Scottish Law Commission

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ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION

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TRUST LAW REVIEW: VARIATION AND TERMINATION OF TRUSTS

The Scottish Law Commission today publishes Discussion Paper No 129 on Variation and Termination of Trusts.

The Discussion Paper is the fourth paper in the Commission's Trust Law Review Programme. It puts forward proposals for reform of the law relating to the variation and termination of private trusts and the re-organisation of non-charitable public trusts.

1. Variation or Termination of Private Trusts by Beneficiaries

In Scotland where all beneficiaries of a private trust are of full age (18 or over) and capacity, and no trust purposes exist which require retention of the property and hence continuation of the trust, the beneficiaries may agree amongst themselves to either vary or terminate the trust. Neither the truster nor the trustees have any veto.

In some other jurisdictions (such as many states in the USA) the consent of the truster is required. In the absence of such consent, the court has to be satisfied that the proposed variation or termination of the trust would not be contrary to a material purpose of the trust. The Commission, however, rejects the introduction of these rules into Scots law and proposes enshrining the existing Scottish position in statute.

At present, the guardian may agree to a variation or termination on behalf of an incapable adult beneficiary. Views are sought as to whether parents should be able to agree on behalf of their children under 16 and also whether young persons aged 16 or 17 should be able to agree themselves. These changes would help reduce the number of cases where the court has to be involved.

2. Variation or Termination of Private Trusts by the Courts

The present requirement to obtain consent to any variation or termination of the trust from all the capable beneficiaries can be extremely onerous, particularly where there are many people whose chances of benefiting are very remote. The Commission considers that such remote beneficiaries should not be deprived by the court of their chance of benefiting

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because, if the very unlikely event occurred, the beneficiary would get a large payout from the trust. Deprivation would breach the European Convention of Human Rights as it would be like ripping up someone's lottery ticket. Instead, the Commission proposes that the court should have power to approve an arrangement without notifying remote beneficiaries whose interests are of negligible value. But, if the very unlikely event occurred, the beneficiary could claim from those who benefited from the varied or terminated trust and the trustees should not be liable. The Commission also suggests giving the court power to approve an arrangement which could prejudice an unborn beneficiary, if satisfied that there is no reasonable prospect of the child ever being born, for example to a woman already aged 65.

At present, where a variation or termination cannot be implemented by agreement due to some or all of the beneficiaries being under 18, incapable, unborn or not yet ascertained, the court has power to approve on their behalf, by virtue of section 1 of the Trusts (Scotland) Act 1961. Judicial approval will be granted only if all the other capable beneficiaries agree and the court is satisfied that the proposed arrangement will not be prejudicial to any of the above beneficiaries. The Commission asks whether the court should also be able to overrule a refusal to consent by capable adult beneficiaries or to approve on behalf of untraceable beneficiaries with a non-negligible interest.

3. Variation or Termination of Non-charitable Public Trusts by the Courts, Public Authorities or Trustees

Currently, public trusts can be re-organised in a wide variety of ways, depending on whether they are charitable, non-charitable or educational, whether they are large or small and finally whether they fail right at the start or later on. The Commission suggests simplifying the position, whilst retaining public accountability, by allowing extra-judicial re-organisation of non-charitable public trusts and educational endowments, similar to the new procedures for charitable trusts under the Charities and Trustee Investment (Scotland) Act 2005. In addition, cases of initial failure presently reliant upon the court's common law cy-près jurisdiction would be brought within a statutory scheme applicable to both charitable and non-charitable public trusts.

NOTES TO EDITORS

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is the Hon Lord Eassie, a Court of Session judge. The other Commissioners are Professor Gerard Maher QC, Professor Kenneth G C Reid CBE, Professor Joseph M Thomson and Mr Colin J Tyre QC.

2. Further information can be obtained by contacting Dr David Nichols, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131, Fax: 0131 662 4900, email: info@scotlawcom.gov.uk).

3. The paper may also be viewed after publication on our website at *www.scotlawcom.gov.uk* or purchased from TSO Scotland Bookshop.