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The Trusts and Succession (Scotland) Bill: a critical analysis of modernising Scottish trust law

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Introduction

The Trusts and Succession (Scotland) Bill was recently passed by the Scottish Parliament. It aims to modernise trusts and succession under Scottish law. This landmark legislation represents a substantial change to Scottish trust law, having not seen a revision of its scale for over a century. The Bill addresses outdated legal provisions and introduces crucial reforms in areas such as the appointment and removal of trustees, duties of trustees, and the rights of beneficiaries. This article seeks to critically analyse these reforms, offering insight into their potential impact and the future of trust law in Scotland.

Keywords

Appointments; Beneficiaries' rights; Executors; Protectors; Removal; Scotland; Succession; Trustees; Trustees' powers and duties

Background of the Trusts and Succession (Scotland) Bill

The Trusts (Scotland) Act 1921 established the foundation of Scotland's trust system and shaped practices for over a century. Though revised through the years, Scotland's trust law faces scrutiny for failing to accommodate modern wealth administration and inheritance complexities. Current social dynamics necessitate laws that can flex with intricate financial and relational structures, recognising diverse living arrangements. Convoluted fiduciary designs and personalised heir arrangements demand navigation through multi-generational legalese. Adaptability remains key, so the law maintains relevance within a shifting world, including nonconformist lineage definitions and innovative asset allotment.

Realising the necessity for change, the Scottish Law Commission undertook a thorough examination, culminating in a comprehensive report published in 2014. This report emphasised the deficiencies of the current legal structure and put forth a range of proposals designed to bring trust law in Scotland up to date.¹ The Trusts and Succession (Scotland) Bill, presented to the Scottish Parliament in November 2022, directly reacted to these recommendations.

The primary objective of the Bill was to align Scottish trust law with current and future societal and economic conditions. It sought to address various aspects of trust management that needed to be updated, including the appointment and responsibilities of trustees, their powers, and the overall administration of trusts. The Bill also aimed to streamline the legal processes associated with trusts, making them more accessible and efficient.

Key reforms in the Bill

The Trusts and Succession (Scotland) Bill represents a monumental shift in Scottish trust law, marking the first comprehensive review and overhaul in over a century. This Bill introduces several significant reforms to modernise Scotland's legal framework governing trusts, succession, and executors.

One of the most notable changes in the Bill is modifying the framework for resigning and removing trustees. Previously, under the Trusts (Scotland) Act 1921, there were stringent limitations, especially for sole trustees or those serving on a remunerated basis. The Bill acknowledges the dynamic nature of trust administration and the necessity for adaptability. It proposes more practical and streamlined mechanisms for trustees wishing to resign, thus enhancing the operational efficiency of trusts. This reform is crucial as it aligns with the evolving needs of trust administration.

Furthermore, the Bill introduces new grounds for removing trustees, including mental incapacity, criminal convictions involving dishonesty, imprisonment, or contempt of court. This expansion empowers other trustees and, in certain scenarios, beneficiaries to act decisively in protecting the trust's interests. However, these criteria, particularly the definition of 'mental incapacity', demand scrutiny to prevent misuse. The need for specificity in certain provisions, like those regarding providing information to beneficiaries, could lead to varying interpretations and potential disputes. These aspects of the Bill must be clarified and refined to ensure they serve their intended purpose without unintended consequences.

The Bill also revises the standard of care for trustees. It establishes a minimum standard of care akin to a prudent person's exercise in managing another's affairs. This sets a clear benchmark for trustee conduct. Significantly, the Bill distinguishes the standard of care based on the trustee's professional background. Professional trustees are held to the standards expected of their profession, recognising their specialised skills and knowledge. This differentiation ensures trustees are accountable commensurate with their expertise and professional responsibilities.

Another critical development under the Bill is the statutory duty of trustees to provide information to beneficiaries. This provision balances the need for beneficiary oversight and the practicalities of trust administration. The Bill also addresses the appointment and decision-making process of trustees. It grants trustees the power to appoint new trustees unless this is contrary to the trust deed. Additionally, the settlor can appoint a new trustee where no capable trustee exists or is traceable. The court can also appoint an additional trustee when suitable for the administration of the trust. In terms of decision-making, the Bill stipulates that decisions can be made by a majority of trustees capable of making such decisions at the time, thus addressing the limitations of the current quorum-based system.

A particularly ground-breaking reform is the formal recognition of protectors in Scotland. Protectors are individuals appointed to monitor and guide the trustees in administering the trust, and until now, they have yet to be formally recognised under Scots law. This change aligns Scotland with other jurisdictions that acknowledge the role of protectors in trust administration.

In terms of succession, the Bill introduces significant changes. It prioritises the surviving spouse or civil partner in intestacy cases, ranking them second only to children and the issue of the deceased. This means that in cases where a person dies without surviving children, the surviving spouse or civil partner will inherit the entire estate. Additionally, the Bill amends the Family Law (Scotland) Act 2006, extending the time limit for cohabitants to claim on intestacy from six to 12 months. This amendment reflects a more contemporary understanding of family structures and relationships.

Impact on Scottish trust law

This Bill goes beyond simple legislative revisions and redefines trust management and regulation in a comprehensive way. The Bill increases the flexibility for managing trusts. The revised processes by the Bill for the resignation and removal of trustees demonstrate an understanding of the dynamic nature of modern trust administration. These developments indicate a move towards a more adaptable legal structure that goes beyond just tweaking administrative procedures. Such adaptability is essential to ensure that trusts can competently handle unforeseen obstacles, safeguard the interests of beneficiaries and preserve the trust's integrity.

The Bill fosters a transparent and trustworthy environment, it is beneficial to require trustees to provide information to beneficiaries. This transparency is essential when it comes to maintaining beneficiaries' confidence in managing trusts. Additionally, the Bill enhances the function of trusteeship by creating defined standards of care, particularly for professional trustees. This is a significant contribution. This elevation not only elevates the standards of behaviour expected of trustees but also improves the governance of trusts.

The Bill demonstrates an understanding of the changing nature of financial and familial relationships in today's society, that regulations that have remained mostly unchanged for over a century are being revised. This modernisation is required for Scottish trust law to effectively address the complexity of the modern world, which includes the transfer of wealth from one generation to the next and the structuring of commercial entities.

In addition, the Bill addresses a critical legal hole by banning those convicted of grave crimes from serving as executors. This is a reflection of the beliefs that society has regarding ethics and justice. Taking this proactive approach, inspired by real-life events, emphasises the law's capacity to evolve in response to societal concerns and ethical discussions, strengthening public trust in the legal system. On the other hand, the Bill poses several difficulties. Implementation inconsistencies may occur as a result of ambiguities in specific provisions. Because this ambiguity may lead to legal issues, additional clarification is required to operationalise the situation effectively. In addition, the grounds for removing trustees, particularly those pertaining to mental incapacity, require careful examination to minimise unintended consequences. To protect against the possibility of exploitation, it is essential to ensure that these provisions are applied prudently and that clear instructions are followed.

Recognising protectors in the Bill is a significant step forward, as it brings the law of trusts in Scotland in line with international standards. According to Scots law, protectors, who play an essential role in the supervision of trust administration, are now granted statutory status, bringing Scotland in line with other jurisdictions. Specifically, this unity is vital for Scotland's incorporation into the global legal structure regarding the administration of trusts that span borders.

The introduction of the Bill reflects contemporary knowledge of family structures, particularly about succession in the family. By expanding the timeframe for claims made by cohabitants and providing precedence to the surviving spouse or civil partner in the event of an intestacy, the Bill acknowledges the changing nature of relationships and the dynamics of families. In the context of succession law, these amendments point to a shift towards an approach that is more inclusive and grounded in reality.

Furthermore, the provisions of the Bill apply to the enhancement of the rights of children and dependents in situations about succession responsibilities. Such a proposal aligns with contemporary perspectives on fairness and the responsibility of families. Because it allows for a more inclusive framework that reflects the different nature of modern familial interactions, this particular component of the Bill is particularly significant in situations where traditional concepts of family structure do not apply.

Further considerations: the need for taxation reform in trust distributions

Even though the Trusts and Succession (Scotland) Bill represents a substantial step towards modernising trust law, it also opens the door to additional reform, particularly about the taxation of beneficiaries of trusts. The fact that the Bill is primarily concerned with the structural and governance components of trust law inadvertently calls for a review of the current taxation framework to which the trusts are subject. Because the Bill makes trust arrangements more flexible and open to scrutiny, ensuring that the tax administration is by these modifications is of the utmost importance. To minimise any inconsistencies that could lead to inefficiencies or loopholes in tax collection and trust management, it is essential to maintain consistency in how trusts are treated legally. The bill that modernises trust law may generate additional complexity in trust administration. These complexities may be beyond the capabilities of the existing taxation regulations to address appropriately. For instance, the altered procedures for trustee resignation and removal could impact the continuity and stability of trust management, which are frequently linked to taxation outcomes. The fact that the Bill does not make any direct reference to tax considerations indicates that there is a requirement for a comprehensive strategy that simultaneously considers both trust law reforms and tax law reforms.

The purpose of the Bill is to ensure that it is in line with the shifting financial and familial patterns prevalent in today's society. As a result, it is of the utmost importance to bring the taxes of trusts up to date at this point. A comprehensive analysis of the impact that the Bill will have on other kinds of trusts, such as those used for asset management, pensions, and commercial objectives, ought to be included in this update. The primary aim of the Bill is to improve the relevance of Scottish trust law to the modern world. The objective is to develop an equitable, transparent, and efficient tax system to achieve this objective.

Conclusion

As a result of the introduction of the Bill, the Scottish trust law is going through a considerable upheaval. This bill tackles long-standing deficiencies and includes significant improvements to modernise the appointment and removal of trustees, standardise duties, and enhance the rights of beneficiaries. These reforms are among the most significant reforms that the Bill proposes. Provisions for more flexibility, openness, and professionalisation in trust management are included in the revisions that have been proposed. These improvements represent a thorough awareness of contemporary socio-economic realities and the complexity of modern trust administration. Concerning the Bill, however, there are a few obstacles to overcome. For instance, several clauses, such as the criterion for trustee removal, have ambiguities, and there is a need for additional clarity to prevent misunderstandings and disagreements.

Furthermore, the Bill emphasises the necessity of a comprehensive approach to the reform of the legal system by bringing attention to the fact that there should be a more extensive discussion on aligning Scotland's taxation laws with these modified trust statutes. In conclusion, the Bill is a significant step forward, but it also brings to light the pressing requirement for continuous monitoring and refinement in the legal landscape. In an ever-changing world, this is an essential step that must be taken to guarantee that Scottish trust law continues to be applicable, efficient, and equitable.

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Footnotes

- 1 Scottish Law Commission, Report on Trust Law (SLC 239) (accessed 22 December 2023)
<https://www.scotlawcom.gov.uk/files/4014/0904/0426/Report_on_Trust_Law_SLC_239.pdf>.