

ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION
NOT FOR PUBLICATION OR BROADCAST
BEFORE 0001 HOURS FRIDAY 30 MARCH 2007

Variation and Termination of Trusts

The Scottish Law Commission's recommendations to Scottish Ministers for reform of the law of public and private trusts are published today. They address some difficulties that may arise in the variation or termination of private trusts and would rationalise and simplify the reorganisation of charities, public trusts and endowments.

1. Variation or Termination of Private Trusts by Beneficiaries

The present position is that the beneficiaries of a trust, if all of full age and capacity, may agree amongst themselves to vary the trust, terminate the trust or resettle the trust property in another trust. There was no support on consultation for either the truster or the court being able to prevent changes to the trust that have been agreed by the beneficiaries. As there is a dearth of authority for some aspects of the present position the draft Bill attached to the Commission's Report sets it out in the form of new statutory provisions.

The Commission recommends that parents or guardians should continue not to be permitted to agree to a variation or termination on behalf of a child beneficiary because of the likely conflict of interest. Also a young person aged 16 or 17 should remain incapable of agreeing to a variation or termination. The decision involves complex considerations and would be almost impossible to undo later if the person were to challenge it when grown up as can be done for other prejudicial transactions. The Bill also makes it clear that a guardian or other authorised person can agree on behalf of a mentally incapable adult beneficiary.

2. Variation or Termination of Private Trusts by the Courts

Under section 1 of the Trusts (Scotland) Act 1961 the Court of Session may approve a variation or termination of a trust on behalf of any beneficiary who is not yet born, cannot be ascertained, is incapable or is under 18. All the other beneficiaries must agree themselves. Approval can be given only if the court is satisfied that the beneficiary will not be prejudiced. The Commission makes recommendations to deal with several problems that have arisen.

- The court can at present allow a variation or termination to go ahead without getting the agreement of, or approving it on behalf of, beneficiaries with negligible interests, but the trustees remain liable to such beneficiaries should their interests emerge later. The court should be allowed to exonerate the trustees from liability. The risk of having to pay out would then be borne by the other beneficiaries.
- The court should be able to approve a variation or termination on behalf of an unborn beneficiary even if it would prejudice that beneficiary, provided it was satisfied that there was no reasonable prospect of the beneficiary being born, eg the potential mother was over 70.
- The court should be able to approve a variation or termination on behalf of an untraceable beneficiary so long as it was satisfied that reasonable steps had been taken to find the person and that the arrangement would not prejudice that person.
- Prejudice should not be limited to financial matters. The court should be able to take non-economic considerations into account.

3. Reorganisation of Charities, Non-Charity Public Trusts and Endowments

At present a charity, a public trust that is not a charity, and an endowment (which is best viewed as a public trust whose property is managed by a body such as a local authority) are reorganised by different procedures, each with its own criteria. This makes the law unnecessarily complicated. The Commission recommends that the Office of the Scottish Charity Regulator (OSCR), which approves reorganisations of charities, should also deal with reorganisations of public trusts and endowments. The reorganisation criteria would also be aligned and simplified. Changes could be made to the purposes or administration, not only where the charity or other body was not working, but also where such matters could with advantage be improved.

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 Drummond Young, a Court of Session judge. The other Commissioners are Professor George L Gretton, Professor Gerard Maher QC, Professor Joseph M Thomson and Colin J Tyre QC. The Chief Executive is Michael Lugton.

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 Report may also be viewed on our website at www.scotlawcom.gov.uk or purchased from TSO Scotland Bookshop.