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Submitted to Trusts and Succession (Scotland) Bill - Consultation
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What is your name?

Name:

Dr Alisdair MacPherson and Professor Roddy Paisley, who are both members of the Centre for Scots Law at the University of Aberdeen

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Are you responding as an individual or on behalf of an organisation?

Individual

Questions (page 1 of 3)

1 What are your views on the proposals contained in Chapter 1?

Partly agree or disagree

Please explain the reasons for your views in relation to this question:

We broadly agree with the proposals in Chapter 1.

As a point of clarity in relation to section 5(1), we assume that if a trust deed sets down specific procedures or conditions for a trustee to resign, these will need to be complied with and/or fulfilled, notwithstanding the existence of the provision in the Bill. To put the matter beyond doubt, consideration could be given to whether it would be desirable to amend the provision or add another sub-section to clarify the position. Some consideration might also be given to a provision confirming that resignation of a trustee might be effected by an electronic deed. This may require some consideration of the provisions of the Requirements of Writing (Scotland) Act 1995, s 1.

As regards section 7, we wonder whether a majority of other trustees should also be able to remove a trustee from office if e.g. the person has been disqualified from acting as a director (see the Company Directors Disqualification Act 1986). It would be highly undesirable if a party who is disqualified from acting as a director could circumvent this by acting as a trustee for a trust that is undertaking similar activities. This power to remove a trustee could persist for so long as the person remains disqualified. We also wonder whether a majority of trustees should be able to remove a trustee who has been made bankrupt, unless perhaps they can reasonably show that the bankruptcy will not affect their activities as a trustee. We do appreciate though that the trust deed itself may specify other circumstances in which a trustee could be removed.

In section 8(1)(b)(i), we wonder why the age of 18 years is used here rather than e.g. 16 years, which is used elsewhere in the Bill (e.g. ss 10(4) and 12(4)). In any event, is an age limit necessary here at all? Why should a person acting on behalf of a younger party not have the ability to remove a trustee on their behalf?

In section 8(2)(a), the term "secured" could be misconstrued, particularly given the context and the possibility that security rights can be granted over trust property. Perhaps "achieved" or "fulfilled" or "possible" (e.g. "a trust purpose which is not possible") would be better. Whichever option is chosen, adding "reasonably" before the relevant word may be desirable (e.g. "a trust purpose which cannot reasonably be achieved"), so that the applicable threshold is not too high.

2 What are your views on the proposals contained in Chapter 2?

Agree

Please explain the reasons for your views in relation to this question:

We agree with the proposals in Chapter 2.

3 What are your views on the proposals on advances to beneficiaries?

Agree with the proposals in general

Please explain the reasons for your views in relation to this question:

We do not have any particular views on this. As such, we are happy to support the relevant provisions in the Bill.

4 What are your views on the rest of the proposals contained in Chapter 3?

Partly agree or disagree

Please provide your response in the box provided.:

We generally agree with the rest of the proposals in Chapter 3. However, we think the term “beneficially entitled” in s 13(1) should be avoided, as it could lead to confusion with the rights/powers held by beneficiaries. Instead, it may be better to refer to “all the powers of a natural person who owns property for their own benefit”.

In section 19(1), it may be preferable to reword the provision to remove the reference to “secure”, so that it reads “take such steps as are requisite to transfer title to the determined assets to the nominee”.

Questions (page 2 of 3)

5 What are your views on the proposals on court powers to change trust purposes in Chapter 8?

Agree

Please explain the reasons for your views in relation to this question:

We are happy to support the provisions in the Bill on this matter.

6 What are your views on the other court powers in Part 1 of the Bill?

Agree

Please explain the reasons for your views in relation to this question:

We have no particular views on them.

7 Do you have any comment on any other chapter of Part 1 (specifically Chapters 4-7)?

Yes

Please share any comments in the box provided.:

We wonder whether sufficient consideration has been given to the consequences of abolishing restrictions on accumulation and the creation of future interests (see Chapter 5). This change could have significant economic impact as certain trusts accumulate assets over a sustained period of time and accordingly obtain sizeable economic power.

8 What are your views on the proposals contained in Part 2 of the Bill?

Not Answered

Please explain the reasons for your views in relation to this question:

With reference to section 71, we consider that it would be possible to interpret the existing statutory provision (s 2(2) of the Succession (Scotland) Act 2016) in the manner desired (see S Wortley, “The Meaning of Succession (Scotland) Act 2016 Section 2: Statutory Interpretation and Survivorship Destinations” 2022 Jur Rev 179, responding to J Robbie, “Death, Divorce and Defective Drafting” (2018) 22 Edin LR 307). However, there is no harm in clarifying the position by statutory amendment, given that this legislative opportunity is available.

We do also wonder whether there should be an equivalent provision on special destinations for cohabitants, as there is for spouses under s 2(2) of the 2016 Act. This would mean that if the cohabitation relationship ends and cohabitant A dies, then cohabitant B is treated as having died before A in relation to property held e.g. in the name of A and B and the survivor of them, so that the survivorship special destination is evacuated.

In relation to section 72, we understand the reason for the change, but we do not think it will have much of an impact in the vast majority of cases, given the existence of prior rights.

Questions (page 3 of 3)

9 Is there anything which you would like to have seen in the Bill which has not been included? If so, please provide details.

Please provide your response in the box provided.:

We consider that the Bill should provide that certain parties who have killed someone else should not be permitted to become the executor of the deceased's estate. Certainly, convicted murderers should not be able to act as executor of their victim's estate and it may also be advisable to extend this rule to those convicted of culpable homicide, and possibly even to those who, on the balance of probabilities (i.e. the civil standard, rather than the criminal standard of beyond reasonable doubt), have caused the death of another party. This would reflect the existing position in relation to succession to bequests and benefits under a will or on intestacy.

There is already some authority under the existing law for a person convicted of culpable killing not to be allowed to become executor to their victim's estate – see e.g. *Smith Petr* 1979 SLT (Sh Ct) 35. In that case the rule applied in Scots law was stated to be based on the same principles as English law. In England a person convicted of murder is excluded from being an executor: In the *Estate of Cunigunda (Otherwise Cora) Crippen, Deceased* [1911] P. 108. We appreciate the Scottish Government already has gone out to consultation on this matter but these cases were not noticed and an inaccurate statement of the law was set out in the consultation. The case law cited there is not authority for the proposition stated in the consultation. See para 4.3 of the Consultation available at <https://www.gov.scot/publications/consultation-law-succession/pages/5/>. Quite apart from this case law, an executor is treated not only as a fiduciary (with enhanced obligations to the deceased and other beneficiaries which are in their scope well above the obligations of a mere beneficiary) but also as the representative of the deceased conforms to the long-established principle that the executor is *eadem persona cum defuncto* (he or she is treated as the same person as the deceased). This latter rule has applied for centuries and is also to be observed in relation to heirs at law prior to the enactment of the Succession (Scotland) Act 1964. It would be even more revolting to good morals and conscience that the killer is to be treated in Scots law as if they were the same legal person as their victim than if they merely obtained a benefit from the estate of the victim. This identity of personality with the victim is wholly repugnant with the good sense and decency of Scots law. It also flies in the face of the fiduciary nature of the role. Our view is that this rule of exclusion of executors (whether nominate or dative) already exists in Scots law and is well established with little doubt as to its application. It is so obvious that there has been no disputed case just as there was no disputed case relative to inheritance by a killer as beneficiary prior to *Smith, Petr* (1979). The practice of solicitors in obtaining a judicial removal or resignation of such a person is a common error that does not make law just as it did not make law for the killer of Maxwell Garvie from Stonehaven in the 1960s to execute an express declinature as to receiving a benefit from her victim's estate. Such a declinature from Mrs Garvie was indeed obtained because there was no reported case law and, to put it bluntly, lawyers and other professionals involved in winding up estates find "comfort" in some written document. It does not mean the lady in the Garvie case was not already excluded from inheriting.

However, again for the purpose of providing "comfort" and to clear up the confusion caused by the above-noted Scottish Government consultation, there is value in statutory clarification to put the issue beyond doubt, particularly in light of what is now the well-known case in which an individual who murdered his mother has apparently become and remained as executor to her estate – <https://www.dailyrecord.co.uk/news/scottish-news/expert-rubbishes-claims-scots-man-29191787>. This is the case mentioned in the Scottish Government consultation, just noted, as if there is no present solution in Scots law except to remove the executor after appointment. The correct approach is that the killer's purported acceptance of the role of executor is void *ab initio* because he is precluded from accepting the office. There is therefore no need to remove him from office and indeed removal is incompetent. We are of the view there is no harm in enacting a statutory provision declaring that this has always been the law of Scotland. Such statutory intervention should be without prejudice to the common law, as this will support flexible solutions in this area of law. The provision could be limited to those convicted of murder, or possibly also to those convicted of culpable homicide, and provide that such individuals cannot become executors to the estate of any person to whom the relevant conviction relates, and any attempt to become executor or to be appointed executor is of no effect. The same should apply to the role of trustee in any *mortis causa* trust. Alternatively, the provision could be broader and provide that any individual who is responsible, whether wholly or partially, on the balance of probabilities, for the unlawful killing (or death) of another person cannot be the executor to that party's estate and any attempt to become executor or to be appointed executor is of no effect. There could, however, be judicial relief afforded in exercise of court discretion, which would allow for e.g. someone who unintentionally caused the death of someone else to receive permission to act as executor. On this point, see the comparable position for the "unworthy heir" (*haeres indignus*), whereby there is court discretion where someone has been unlawfully killed (see *Forfeiture Act 1982, s 2*). It is notable that there is, as yet, no court discretion for the exclusion of executors or *mortis causa* trustees, almost certainly because this is seen as even more heinous and as a gross betrayal by someone who should not be able to take up a fiduciary position.

There are other aspects of the law of trusts and succession that may have benefited from consideration prior to the Bill's introduction and then, subsequently, provisions within the Bill; however, these often involve substantial areas of law extending into other areas and/or contentious issues, so we understand (to some extent) why they have not been included. The following are some principal examples:

- The treatment of trusts in insolvency law. Under the current law, the formal insolvency process for trust estates is sequestration. There are various points of uncertainty as to how sequestration operates in relation to trust estates. In addition, there are broader arguments in favour of developing an insolvency framework for trusts (and partnerships) that is more akin to the current corporate insolvency regime, this is particularly true where corporate trustees are involved.
- Trusts as a separate legal entity. Consideration could have been given to whether trusts as a whole should be recognised as having separate legal personality or if a sub-category of trusts should have this.
- The use of trusts for the purposes of security. There is some authority under the current law that supports using trusts for security purposes, at least for moveable property, and practice has proceeded on this basis. However, the position is not without doubt and would benefit from statutory clarification in a number of respects, including the extent to which the general law of security rights applies to them, e.g. in relation to the registration of charges regime for UK companies. In addition, section 9(3) of the *Conveyancing and Feudal Reform (Scotland) Act 1970* provides that "[a] grant of any right over land or a real right in land for the purpose of securing any debt by way of a heritable security shall only be capable of being effected at law if it is embodied in a standard security", which suggests that it is not possible to put such property into trust for security purposes. However, we are aware that this view is not universally shared and a definitive statutory statement on the matter would be welcome.
- The use of trusts for other "workaround" purposes. This could include consideration of whether it should not be possible to hold certain types of property in trust.

- The reform of legal rights. Further consideration needs to be given to the reform of legal rights in favour of issue (children etc) and spouses, e.g. whether the legal rights should remain limited to the net moveable estate.

10 Is there any other comment you would like to make on the Bill more generally? If so, please give details.

Please provide your response in the box provided.:

We welcome this consultation and are pleased to respond to it. We are generally supportive of the Bill and its provisions and applaud the amount of work undertaken by various parties over a number of years, including the Scottish Law Commission. The proposed reforms will bring greater clarity and certainty to the law in a number of respects.

We have some concerns regarding circumstances in which the domicile of trustees could be moved to somewhere outwith Scotland and how this may impact on the application of relevant provisions and the fulfilment of policy objectives. It would be undesirable if a party could use a change in domicile to avoid policy requirements regarding transparency etc. Perhaps a change in domicile of a trustee may be justified provided that the change can be reversed or does not apply if there are relevant public policy or national security reasons.