Prospects and Possibilities

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Trusts and Succession (Scotland) Bill: Prospects and Possibilities

A. INTRODUCTION

After a long wait, we have the Trusts and Succession (Scotland) Bill to mull over.[1] The proposed legislation will repeal the centenarian Trusts (Scotland) Act 1921 and replace many other provisions relating to trusts and succession.[2] The Bill is largely the product of the Scottish Law Commission's extensive work in this area, beginning in 2003.[3] This article will evaluate some of the most significant changes and updates to Scots trusts law proposed in the Bill. It will also discuss additional or alternative powers and provisions which have been proposed during the Delegated Powers and Law Reform Committee's Consultation period, in particular an express power for trustees to consider environmental, social and governance ("ESG") aims in furtherance of the trust purposes, when making investment decisions.[4]

B. TRUSTS AND SUCCESSION (SCOTLAND) BILL: PRACTICAL AND POLICY PROBLEMS RESOLVED?

Part 1 of the Bill has extensive provisions relating to trust law. Part 2 is short and affects two aspects of succession law. Several responses to the consultation suggested that changes to succession law should not be included in this legislation, and no doubt it would be neater to do it separately.[5] Modernisation of succession law is widely thought to be needed, but it is a very difficult area to find consensus on the best policy on matters such as legal rights and

[1] Trusts and Succession (Scotland) Bill published 22 November 2022, available at https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/trusts-and-succession-scotland-bill/introduced/bill-as-introduced.pdf.
[2] Schedule 1 amends twenty-two Acts and Schedule 2 repeals fourteen Acts in full or in part.
[3] Scottish Law Commission, *Report on Trust Law* (Scot Law Com No 239, 2014). The full list of publications in the Trusts project is available at https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/trusts/.
[4] Trusts and Succession (Scotland) Bill – consultation (closed 20 March 2023) with submitted responses available at https://yourviews.parliament.scot/dplr/trusts-succession-bill-consultation/.
[5] Ibid, and evidence given to Delegated Powers and Law Reform Committee Sixteenth Meeting on Tuesday 16 May 2023, available at https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-delegated-powers-and-law-reform-committee/meetings/2023/dplrs62316.

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cohabitants' claims.[6] The Bill therefore only has two provisions regarding matters considered less controversial, and the changes will affect a small minority of estates. The succession aspects shall not be discussed here, but it seems sensible to have these changes implemented quickly, since wider reform of succession law is unlikely to happen any time soon. Moreover, the title of the Bill perhaps acts as a reminder that whilst the legislation primarily updates trust law, it will have an important role in governing the administration of executries. Executors are trustees, and the definition of "trustee" includes executors nominate and executors dative.[7]

The Bill offers expanded powers to appoint and remove trustees. The provision enabling removal of trustees without recourse to the courts is to be welcomed. Currently an application must be made to the court under the Trusts (Scotland) Act 1921.[8] Several recent cases involving executors have shown how difficult it is to meet the current high threshold of "malversation of office", i.e. a fundamental breach of fiduciary duties, or insurmountable conflict of interest, to remove a trustee.[9] Section 6 of the Bill allows co-trustees to remove a fellow trustee who is "unfit to carry out the duties of a trustee", or is acting in a way "inconsistent with a trustee's fiduciary duty", or has "neglected the trustee's duties", or is "incapable" or "untraceable". This is practically useful but all leaves room for interpretation, even with a detailed definition of "incapable" contained in section 75. Some respondents have expressed concern that the provision could be used by co-trustees in a vexatious manner to oust a trustee. Where there are only two trustees, a single trustee would count as the majority of "other" trustees, giving them control.[10] The trustee being forced out would then need to take action to challenge their removal. However, on balance, the provision would be of considerable help in the majority of situations where the removal of a trustee is not controversial, and will allow this action to be effected quickly and inexpensively.

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[6] Scottish Government Response to Consultation on the Law of Succession, May 2020, available at https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-analysis/2020/05/scottish-government-response-consultation-law-succession/documents/scottish-government-response-consultation-law-succession/scottish-government-response-consultation-law-succession/govscot%3Adocument/scottish-government-response-consultation-law-succession.pdf.

[7] Trusts and Succession (Scotland) Bill, section 74(1) (with an exception from sections 3 and 5 regarding assumption and resignation for executors dative).

[8] Ibid ss. 7, 8 and 10.

[9] *Ciarrocca v Ciarrocca* [2021] CSOH 59; 2021 GWD 20-282; D Adam & Y Evans, "Executor removal: a high bar" (2021) JLSS (Aug) 20.

[10] Trusts and Succession (Scotland) Bill, section 7(1).

Decision-making by trustees is covered in sections 11 and 12 of the Bill. These sections are a useful reflection of modern practice, in that the emphasis is on having an "opportunity" to express an opinion, rather than requiring a quorate meeting to take place. The exclusion from a particular decision of conflicted, incapable or untraceable trustees from the quorum is sensible. There is no mention at all of trustees *sine qua non*, i.e. trustees granted a power of veto, so in that situation we will still rely on the common law.

The powers and duties of trustees are laid out in chapter 3, sections 13 to 33. Some aspects are codification of the common law, with some helpful clarifications. The powers and duties are in the main useful starting default positions, and many of the powers would be included in professionally drafted deeds anyway. One of the most significant elements is the trustees' duty of care under section 27. The provision sets out the higher standard of care for professional trustees, which likely conforms to the expectation of the truster and beneficiaries. There is a useful exception for individuals who are professionally qualified but not acting on that basis, who will be subject only to the ordinary lay person's standard of care.[11] One omission is that the standard of care for protectors and supervisors is not covered. The subsequent sections cover breaches, and defences to breaches, of fiduciary duty, which is helpfully stated because there is opposing, and often very dated, authority here.[12] However, "fiduciary duty" is not defined, so we still need to look to case law.

The provisions relating to disclosure of information to beneficiaries (and mere potential beneficiaries) are new legislative territory. The Scottish Law Commission recommended setting out a list of documents that ought to be given to beneficiaries, but the provisions do not go that far. A difference is drawn between a positive duty on trustees to provide information under section 25 and the response to requests for information under section 26. For example, section 25 requires trustees to inform someone that they are a beneficiary, or 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". The Bill takes quite a carefully worded approach here, but this requirement concerned some respondents to the consultation.[13] One can imagine that many parents and guardians will not necessarily be keen to alert a beneficiary of their status and (perhaps discretionary) entitlement on their sixteenth birthday. For good reason, trusts will often be drafted with a range of long-stop beneficiaries, some of whom may be very remote. Some

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[11] Section 27(3)(b).
[12] Discussion Paper on *Breach of Trust* (Scot Law Com No. 123, 2003, paras 2.4 – 2.9.
[13] See n 4 above.

beneficiaries, such as a fiar where there is a young liferenter, are likely to wait a long time before eventually receiving something from the trust.

Section 26 covers requests for information. The onus in section 26(1) is on trustees to disclose "information requested by the beneficiary… unless the trustees consider it would be inappropriate", which leaves them some room to manoeuvre. Trustees can, under subsections (7) and (8), seek directions from the court. The danger of very remote prospective beneficiaries hounding trustees is somewhat alleviated by the possibility of trustees charging a reasonable fee for provision of information under section 26(3). Section 26(6) confirms that trustees are also "not ordinarily" obliged to disclose the reasoning for their decisions, nor the terms of any letter of wishes written by the truster.

This is all, of course, in parallel with ever-increasing compliance burdens on Scottish trusts, and it is likely that trustees are having to relay information about beneficiaries to HMRC and other agencies anyway.[14] As well as tax transparency, trustees have obligations in relation to reporting of land ownership in Scotland.[15]

One of the more expansive new provisions grants a power to the court to alter trust purposes in a private trust where a material change of circumstances has occurred, including changes to the nature or amount of the trust fund, the circumstances of the beneficiaries, or the tax regime.[16] This would be very useful in helping trustees out of situations not foreseen when the trust was created. The power however is constrained by the proposed requirements that the truster must be dead, and that twenty five years have passed since the trust was created (unless another duration is stated in the deed). This seems an unduly lengthy time to wait, considering that there is a requirement for a *material* change in circumstances. Given that trusts are often established precisely to allow flexibility over the use of assets, a shorter (or perhaps no) time limit would be more useful. Where a truster seeks restriction for a longer period, that can be provided for in the drafting of the trust deed. Since the court must approve the change of purposes and is directed to have regard to the truster's intentions, this would seem a reasonably balanced approach.[17]

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[14] See I Macdonald & A Pearson, "TRS: more trusts, more information, more access" (2021) JLSS (Feb) 42.
[15] For example, The Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) (Scotland) Regulations 2023.
[16] Trusts and Succession (Scotland) Bill, s 61(3).
[17] Ibid, s 61(10).

C. FURTHER PROPOSALS: PROSPECTS AND POSSIBILITIES

During the stage one consultations on the Bill, the Delegated Powers and Law Reform Committee have received and heard evidence on some further provisions which could be added to the Bill. As noted above, there is much which could potentially be added regarding succession. Major changes will not be possible, however, unless or until we get a full Succession Bill.

The Trusts (Scotland) Act 1921, as originally enacted, gave trustees a very narrow set of investment powers. The default powers were widened considerably by the Trusts (Scotland) Act 1961 and the Charities and Trustee Investment (Scotland) Act 2005. The new Bill accords trustees the power to make "any kind of investment".[18] They must have regard to "the suitability to the trust of the proposed investment" and the need for diversification.[19] It is submitted that this can be interpreted as meaning that trustees could consider ESG factors, as well as financial considerations, when making investment decisions. However, it would be helpful to add wording to the legislation to expressly empower trustees to take these factors into account when they are making investment choices.

Generally, trustees must proceed cautiously when making investment decisions. They must uphold their fiduciary duties in protecting the trust fund for the benefit of the beneficiaries and avoid any conflict of interest. Trustees are likely to be wary of green, ethical or "responsible" investing which might (in a short-term, financial sense) underperform compared to other investment choices, not least because beneficiaries might challenge the choice of investment. This tension was recently explored by the English High Court in *Butler-Sloss and others v Charity Commission*.[20] English trusts law is, of course different, but the case gives useful directions for charitable trustees on the need to balance their duties and formulate an appropriate investment strategy for their charity. The High Court ultimately permitted a wide power of investment, including ESG investment, and reiterated that the primary and overarching duty was to further the purposes of the trust. A clear statement in Scots trust legislation along these lines would be useful and empowering to trustees when

[18] Ibid, s 16(1).
[19] Ibid, s 17(1).
[20] *Butler-Sloss & Ors v The Charity Commission for England and Wales* [2022] EWHC 974 (Ch); [2022] 3 WLR 182.

setting an investment strategy. They could then proceed with less fear of challenge by beneficiaries.[21]

In many charitable or public trusts (but also in some private trusts), investing in an environmental or social cause might achieve the trust purposes more effectively than investing with just profitability in mind. Divestment from perceived "sin" investments such as armaments, tobacco and fossil fuels has been a strong trend in recent years, and indeed might be seen as a financially, as well as ethically sound choice, particularly if effected gradually.[22] Trusts are often used as vehicles for holding land, and there can be considerable divergence between beneficiaries' financial expectations and the environmentally responsible use of land.[23] There are some 500 land trusts in Scotland, in control of nearly 3% of the land.[24] An interest in more than just economic returns is also shown by the considerable growth in the use of social enterprises, many of which will be run by trustees, and investment in ethical pension funds, which are of course trusts.

If the aim is to make Scots trusts law attractive and modern and to contribute to (or at least, not to hinder) Scotland's net zero goals, then a clear provision allowing ESG investments should be written into law. Although the context is slightly different, there is already a similar provision in the Scottish Crown Estate Act 2019 which balances the need to enhance value with the direction to look at sustainability and ESG factors.[25] Section 7 of that Act is as follows:

> 7 Duty to maintain and enhance value
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> (1)The manager of one or more Scottish Crown Estate assets must maintain and seek to enhance—
>
> (a) the value of the assets, and
>
> (b) the income arising from them.

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[21] This would accord with Lord Murray's view of trustee's investment duties in *Martin v City of Edinburgh District Council* (1988) SLT 329.

[22] According to Social Enterprise Scotland, there are more than 6,000 social enterprises in Scotland, generating over £2.3 billion for the economy: see https://socialenterprise.scot/.

[23] A MacCulloch & C T Reid, "Obstacles to environmentally sensitive land management" (1993) Environmental Law and Management 202.

[24] Scottish Government, Community ownership in Scotland 2021, available at: https://www.gov.scot/publications/community-ownership-scotland-2021/;
A McIntosh, "The Cheviot, the Stag and the Black, Black Carbon: Natural Capital, the Private Finance Investment Pilot and Scotland's Land Reform", 26 May 2023, 32-33, available at: https://www.communitylandscotland.org.uk/wp-content/uploads/2023/05/2023-CLS-Full-Cheviot-Carbon-Discussion-McIntosh.docx.pdf.

[25] Professor Colin Reid drew this provision to my attention.

(2) In complying with the duty under subsection (1), the manager must—
(a) act in the way best calculated to further the achievement of sustainable development in Scotland, and
(b) seek to manage the assets in a way that is likely to contribute to the promotion or the improvement in Scotland of—
(i) economic development,
(ii) regeneration,
(iii) social wellbeing,
(iv) environmental wellbeing.

The provisions in section 7(2) were added during consultation stages on the bill leading to the 2019 Act. This seems a useful template for future trust legislation. Trustees could be empowered (but not obliged) to consider these environmental and social factors when choosing investments. Linking the investment decision to the furtherance of the trust purposes would be important here. It would limit the opportunity for trustees to take decisions based on their personal ethical beliefs, and trustees are still obliged to take proper investment advice (and there is notable growth in ESG advisory services)[26]. The trust deed may also permit or prohibit certain types of investment, and the legislation would not override the terms of the deed. Modern deeds tend to give trustees a long list of investment powers, but older deeds can be sparse and that is where the provision would be especially helpful. The legislation enacting the Trusts and Succession (Scotland) Bill should list an express list of factors which *might* be considered, if in the opinion of the trustees such choices would more effectively further the trust purposes.

D.CONCLUSION

The Trusts and Succession (Scotland) Bill is hugely welcomed and will be a significant upgrade to the Scots law of trusts. The Bill makes modernising and practical improvements to many parts of trust law which are dusty and outdated. The default trustee powers and duties will be clearer and more fit for the modern, diverse use of trusts. Several suggestions have been put forward for minor amendments to the provisions to make them more precise, or more effective in practice. The case has been put forward here for express powers regarding

[26] Scottish Legal News "Burness Paull expands ESG advisory offering" 18 May 2023, available at https://www.scottishlegal.com/articles/burness-paull-expands-esg-advisory-offering.

ESG investment, and it is hoped that the Delegated Powers and Law Reform Committee might consider adding this provision. It is argued that this would empower and embolden trustees to take ESG investment decisions in furtherance of the trust purposes. New trust legislation does not come along very often, so it is vital to take this opportunity to make it as useful and powerful as possible.

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