

Trusts and Succession (Scotland) Bill

Child Rights And Welfare Impact Assessment Screening

November 2022

Child Rights and Wellbeing Screening Sheet for the Trusts and Succession (Scotland) Bill

1. Brief Summary

The Bill implements the recommendations of the Scottish Law Commission's Report on Trust Law, published in 2014, and one substantive provision on the Scots law of succession (on the order of intestate succession), recommended in the Scottish Law Commission's Report on Succession, published in 2009. In general, the Bill covers the powers and duties of trustees, the powers of the courts in trust matters, and miscellaneous other issues in trust law, as well as one substantive provision on the Scots law of succession (about the order of intestate succession).

A significant number of the recommendations deal with the powers and duties of trustees. The Trusts (Scotland) Act 1921 ("the 1921 Act") sets out a number of statutory powers and duties of trustees that form part of every trust unless the contrary is provided for in the trust deed.

Most of the current statutory law relating to trusts is found in the 1921 Act. Not only is its structure and wording old-fashioned, it has been heavily amended so that it is not easy for truster, trustees or beneficiaries to understand what their legal rights and duties are. In modern trust practice, the powers and duties of trustees are markedly different from those in the 1921 Act. The Bill, therefore, will bring the powers and duties laid out in statute more into line with modern practice.

The overall policy aim of the Bill is to ensure that the Scots law of trusts is clear and coherent and able to respond appropriately to modern conditions and commercial requirements. This will be achieved by bringing together existing trusts legislation into a single statute, reforming and updating it into modern statutory language.

The opportunity is used to clarify a number of trust issues, making clear that certain trust structures are permitted under Scots law. For instance, that a trust can be set up which serves a purpose (for example, the maintenance of a bench in the public space) rather than a specified person. Other examples include the appointment of a supervisor or protector.

Many of the provisions found in the Bill are default provisions; that is, they apply in the absence of any contrary provision in the trust deed. The legislation governing trusts invariably contains a large number of such provisions; that is true of the 1921 Act, and also of legislation found in other jurisdictions. In selecting default rules, a policy of adopting current best practice has been pursued.

The proposals in the Bill are in line with two of the Scottish Government's National Outcomes,¹ which form part of the Scottish Government's National Performance Framework.² They are:

- "We recognise that a strong, competitive economy is essential to supporting jobs, incomes and our quality of life":³ As outlined above, the Bill will modernise the law

¹ These are available at <https://nationalperformance.gov.scot/national-outcomes>

² This can be accessed at <https://nationalperformance.gov.scot>

³ This can be accessed at <https://nationalperformance.gov.scot/national-outcomes/economy>

of trusts in Scotland. The benefits of the Bill will be shared throughout Scotland, providing clarity for both traditional family trusts and complex commercial trusts.

- “Investing in the skills and creativity of our workforce, protecting workers rights and providing decent working conditions is the right thing to do. It also makes our economy more stable, productive and efficient”:⁴ Implementation of the Bill will secure and develop the already thriving trust industry which exists in Scotland. This is likely to create an increased demand for trust-related professionals.

2. What aspects of the policy/measure will affect children and young people up to the age of 18?

The Scots law of trusts is badly outdated. As well as reforming the law, the Bill will bring together trust legislation into a single, coherent statute drafted in modern form to meet modern conditions in Scotland.

At its simplest, a trust is a legal relationship created when one person (the truster) transfers their ownership of specified property to another person (the trustee) to be held for the benefit of another person (the beneficiary).

Accordingly, the Bill will affect those who choose to set up or administer a trust or who are a beneficiary under a trust. For those not wishing to be involved with a trust, there are a range of other legal devices which may be considered and which remain unaffected by this Bill. There are, however, three provisions in the Bill where beneficiaries are treated differently because of age. These concern the -

- removal of trustee by beneficiaries;
- judicial approval of arrangements to vary or terminate a trust etc., and
- information duties of trustees.

The first of these provisions is a statutory statement of a wider common law rule found in *Miller’s Trustees*⁵ and *Yuill’s Trustees*.⁶ The Bill provides that a trustee may be removed from office by all beneficiaries provided that certain conditions are met, one of which is that they are all at least 18 years old.

The second is a restatement of the regime laid out in the *Trusts (Scotland) Act 1961* in terms of which the court supplies approval to a variation or termination of a trust on behalf of beneficiaries who have not yet attained the age of 16 years. The court will continue to take account of the views of a 16 or 17 year old in deciding whether or not to approve a trust variation or termination on his or her behalf, and may take the views of a child beneficiary who has not attained the age of 16 years.

The third provision is intended to reinforce the fundamental and long-standing right of the beneficiaries to hold the trustees to account. It sets out a trustee’s duty to inform beneficiaries of their interest in the trust. Where the person has not attained

⁴ This can be accessed at <https://nationalperformance.gov.scot/national-outcomes/fair-work-and-business>

⁵ (1890) 18 R 301.

⁶ *Yuill’s Trs v Thomson* (1902) 4 F 815.

the age of 16 years the duty is to provide information to the person's guardian, thereby allowing the child to participate in the trust.

A parent or guardian's rights and responsibilities in relation to a child are governed by the Children (Scotland) Act 1995 ("the 1995 Act") (subject to amendment by the Children (Scotland) Act 2020). Section 1(1)(b) of the 1995 Act articulates the parent's responsibility to provide direction and guidance in a manner that is appropriate to the stage of development of the child. Section 1(1)(d) articulates the parent's responsibility to act as the child's legal representative. Section 6 of the 1995 Act requires the person acting as legal representative to have regard so far as practicable to the views of the child when coming to a major decision, taking account of the child's age and maturity. Therefore, where the Bill provides for the parent or guardian of a minor beneficiary to act as their representative in relation to a trust, the exercise of that function will be informed by the parent or guardian's obligations to the child under Part 1 of the 1995 Act.

3. What likely impact – direct or indirect – will the policy/measure have on children and young people?

As mentioned above, the Bill will affect those who choose to set up or administer a trust or those who are a beneficiary under a trust. Consequently, for those children who wish to use a trust in order to transfer their ownership of specified property, there will be a direct impact.

The three provisions outlined above will directly impact children who are beneficiaries of a trust, although the first two are already part of current Scots law. The Scottish Government recognises that young children may be unfairly pressured by parents to agree to remove a beneficiary or to an unfavourable variation of the trust agreement. Continued judicial oversight of variation or termination of a trust and over removal of trustees by beneficiaries are a proportionate measure designed to deal with potential conflicts of interest that may arise between adult parents and their children in family trusts. When considering supplying consent to variation or termination of a trust agreement involving a child beneficiary, a court must consider the views of 16 and 17 year-olds and give consideration to hearing the views of a child under the age of 16 in appropriate circumstances.

The Age of Legal Capacity (Scotland) Act 1991 makes provision in Scots law as to the legal capacity of two distinct groups of children: persons under the age of 16 years and those aged between 16 and 18 years. As a general rule, those under 16 cannot enter into any transactions (but there are exceptions). For those aged between 16 and 18 years of age, they are capable of entering into transactions but these may be set aside or ratified by the court.

The third provision (the duty to provide certain information) balances the rights of children and the rights of parents while fitting into the wider Scots law scheme of property ownership. For example, the default age for a child to receive money left to them in a will is 16 years old.

As outlined above, this provision takes a proportionate approach: where the child has not attained the age of 16 years the duty is to provide information to the person's

guardian. The parent or guardian is bound to consider the appropriate time and manner in which to pass on that information to the child, in accordance with their responsibilities to provide the child with direction and guidance in a manner that is appropriate to their stage of development, and to act as the child's legal representative, whilst taking the views of the child into account while discharging these responsibilities.

The Scottish Government does not expect there to be an indirect impact on children as a result of these provisions.

4. Which groups of children and young people will be affected?

The Bill will affect any child who chooses to set up or administer a trust. As beneficiary, some of the provisions (see above) will have a direct impact on all children under 18 years of age; while one provision (trustee's duty to provide information to beneficiaries) will have a direct effect on children who have not yet attained the age of 16 years.

5. Is a Children's Rights and Wellbeing Impact Assessment required?

No. The policy brings no discernible reduction or progress in children's rights or their wellbeing and therefore a CRWIA is not, in our opinion, required.

6. Sign & Date

Policy Lead:

Michael Paparakis, Justice; Civil Law and Legal System, 02 November 2022

Deputy Director:

Denise Swanson, Justice; Civil Law and Legal System, 07 November 2022



© Crown copyright 2022

OGL

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-80525-236-8 (web only)

Published by The Scottish Government, November 2022

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS1196642 (11/22)

W W W . g o v . s c o t