of that property as though the trust has failed, or
  - (ii) where the application relates only to part of the trust property, that the trustees dispose of that part as though the trust has failed in relation to that part.
- (4) But subsections (2) and (3) are to be disregarded if the trust can be reformed in accordance with its own terms.
  - (5) This section applies irrespective of when the trust was created.

### *Supervisors*

#### **45 Appointment of supervisor**

- (1) The truster may, in respect of a private purpose trust, by the trust deed make provision for the appointment of a person (to be known as a “supervisor”) to oversee the fulfilment by the trustees of the trust’s specific purpose.
- (2) The duties of the supervisor are fiduciary obligations; and the supervisor is subject to a duty of care.
- (3) It is not competent to appoint—
  - (a) a trustee to be a supervisor of the trust; or
  - (b) a supervisor of the trust to be a trustee.
- (4) Subject to the terms of the trust deed, it is competent for there to be more than one supervisor of the trust at any time.
- (5) Subsection (6) applies where—
  - (a) the terms of a private purpose trust require the appointment of a supervisor but it is impossible, difficult or inexpedient to make the appointment without the court’s assistance, or
  - (b) no supervisor exists or is traceable who has the legal capacity, or is willing or fitted, to carry out the duties of that office.
- (6) The court may appoint a person to be a supervisor of the private purpose trust—
  - (a) in the case mentioned in paragraph (a) of subsection (5), on the application of—
    - (i) the trustees,
    - (ii) a supervisor, or
    - (iii) any other person with an interest in the trust, or
  - (b) in the case mentioned in paragraph (b) of that subsection, on the application of—
    - (i) the trustees,
    - (ii) any supervisor other than one lacking the legal capacity, or unwilling or unfitted, to carry out the duties of that office, or
    - (iii) any other person with an interest in the trust.
- (7) The making of an appointment under subsection (6) removes any incapable or untraceable supervisor from office.
- (8) This section applies irrespective of when the trust was created.

**46 Rights and remedies of supervisor**

- (1) Subject to the terms of the trust deed, the supervisor of a private purpose trust has the same rights as a beneficiary would have—
  - (a) to bring an action, or make an application to the court, in respect of the trust,
  - (b) to be informed by the trustees of the terms of the trust deed,
  - (c) to receive information concerning the trust and its administration from the trustees, and
  - (d) to inspect, and take copies of, the trust documents.
- (2) Subsections (3) and (5) to (8) of section 26 apply to a disclosure to a supervisor by virtue of subsection (1) as they apply to a disclosure to a beneficiary by virtue of subsection (1)(a) of that section.
- (3) The supervisor has, in the performance of the supervisor's duties as respects the private purpose trust, the same rights as a trustee would have—
  - (a) to protection and indemnity, and
  - (b) to make an application to the court for—
    - (i) an opinion,
    - (ii) advice or direction, or
    - (iii) relief from personal liability.
- (4) In the event of a breach of trust, the supervisor has, on behalf of the private purpose trust, the same remedies against the trustees or a third party as a beneficiary would have.
- (5) This section applies irrespective of when the trust was created.

**47 Application to supervisors of certain provisions relating to removal from office and to decision making**

- (1) Sections 6(1), 11 and 12 apply in relation to a supervisor and the duties of a supervisor as they apply in relation to a trustee and the duties of a trustee.
- (2) This section applies irrespective of when the trust was created.

**48 Resignation of supervisor**

- (1) A supervisor has power to resign office by notice in writing delivered to the trustees.
- (2) The resignation takes effect on the delivery of that notice.
- (3) But any resignation given under this section in order to facilitate a breach of trust is of no effect.
- (4) This section applies irrespective of when the trust was created.

**PART 7**

## PROTECTORS

**49 Protectors**

- (1) The trust deed may—
  - (a) make provision for the appointment of a person (to be known as a “protector”) to oversee the exercise by the trustees of their functions, and
  - (b) require the trustees to obtain the consent of the protector before exercising (or before exercising in circumstances specified in the trust deed) such of those functions as may be so specified.
- (2) For the purposes of subsection (1) the trust deed may, by the trust deed, confer powers on the protector.
- (3) Without prejudice to the generality of subsection (2), powers conferred by virtue of that subsection may include the power to—
  - (a) determine the law of the domicile of the trust,
  - (b) determine the administrative centre of the trust,
  - (c) direct the trustees to remove, under section 7(1), one of their number from office,
  - (d) direct the trustees to assume, under section 3(1), an additional trustee,
  - (e) direct that a person is not to enjoy a beneficial interest,
  - (f) direct that a person is to enjoy a beneficial interest (whether or not in consequence of a direction under paragraph (e)),
  - (g) withhold, whether conditionally or unconditionally, consent required by the trustees by virtue of subsection (1)(b),
  - (h) make an application under section 61(1),
  - (i) oppose any application made under that section,
  - (j) verify the trust accounts, and
  - (k) represent—
    - (i) an incapable person,
    - (ii) a person who has not attained the age of 16 years,
    - (iii) a beneficiary not yet ascertained,
    - (iv) a potential beneficiary not yet ascertained, or
    - (v) a person who is untraceable.
- (4) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise) the protector may, on application to the trustees, inspect, without charge and at any reasonable time, any document held by them or on their behalf.
- (5) The duties of the protector are fiduciary obligations; and the protector is subject to a duty of care.
- (6) It is not competent to appoint—
  - (a) a trustee to be the protector of the trust; or

- (b) the protector of the trust to be a trustee.
- (7) It is competent for the truster to appoint the truster's own self to be the protector of the trust.
- (8) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise) it is competent for there to be more than one protector of the trust at any time.
- (9) This section applies irrespective of when the trust was created.

## **50 Appointment of new protector**

- (1) Subsection (2) applies where—
  - (a) by the trust deed, the truster appointed a protector, but
  - (b) no protector exists or is traceable who has the legal capacity, or is willing or fitted, to carry out the duties of that office.
- (2) The truster may appoint a new protector.
- (3) But if the truster has died or is incapable then, except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise) the trustees may appoint a new protector in the circumstances mentioned in paragraphs (a) and (b) of subsection (1).
- (4) The making of an appointment under subsection (2) or (3) removes any incapable or untraceable protector from office.
- (5) This section applies irrespective of when the trust was created.

## **51 Application to protectors of certain provisions relating to removal from office and to decision making**

- (1) Sections 6, 11 and 12 apply in relation to a protector and the duties of a protector as they apply in relation to a trustee and the duties of a trustee.
- (2) This section applies irrespective of when the trust was created.

## **52 Resignation of protector**

- (1) A protector has power to resign office by notice in writing delivered to the trustees.
- (2) The resignation takes effect on the delivery of that notice.
- (3) But any resignation given under this section in order to facilitate a breach of trust is of no effect.
- (4) This section applies irrespective of when the trust was created.

## **53 Liability for compliance with protector's direction**

- (1) This section applies where a trustee complies timeously and correctly with a protector's direction (being a direction which the protector has power to give).
- (2) In so far as such compliance comprises the breach of a duty owed to a beneficiary or third party then, except in so far as the trust deed expressly provides otherwise, the protector, and not the trustee, incurs personal liability for any resultant harm.

- (3) This section applies irrespective of when the trust was created.

## PART 8

### POWERS OF THE COURT

#### *Variation and termination of private trusts*

#### **54 Arrangements to vary or terminate a trust etc.**

- (1) This section applies to an arrangement which—
- (a) varies the purposes of a trust,
  - (b) terminates a trust, whether in whole or in part,
  - (c) varies the powers of trustees to manage or administer trust property, or
  - (d) creates a new trust in relation to all or part of trust property.
- (2) The arrangement may be made if agreement or approval is given in accordance with section 55 by or on behalf of each beneficiary, and of each potential beneficiary, of the trust in question.
- (3) This section is subject to section 58.
- (4) This section—
- (a) applies irrespective of when the trust was created, but
  - (b) does not apply as respects a private purpose trust.

#### **55 Agreement or approval for purposes of section 54(2)**

- (1) In this section “agreement” means agreement for the purposes of section 54(2) and “approval” means approval for those purposes.
- (2) Agreement may be given by a beneficiary if the beneficiary either—
- (a) has attained the age of 18 years and is capable, or
  - (b) is not a natural person.
- (3) Approval may be given by a potential beneficiary if that person falls within subsection (7).
- (4) Approval on behalf of a person who is incapable may be given by any person authorised to give it—
- (a) under the Adults with Incapacity (Scotland) Act 2000, or
  - (b) under the law of a country other than Scotland.
- (5) Approval may be given by the court on behalf of—
- (a) a person who has not attained the age of 18 years,
  - (b) a person who is incapable,
  - (c) a potential beneficiary who does not fall within subsection (7),
  - (d) an unborn person, or
  - (e) a person who is untraceable.

- (6) The powers of the court under subsection (5) are exercisable on the application of the trustees or of any of the beneficiaries.
- (7) A potential beneficiary falls within this subsection where—
  - (a) the potential beneficiary either—
    - (i) has attained the age of 18 years and is capable, or
    - (ii) is not a natural person, and
  - (b) the potential beneficiary would be of the specified description, or as the case may be a member of the specified class, if—
    - (i) the future date were the date of the hearing of the petition for approval, or
    - (ii) the future event had happened at the date of that hearing.
- (8) In subsection (7)(b), “specified description”, “specified class”, “future date” and “future event” are to be construed by reference to the definition, in section 75(1), of “potential beneficiary”.
- (9) This section—
  - (a) applies irrespective of when the trust was created, but
  - (b) does not apply as respects a private purpose trust.

## **56 Giving of approval by court**

- (1) The court is to give approval under section 55(5) only if it is of the opinion that the carrying out of the arrangement in question would not be prejudicial to the person on whose behalf the approval is sought.
- (2) Except that subsection (1) does not apply where the approval is sought under—
  - (a) paragraph (c) of section 55(5) on behalf of an unascertained person if the court is satisfied that there is no reasonable likelihood of the event taking place which would make that person a beneficiary, or
  - (b) paragraph (d) of that section if the court is satisfied that there is no reasonable likelihood of the person on whose behalf the approval is sought being born.
- (3) In considering, for the purposes of subsection (1), whether the carrying out of an arrangement would be prejudicial to a person the court may have regard to—
  - (a) any economic or other benefit which the person is likely to receive from the arrangement,
  - (b) any economic or other detriment which the person is likely to sustain in consequence of the arrangement,
  - (c) the welfare of any member of the person’s family, and
  - (d) such other factors as seem to the court to be material.
- (4) This section—
  - (a) applies irrespective of when the trust was created, but
  - (b) does not apply as respects a private purpose trust.

**57 Interests of negligible value**

- (1) This section applies in relation to loss sustained by—
  - (a) a beneficiary, or
  - (b) a potential beneficiary,(either such person being referred to in this section as “B”) as a consequence of the making of an arrangement to which section 54 applies.
- (2) The trustees are not liable to B for the loss if—
  - (a) B was a beneficiary, or potential beneficiary, when the arrangement was made,
  - (b) agreement by, or approval on behalf of, B to the arrangement (being agreement or approval in accordance with section 55) was not given, and
  - (c) prior to the arrangement being made the court, on the petition of the trustees or of any of the beneficiaries, was satisfied either—
    - (i) that B’s interest was so remote as to be of negligible value, or
    - (ii) that, in the event of B becoming a beneficiary, B’s interest would be so remote as to be of negligible value.
- (3) This section—
  - (a) applies irrespective of when the trust was created, but
  - (b) does not apply as respects a private purpose trust.

**58 Arrangements to vary or revoke alimentary purposes**

- (1) Where a beneficiary under a trust has entered into enjoyment of—
  - (a) an alimentary liferent of, or
  - (b) any alimentary income from,the trust property, or any part of the trust property, an arrangement to vary or revoke the alimentary purpose in question requires the authorisation of the court under this section as well as agreement or approval given in accordance with section 55.
- (2) The court may give authorisation under this section if it considers that the carrying out of the arrangement would be reasonable having regard to—
  - (a) the income of the beneficiary from all sources, and
  - (b) such other factors as seem to the court to be material.
- (3) The powers of the court under this section are exercisable on the application of the trustees or of any of the beneficiaries.
- (4) Subsection (1) does not apply to an alimentary purpose created by a woman in her own favour prior to 24th July 1984.
- (5) In this section, “alimentary purpose” means a trust purpose entitling the beneficiary to an alimentary liferent of, or alimentary income from, the trust property or any part of the trust property.
- (6) This section—
  - (a) applies irrespective of when the trust was created, but
  - (b) does not apply as respects a private purpose trust.

**59 Views of 16 and 17 year olds**

- (1) This section applies where the court is considering whether—
  - (a) to give, on behalf of a person who—
    - (i) has attained the age of 16 years but not that of 18 years, and
    - (ii) is capable,approval under section 55(5) to an arrangement, or
  - (b) to authorise, under section 58, an arrangement in a case where the alimentary beneficiary is a person such as is mentioned in paragraph (a).
- (2) The court is to take such account as it thinks fit of the person's attitude to the arrangement.
- (3) This section—
  - (a) applies irrespective of when the trust was created, but
  - (b) does not apply as respects a private purpose trust.

**60 No requirement for agreement of trusteer**

- (1) An arrangement such as is referred to in section 54(1) or 58(1) may be made without the agreement of the trusteer unless that person is, other than by virtue of being the trusteer, a beneficiary or potential beneficiary of the trust.
- (2) This section—
  - (a) applies irrespective of when the trust was created, but
  - (b) does not apply as respects a private purpose trust.

*Alteration of trust purposes***61 Alteration of trust purposes on material change in circumstances**

- (1) Subsection (9) applies where, on the application of a person mentioned in subsection (8) in relation to any trust other than a commercial trust or a private purpose trust, the court is satisfied in the case of—
  - (a) an *inter vivos* trust, as to the matters mentioned in subsection (3), or
  - (b) a testamentary trust, as to the matters mentioned in subsection (6).
- (2) Any other person mentioned in subsection (8) may oppose the application.
- (3) The matters are—
  - (a) that there has been a material change in circumstances since the trust was created (or that such a change is reasonably to be regarded as in prospect),
  - (b) that the trusteer is dead, and
  - (c) that a period of at least 25 years has elapsed since the trust was created.
- (4) But as respects any trust, the trust deed may provide expressly, either or both—
  - (a) that paragraph (b) of subsection (3) is to be disregarded,

- (b) that paragraph (c) of that subsection is to apply with the substitution, for the reference to 25 years, of a reference to a shorter period of time (being a period specified in the deed).
- (5) Instead of specifying a period of time by virtue of subsection (4)(b), the trust deed may provide expressly that paragraph (c) of subsection (3) is to be disregarded.
- (6) The matters are—
- (a) that there has been a material change in circumstances since the testamentary writing was executed (or that such a change is reasonably to be regarded as in prospect),
  - (b) that the testator is dead, and
  - (c) that a period of at least 25 years (or where the testamentary writing specifies for the purposes of this subsection a shorter period, that shorter period) has elapsed since the death.
- (7) But where the court is satisfied that there was a period, between the change in circumstances and the date of death, during which the testator, either or both—
- (a) was incapable,
  - (b) was unaware (or could not reasonably be supposed to have been aware) of the change and of its effect on the trust,
- it may determine that paragraph (c) of subsection (6) is to apply in relation to the trust as if the period of 25 years (or as the case may be the shorter period) referred to in the paragraph were to run not from the death but from the change in circumstances or, if it thinks fit, from the commencement of the period of incapacity or unawareness.
- (8) The persons are—
- (a) the trustees,
  - (b) in the case of an *inter vivos* trust, the truster,
  - (c) a descendant of the truster,
  - (d) a beneficiary or potential beneficiary,
  - (e) a guardian, descendant or ancestor of a beneficiary or potential beneficiary,
  - (f) a judicial factor, and
  - (g) unless the trust deed expressly or impliedly excludes the possibility—
    - (i) a protector, and
    - (ii) a supervisor.
- (9) The court may alter the trust purposes in so far as it is, in the opinion of the court, expedient to do so to offset or counter the effect, or as the case may be the prospective effect, of the change in circumstances.

- (10) Without prejudice to the generality of subsection (9), in the exercise of its power under that subsection the court—
- (a) is in particular to have regard—
    - (i) to the intentions, or probable intentions, of the truster as they appear from the trust deed or testamentary writing and from such other evidence as is available to the court (except that if those intentions, or probable intentions, cannot be ascertained the court is instead to have regard to the probable intentions of a reasonable truster in the circumstances current when the power is exercised),
    - (ii) to whether the beneficiaries consent to the alteration in question, and
    - (iii) to the fairness of that alteration,
  - (b) may bring the trust to an end whether in whole or in part, and
  - (c) may make provision as regards vesting, or postponement of vesting, of the trust property.
- (11) For the purposes of subsection (10)(a), any intention, or probable intention, to exclude the exercise of the court's powers under subsection (9) may be disregarded.
- (12) In this section “change in circumstances” includes (without prejudice to the generality of the expression) a change in—
- (a) the nature or amount of the trust property,
  - (b) the personal or financial circumstances of—
    - (i) a member of the truster's family, or
    - (ii) any other person intended to be benefited by the trust, or
  - (c) the tax regime.
- (13) In deciding, for the purposes of this section, if a trust is a commercial trust, the court is in particular to have regard to whether—
- (a) the trust is set up under, or by virtue of, a contract (bilateral or multilateral) of a commercial nature, or
  - (b) the truster has settled property into the trust for value.
- (14) For the purposes of this section “commercial trust”—
- (a) means a trust which—
    - (i) forms part of a commercial arrangement, and
    - (ii) is intended to further that arrangement, and
  - (b) without prejudice to that generality, includes—
    - (i) a personal or occupational pension scheme (within the meaning of the Pension Schemes Act 1993) established under a trust,
    - (ii) a life assurance policy,
    - (iii) a unit trust or any other trust-based investment scheme, and
    - (iv) a trust created under or comprised in a partnership agreement.
- (15) This section applies irrespective of when the trust was created.
- (16) This section is without prejudice to section 63.

*Powers in relation to ex officio trustees***62 Appointment by the court of a trustee to take the place of an *ex officio* trustee**

- (1) The court may, as regards any trust, on the application of an *ex officio* trustee appoint a person nominated by the applicant to be a trustee in place of the applicant if the court—
  - (a) considers it expedient to do so for the administration of the trust, and
  - (b) is satisfied that the power to make such a nomination is not, expressly or by implication, excluded by the trust deed.
- (2) The making of an appointment under subsection (1) removes the applicant from the office of trustee.
- (3) A person who, having been nominated under subsection (1), still holds the office of trustee as at the date mentioned in subsection (4), ceases to hold the office of trustee on that date.
- (4) The date referred to in subsection (3) is the date on which the nominator ceases to hold the office by virtue of which that person was an *ex officio* trustee when the nomination was made.
- (5) In subsection (1), the expression “in place of” is not to be construed as implying that the person appointed is to be in any way dependent upon, or under the direction of, the nominating trustee.
- (6) This section applies irrespective of when the trust was created.

**63 Office supplying *ex officio* trustee**

- (1) Where the holder of an office specified in a trust deed is (in terms of the trust deed) eligible to be a trustee by virtue only of being the holder of that office, the court may remove the specification of the office from the trust deed on the application of the trustees.
- (2) Where the specified office is extant, an application under subsection (1) may also be made by—
  - (a) the holder, or
  - (b) the body of which the holder is an officer.
- (3) If an application under subsection (1) seeks the specification of a different office in substitution for the specification removed, the court may make that substitution if satisfied either—
  - (a) that the specification sought is more appropriate to the purposes of the trust than the specification removed, or
  - (b) that the office removed is no longer extant.
- (4) This section applies irrespective of when the trust was created.

*Petition in respect of defective exercise of fiduciary power etc.***64 Petition in respect of defective exercise of fiduciary power etc.**

- (1) This section applies where a relevant person—
  - (a) considers that a trustee has taken a decision in purported exercise of a fiduciary power but that taking it was a defective exercise of the power, or

- (b) reasonably apprehends that a trustee is about to take a decision in purported exercise of a fiduciary power but that taking it would be a defective exercise of the power.
- (2) The relevant person may apply to the court for an appropriate remedy in respect of the decision taken or as the case may be of the decision which is about to be taken.
- (3) The grounds on which the court may grant such a remedy are—
  - (a) that the trustee, in taking the decision, either has considered (or would be considering) the wrong question or has not considered (or would not be considering) the correct question,
  - (b) that the trustee, in taking the decision, either has failed (or would be failing) to take a relevant consideration into account or has taken (or would be taking) an irrelevant consideration into account,
  - (c) that taking the decision was (or would be) *ultra vires*,
  - (d) that taking the decision was (or would be) fraud on a power,
  - (e) that in taking the decision the trustee failed (or would be failing) to act honestly or in good faith,
  - (f) where the application is by virtue of paragraph (a) of subsection (1)—
    - (i) that no reasonable person, properly instructed as to the facts and the law, could have come to the decision, or
    - (ii) that in some other way the decision was perverse,
  - (g) where the application is by virtue of paragraph (a) of subsection (1), that it would not have been taken but for the trustee being in error as to fact or law, and
  - (h) where the application is by virtue of paragraph (b) of subsection (1), that to take the decision would be perverse.
- (4) Where the application is by virtue of paragraph (a) of subsection (1), paragraph (a) of subsection (3) applies whether or not the trustee purported to consider the correct question.
- (5) For the purposes of subsection (3)(g), the error—
  - (a) must relate to the factual or legal situation at the time the decision in question was taken, and
  - (b) need not be as to the effect or consequence of that decision.
- (6) In subsection (1),—
  - (a) “appropriate remedy” means—
    - (i) where the application is by virtue of paragraph (a) of subsection (1), reduction (whether partial or full), rectification, or declarator, and
    - (ii) where the application is by virtue of paragraph (b) of that subsection, interdict, and
  - (b) “relevant person” means—
    - (i) the truster, a trustee, a beneficiary or a potential beneficiary,
    - (ii) any protector or supervisor, and
    - (iii) any other person if that other person has a patrimonial interest in the exercise of the fiduciary power in question (or in its not being exercised).

- (7) This section applies—
- (a) irrespective of when the trust was created, but
  - (b) only as regards a decision taken (or, as the case may be, which it is reasonably apprehended will be taken) after the section comes into force.

*Amendment of Court of Session Act 1988*

**65 Amendment of Court of Session Act 1988**

After section 6 of the Court of Session Act 1988 insert—

**“6A Allocation of business in relation to trusts and to the estates of deceased persons**

- (1) With a view to—
- (a) securing that directions may be obtained—
    - (i) in relation to trust property, by trustees and others, and
    - (ii) in relation to a deceased’s estate, by executors,
 with as little delay as possible, and
  - (b) the simplifying of procedure and the reduction of expense in applications to the Court for such directions,

the Court is, in the exercise of the powers conferred on it by section 5 of this Act, to provide by act of sederunt for the matters mentioned in subsection (2) below.

- (2) The matters are—
- (a) enabling trustees, protectors or supervisors under a trust deed, or any other person with an interest in the trust property, to obtain the direction of the Court on questions relating to—
    - (i) the investment, distribution, management or administration of the trust estate; or
    - (ii) the exercise of any power vested in, or the performance of any duty imposed on, the trustees notwithstanding that such direction may affect contingent interests in the estate, whether of persons in existence at, or of persons who may be born after, the date of the direction;
  - (b) irrespective of whether there is a will trust, enabling an executor (nominate or dative) of a person who dies after the coming into force of section 65 of the Trusts (Scotland) Act 2018 to obtain the direction of the Court on questions relating to—
    - (i) the investment, distribution, management or administration of the person’s estate; or
    - (ii) the exercise of any power vested in, or the performance of any duty imposed on, the executor notwithstanding that such direction may affect contingent interests in the estate, whether of persons in existence at, or of persons who may be born after, the date of the direction.

- (3) In subsection (2)(a)—

“protector” is to be construed in accordance with section 49(1)(a) of the Trusts (Scotland) Act 2018, and

“supervisor” is to be construed in accordance with section 45(1) of that Act.”.

### *Expenses*

#### **66 Expenses of litigation**

- (1) Subject to the following provisions of this section, a trustee does not incur personal liability for the expenses of civil litigation to which the trust is party.
- (2) Subject to subsection (6), if such expenses are found to be recoverable from the trust but the trust property is insufficient to meet the expenses then the excess is recoverable from the personal property of the trustees (liability being joint and several).
- (3) A trustee may be found personally liable, in whole or in part, for the expenses of civil litigation to which the trust is party if—
  - (a) the litigation is, in the opinion of the court, unnecessary,
  - (b) the litigation relates to the trustee’s opposing the appointment of a judicial factor to administer the trust in place of the trustee and the trustee is unsuccessful both—
    - (i) in opposing the appointment, and
    - (ii) as regards being removed from office,
  - (c) the litigation relates to the trustee’s opposing the reduction of the trust deed and the trustee is unsuccessful in opposing the reduction,
  - (d) the trustee has, by breach of duty, brought about the litigation,
  - (e) the trustee is part of a minority of the body of trustees and that minority has, in the name of the trust, pursued the litigation—
    - (i) without consulting such of the other trustees as are both capable and traceable, and
    - (ii) unsuccessfully, or
  - (f) the trustee is part of a minority of the body of trustees and that minority has, in the name of the trust, defended the litigation—
    - (i) without consulting such of the other trustees as are both capable and traceable, and
    - (ii) without the defence being of any benefit to the trust.
- (4) Where, by virtue of subsection (3), a trustee is found personally liable for the expenses of civil litigation to which the trust is party, the court may allow the trustee relief against the trust property if and in so far as the court considers it appropriate to do so.
- (5) Subsection (6) applies where a trust is party to ongoing civil litigation.
- (6) On the application of a trustee the court may, if it considers it would be unfair not to do so, relieve the trustee of personal liability for certain expenses—
  - (a) incurred, or
  - (b) yet to be incurred.
- (7) This section applies irrespective of when the trust was created.

**67 Expenses of application**

- (1) Any question of expenses in relation to an application under this Act is to be determined by the court.
- (2) Without prejudice to the generality of subsection (1), the court may, if it considers it reasonable to do so, direct that any such expenses be paid out of the trust property.

*Miscellaneous powers***68 Authorisation to make payments on basis that an event has or has not occurred or will or will not occur**

- (1) The court may, on the application of one or more of the trustees or of any person with an interest in the trust property, grant an order authorising the trustees to make payments from the trust property on the basis that an event specified in the application—
  - (a) has, or has not, occurred, or
  - (b) will, or will not, occur.
- (2) An order under subsection (1) may be granted on such conditions as the court thinks fit to impose.
- (3) Should it be found that the basis on which the order was granted was untrue, a trustee who has acted in accordance with the order incurs no personal liability unless, in connection with the making of the application—
  - (a) some relevant fact was concealed from the court—
    - (i) by the trustee, or
    - (ii) by some other person and the trustee knew, or ought to have known, of the concealment, or
  - (b) there were fraudulent actings—
    - (i) on the part of the trustee, or
    - (ii) on the part of some other person and the trustee knew, or ought to have known, of those actings and that they were fraudulent.
- (4) This section is without prejudice to any right of a beneficiary to recover trust property from a person to whom, by virtue of the order, a payment has been made or from any successor of such a person.
- (5) This section applies irrespective of when the trust was created.

**69 Completion of title by beneficiary**

- (1) A beneficiary absolutely entitled to heritable or incorporeal moveable property, title to which has been taken in the name of a trustee who has died or become incapable without having executed a conveyance (or as the case may be an assignation) of the property, may apply to the court for authority to complete title to the property in the beneficiary's own name.
- (2) The court may, on any such application, grant warrant for completing title to the property.
- (3) Any such warrant is effectual as a conveyance (or as the case may be as an assignation) of the property in favour of the beneficiary.

- (4) Reference in subsections (1) and (3) to a beneficiary includes reference to any person deriving right from a beneficiary.
- (5) This section applies irrespective of when the trust was created.

**70 Warrant to vest corporeal moveable property in beneficiary where trustee has died or become incapable**

- (1) This section applies where—
  - (a) a trustee has died or become incapable vested in corporeal moveable property to which a beneficiary is absolutely entitled, but
  - (b) delivery of the property to, or possession of the property by, the beneficiary is required for the property to vest in the beneficiary.
- (2) The court may, on the application of the beneficiary, grant warrant for the property to vest in the beneficiary.
- (3) Any such warrant is effectual to vest the property in the beneficiary, as at the date of the warrant, as if the beneficiary had taken delivery or possession of the property on that date.
- (4) Reference in subsections (1) to (3) to a beneficiary includes reference to any person deriving right from a beneficiary.
- (5) This section applies irrespective of when the trust was created.

**71 Superintendence order as to investment and distribution of trust property**

- (1) The court may, on the application of one or more of the trustees, order the accountant of court to superintend the trustees' administration of the trust insofar as that administration relates to—
  - (a) the investment of trust property, and
  - (b) the distribution of trust property among creditors and beneficiaries.
- (2) If the order (to be known as a "superintendence order") is granted, the accountant of court—
  - (a) must, annually, examine and audit the trustees' accounts, and
  - (b) may report to the court, and obtain the court's directions, on any question which may arise with regard to the administration superintended.
- (3) This section applies irrespective of when the trust was created.

*Saving as regards public trusts*

**72 Saving as regards public trusts**

Sections 54 to 61 do not apply as respects a public trust.

## PART 9

### MISCELLANEOUS AND GENERAL

#### *Miscellaneous*

#### **73 Amendment of Requirements of Writing (Scotland) Act 1995**

- (1) In section 7(7) of the Requirements of Writing (Scotland) Act 1995 (subscription and signing), after “partnerships,” insert “bodies of trustees,”.
- (2) In Schedule 2 of that Act (subscription and signing: special cases), after paragraph 2 insert—

#### *“Trusts*

2A (1) Except where an enactment or the trust deed expressly provides otherwise, where a granter of a document executed after the commencement of section 73 of the Trusts (Scotland) Act 2018 is a body of trustees, the document is signed by that body if it is signed on the body’s behalf either by a majority of the trustees or by a person (whether or not one of the trustees) authorised to sign the document on the body’s behalf.

- (2) Sub-paragraph (1) of this paragraph applies in relation to the signing of an alteration to a document as it applies in relation to the signing of a document.
- (3) In this paragraph, “trust” has the meaning assigned to that expression by section 75(1) of that Act of 2018.”.

#### *General*

#### **74 Application by petition**

Any application under this Act is to be by petition.

#### **75 Interpretation**

- (1) In this Act, unless the context otherwise requires—

“beneficiary”, in relation to a trust, means a person having, whether directly or indirectly, a vested or contingent interest under the trust,

“the court” means the Court of Session except that in sections 1, 6, 62, 63, 67, 69 and 70 the expression includes the appropriate sheriff court,

“guardian” includes a person’s continuing attorney,

“potential beneficiary” means a person (whether or not an ascertained person) who—

(a) is not a beneficiary, but

(b) may become a beneficiary on being, at a future date or on the happening of a future event, a person of some specified description or a member of some specified class of persons,

“private purpose trust” is to be construed in accordance with section 42,

“protector” is to be construed in accordance with section 49(1)(a),

“supervisor” is to be construed in accordance with section 45(1),

“trust” means any trust (whether or not constituted by deed or other writing, by or by virtue of Act of Parliament or of the Scottish Parliament, by Royal Charter, or by resolution of any corporation, public body or ecclesiastical body),

“trust deed” means any—

- (a) deed or other writing,
- (b) enactment,
- (c) Royal Charter, or
- (d) resolution of any corporation, public body or ecclesiastical body,

which constitutes any trust, and

“trustee” means a trustee under any trust but includes an executor nominate and an executor dative.

- (2) In the definition of “the court” in subsection (1), “the appropriate sheriff court” means—
  - (a) where the sole trustee is, or a majority of the trustees are, habitually resident in a particular sheriffdom—
    - (i) a sheriff court of that sheriffdom, or
    - (ii) where a majority of the trustees consent, a sheriff court of any other sheriffdom in which at least one of the trustees is habitually resident, or
  - (b) where paragraph (a) is not applicable, the sheriff court at Edinburgh.
- (3) In the definition of “guardian” in that subsection, “continuing attorney” is to be construed in accordance with section 15(2) of the Adults with Incapacity (Scotland) Act 2000 (creation of continuing power of attorney).

## **76 The expressions “incapable” and “capable”**

- (1) For the purposes of this Act, a person is to be regarded as “incapable” who, for either or both of the reasons mentioned in subsection (3), is incapable of one or more of the following—
  - (a) making decisions,
  - (b) communicating decisions,
  - (c) understanding decisions,
  - (d) retaining the memory of decisions.
- (2) And the expression “capable” is to be construed accordingly.
- (3) The reasons are—
  - (a) that the person is mentally disordered,
  - (b) that, because of physical disability, the person has an inability to communicate.
- (4) But subsection (1) is subject to subsection (5).
- (5) A person is not incapable by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise).
- (6) For the purposes of subsection (3)(a), a person is to be regarded as “mentally disordered” who has any disorder or disability of the mind (however caused or manifested).

**77 The expressions “untraceable” and “traceable”**

- (1) For the purposes of sections 1(1)(b) and (3), 2, 6(1)(e), 7(1)(b), 12(2)(c), 40(1), 49(3)(k)(v), 50(1)(b) and (4), 55(5)(e) and 66(3)(e)(i) and (f)(i) (and without prejudice to the generality of those sections) a person is to be regarded as “untraceable” if—
  - (a) the person has not been traced, and
  - (b) in the case of—
    - (i) section 1(1)(b) and (3), 6(1)(e), 49(3)(k)(v), 55(5)(e) or 66(3)(e)(i) and (f)(i) the court is satisfied that reasonable steps have been taken to trace the person,
    - (ii) section 2, the truster is so satisfied, or
    - (iii) section 50(1)(b), the truster is alive, capable and so satisfied (or if the truster is not alive or is not capable, every trustee who is both capable and traceable is so satisfied), or
    - (iv) section 7(1)(b), 12(2)(c) or 40(1), every trustee who is both capable and traceable is so satisfied.
- (2) And the expression “traceable” is to be construed accordingly.

**78 Modification of enactments**

Schedule 1 makes provision for the modification of enactments.

**79 Ancillary provision**

- (1) The Scottish Ministers may, by order, make such incidental, supplemental, consequential, transitory, transitional or saving provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any provision made by, under or by virtue of this Act.
- (2) An order under subsection (1) may modify any enactment (other than this Act).
- (3) An order under subsection (1)—
  - (a) is subject to the affirmative procedure if it modifies any enactment, and
  - (b) is otherwise subject to the negative procedure.

**80 Repeals**

The enactments mentioned in schedule 2 are repealed to the extent mentioned in the second column of that schedule.

**81 Savings**

- (1) Nothing in any section of this Act affects proceedings commenced before that section comes into force.
- (2) In so far as subsection (1) of section 2 of the Trusts (Scotland) Act 1961 continues to have effect by virtue of the exception in the entry for that section in schedule 2, references in that subsection to paragraphs of section 4(1) of the Trusts (Scotland) Act 1921 are to be construed as references to the paragraphs in question as they had effect immediately before the repeal, by this Act, of that Act of 1921.

**82 Commencement**

- (1) This section and section 83 come into force on the day after Royal Assent.
- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.
- (3) Different days may be so appointed for different purposes and for different provisions.

**83 Short title**

The short title of this Act is the Trusts (Scotland) Act 2018.

SCHEDULE 1  
(introduced by section 78)

MODIFICATION OF ENACTMENTS

*Titles to Land Consolidation (Scotland) Act 1868*

- 1 In section 24 of the Titles to Land Consolidation (Scotland) Act 1868 (mode of completing title by a judicial factor on a trust estate etc.), for “1921” substitute “2018”.

*Judicial Factors (Scotland) Act 1880*

- 2 In section 4 of the Judicial Factors (Scotland) Act 1880 (sheriff empowered to appoint judicial factors in small estates), in paragraph (1A)(a), for “have the same meaning as in sections 22 to 24 of the Trusts (Scotland) Act 1921” substitute “be construed in accordance with section 75(2) of the Trusts (Scotland) Act 2018 (taking any reference in section 75(2) to a trustee to include a reference to a judicial factor)”.

*National Parks and Access to the Countryside Act 1949*

- 3 In section 16(5)(b) of the National Parks and Access to the Countryside Act 1949 (agreements for management of nature reserves in Scotland and Wales)—
- (a) for “1921” substitute “2018”, and
  - (b) for “section 4 thereof (which relates to the general powers of trustees)” substitute “Part 3 thereof (which relates to the powers and duties of trustees)”.

*Historic Buildings and Ancient Monuments Act 1953*

- 4 In section 8(6) of the Historic Buildings and Ancient Monuments Act 1953 (power of Minister to accept endowments of historic buildings), for “1921” substitute “2018”.

*Town and Country Planning (Scotland) Act 1959*

- 5 In section 54(6) of the Town and Country Planning (Scotland) Act 1959 (interpretation), for “, 1921” substitute “2018”.

*Trusts (Scotland) Act 1961*

- 6 (1) The Trusts (Scotland) Act 1961 is amended as follows.
- (2) In section 2 (validity of certain transactions by trustees), after subsection (6) insert—
- “(7) In this section, “judicial factor” means any person holding a judicial appointment as a factor on another person’s estate.”.
- (3) In section 6(1) (interpretation), for “in the Act of 1921” substitute “they had in the Act of 1921 immediately before the repeal, by the Trusts (Scotland) Act 2018, of the Act of 1921.”.

*Trustee Investments Act 1961*

- 7 (1) The Trustee Investments Act 1961 is amended as follows.
- (2) In section 3(3)(a)(i) (as it applies by virtue of paragraph 4(3) of schedule 3 of the Charities and Trustee Investment (Scotland) Act 2005), for “, 1921” substitute “2018”.
  - (3) In section 6(7) (as it applies by virtue of paragraph 4(2) of schedule 3 of the Charities and Trustee Investment (Scotland) Act 2005), omit “Without prejudice to section eight of the Trustee Act, 1925, or section thirty of the Trusts (Scotland) Act 1921 (which relate to valuation, and the proportion of the value to be lent, where a trustee lends on the security of property)”.
  - (4) In section 17(5) (short title, extent and construction), for “1921” substitute “2018”.

*Land Compensation (Scotland) Act 1963*

- 8 (1) The Land Compensation (Scotland) Act 1963 is amended as follows.
- (2) In section 45(5) (interpretation), for “has the same meaning as in the Trusts (Scotland) Act 1921” substitute “and “trust” have the same meanings as in the Trusts (Scotland) Act 2018 except that in this subsection “trustee” includes a judicial factor and “trust” includes a judicial factory.”.
  - (3) In paragraph 7 of schedule 3 (as it applies by virtue of section 77 and paragraph 2 of schedule 16 of the Planning and Compensation Act 1991), for sub-paragraph (4) substitute—
    - “(4) In this paragraph, “trustee” and “trust” have the same meanings as in the Trusts (Scotland) Act 2018 except that in this paragraph “trustee” includes a judicial factor and “trust” includes a judicial factory.”.

*Forestry Act 1967*

- 9 In paragraph 4(2) of schedule 2 of the Forestry Act 1967 (conveyancing and other provisions connected with forestry dedication)—
- (a) for “1921” substitute “2018”, and
  - (b) for “section 4 thereof (which relates to the general powers of trustees)” substitute “Part 3 thereof (which relates to the powers and duties of trustees)”.

*Countryside (Scotland) Act 1967*

- 10 In section 49A(6) of the Countryside (Scotland) Act 1967 (management agreements in relation to natural heritage)—
- (a) for “1921” substitute “2018”, and
  - (b) for “section 4 thereof (which relates to the general power of trustees)” substitute “Part 3 thereof (which relates to the powers and duties of trustees)”.

*Agriculture Act 1970*

- 11 In section 33(3) of the Agriculture Act 1970 (miscellaneous amendments relating to amalgamations)—
- (a) for “1921” substitute “2018”, and
  - (b) for “section 4 thereof (which relates to the general powers of trustees)” substitute “Part 3 thereof (which relates to the powers and duties of trustees)”.

*Prescription and Limitation (Scotland) Act 1973*

- 12 In section 15(1) (interpretation of Part 1 of the Act), in the definition of “trustee”, for “1921” substitute “2018”.

*National Health Service (Scotland) Act 1978*

- 13 In paragraph 5 of schedule 7 of the National Health Service (Scotland) Act 1978 (the Research Trust), for “subsection (1) of section 4 of the Trusts (Scotland) Act 1921” substitute “Part 3 of the Trusts (Scotland) Act 2018”.

*Ancient Monuments and Archaeological Areas Act 1979*

- 14 In section 18(5) of the Ancient Monuments and Archaeological Areas Act 1979 (powers of limited owners for purposes of sections 12, 16 and 17 of that Act)—
- (a) for “1921” substitute “2018”, and
  - (b) for “section 4 of that Act (general powers of trustees)” substitute “Part 3 of the Trusts (Scotland) Act 2018 (powers and duties of trustees)”.

*Married Women’s Policies of Assurance (Scotland)(Amendment) Act 1980*

- 15 (1) The Married Women’s Policies of Assurance (Scotland)(Amendment) Act 1980 is amended as follows.
- (2) In section 2(1)(a) (powers of trustee under policy), for “1921” substitute “2018”.
  - (3) In section 4 (application of Trusts (Scotland) Act 1961)—
    - (a) for “1 of the Trusts (Scotland) Act 1961” substitute “55 of the Trusts (Scotland) Act 2018”, and
    - (b) for “the said section 1” substitute “section 55 of that Act of 2018”.

*Civil Jurisdiction and Judgments Act 1982*

- 16 In schedule 8 of the Civil Jurisdiction and Judgments Act 1982 (rules as to jurisdiction in Scotland), in rule 2(g), for “within the meaning of section 24A of the Trusts (Scotland) Act 1921” substitute “as defined in section 75(2) of the Trusts (Scotland) Act 2018”.

*Coal Mining Subsidence Act 1991*

- 17 In schedule 2 of the Coal Mining Subsidence Act 1991 (recipients of depreciation payments: special cases), in paragraph 4(2)(a), for “1921” substitute “2018”.

*Age of Legal Capacity (Scotland) Act 1991*

- 18 In section 1(3) of the Age of Legal Capacity (Scotland) Act 1991 (age of legal capacity)—
- (a) after paragraph (d) insert—
    - “(da) confer on any person under the age of 18 years the legal capacity to give agreement to an arrangement mentioned in section 54(1) of the Trusts (Scotland) Act 2018”, and
  - (b) in paragraph (f)(iii), for “1 of the Trusts (Scotland) Act 1961” substitute “55(5) of the Trusts (Scotland) Act 2018”.

*Children (Scotland) Act 1995*

- 19 In section 10 of the Children (Scotland) Act 1995 (obligations and rights of person administering child’s property)—
- (a) in subsection (1)(b), after “Act” insert “and to subsection (1A) below”, and
  - (b) after subsection (1) insert—
    - “(1A) Subsection (1)(b) confers no entitlement to give approval on a child’s behalf to an arrangement to which section 54 of the Trusts (Scotland) Act 2018 applies”.

*National Parks (Scotland) Act 2000*

- 20 In section 15(4) of the National Parks (Scotland) Act 2000 (management agreements in relation to National Parks)—
- (a) for “1921 (c.58)” substitute “2018”, and
  - (b) for “section 4 of that Act (general powers of trustees)” substitute “Part 3 of the Trusts (Scotland) Act 2018 (powers and duties of trustees)”.

*Christmas Day and New Year’s Day Trading (Scotland) Act 2007*

- 21 In section 7 (interpretation), in the definition of “trustee”, for “section 2 of the Trusts (Scotland) Act 1921 (c.58)” substitute “section 75(1) of the Trusts (Scotland) Act 2018 but includes a judicial factor”.

*Public Appointments and Public Bodies etc. (Scotland) Act 2003*

- 22 In section 7(1) of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (investment and borrowing)—
- (a) in paragraph (a), for “section 4(1) of the Trusts (Scotland) Act 1921 (c.58)” substitute “Part 3 of the Trusts (Scotland) Act 2018”, and
  - (b) in paragraph (b)—
    - (i) for “1921” substitute “2018”,

- (ii) after “the Trustee Investments Act 1961 (c.62)” insert “(as read with paragraph 4(2) of schedule 3 of the Charities and Trustee Investment (Scotland) Act 2005)”, and
- (iii) in sub-paragraph (ii), after “that Act” insert “(as read with the paragraph 4(2) mentioned above)”.

*Charities and Trustee Investment (Scotland) Act 2005*

- 23 In section 34(6) of the Charities and Trustee Investment (Scotland) Act 2005 (powers of Court of Session), for “section 22 of the Trusts (Scotland) Act 1921 (c.58) applies as if the trustee had been appointed under that section” substitute “the provisions of the Trusts (Scotland) Act 2018 apply as if the trustee had been appointed under section 1(1)(b) of that Act.

*Scottish Parliamentary Pensions Act 2009*

- 24 In Part B of schedule 1 of the Scottish Parliamentary Pensions Act 2009 (Fund trustees), for paragraph (4) of rule 8 substitute—
- “(4) The court may appoint a Fund trustee only on an application under section 1 of the Trusts (Scotland) Act 2018 made by virtue of section 5(2) of that Act.
  - (4A) In paragraph (4), “court” has the meaning assigned, in relation to section 1 of that Act, by section 75(1) and (2) of that Act.”.

SCHEDULE 2  
(introduced by section 80)

REPEALS

| <i>Enactment</i>   | <i>Extent of repeal</i>   |
|--|---|
| Powers of Appointment Act 1874 (c.37)                            | The whole Act.  |
| Trusts (Scotland) Act 1921 (c.58)                                | The whole Act.  |
| Trusts (Scotland) Act 1961 (c.57)                                | Section 1.<br><br>Except in so far as relating to judicial factors, section 2(1) and (2).<br><br>Sections 3 and 4.<br><br>In section 6(1), the definition of “the court”.<br><br>In section 7(1), the words “, and this Act and the Act of 1921 may be cited together as the Trusts (Scotland) Acts 1921 and 1961”. |
| Trustee Investments Act 1961 (c.62)                              | In section 7(1), paragraph (a).<br><br>Sections 10 and 14.  |
| Succession (Scotland) Act 1964 (c.41)                            | In section 20, the words “, and the Trusts (Scotland) Acts 1921 and 1961 shall have effect as if any reference therein to a trustee included a reference to such an executor dative”.   |
| Age of Majority (Scotland) Act 1969 (c.39)                       | In part 1 of schedule 1, the entry relating to section 1(2) of the Trusts (Scotland) Act 1961.  |
| Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55) | Section 13.   |
| Law Reform (Parent and Child) (Scotland) Act 1986 (c.9)          | In schedule 1, paragraph 4,   |
| Age of Legal Capacity (Scotland) Act 1991 (c.50)                 | In schedule 1, paragraphs 25 and 27.  |
| Requirements of Writing (Scotland) Act 1995 (c.7)                | In schedule 4, paragraphs 29 and 30.  |
| Children (Scotland) Act 1995 (c.36)                              | In schedule 4, paragraph 6.   |

| <i>Enactment</i>  | <i>Extent of repeal</i>                                  |
|---|--|
| Charities and Trustee Investment (Scotland) Act 2005 (asp 10) | Sections 93 to 95.<br>In schedule 3, paragraphs 2 and 3. |
| Land Registration etc. (Scotland) Act 2012 (asp 5)            | In schedule 5, paragraph 8.                              |
| Succession (Scotland) Act 2016 (asp 7)                        | Section 23.  |