OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 14 November 2023

Session 6

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DELEGATED POWERS AND LAW REFORM COMMITTEE

31st Meeting 2023, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Oliver Mundell (Dumfriesshire) (Con)
Mercedes Villalba (North East Scotland) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Siobhian Brown (Minister for Victims and Community Safety)
Rhoda Grant (Highlands and Islands) (Lab) (Committee Substitute)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 14 November 2023

[The Convener opened the meeting at 09:31]

Interests

The Convener (Stuart McMillan): Good morning, and welcome to the 31st meeting in 2023 of the Delegated Powers and Law Reform Committee. We have received apologies from Mercedes Villalba; in her place I welcome Rhoda Grant. Before we move to the first item on the agenda, I remind everyone to switch off their mobile phones or to put them into silent mode.

The first item of business is a declaration of interests. In accordance with section 3 of the "Code of Conduct for Members of the Scottish Parliament", I invite Rhoda Grant to declare any interests relevant to the remit of the committee.

Rhoda Grant (Highlands and Islands) (Lab): I do not think that I have any relevant interests but, for the record, I am a Unison member and a member of the Co-op Party.

The Convener: Thank you very much for that, Rhoda.

Decision on Taking Business in Private

09:31

The Convener: The next item of business is to decide whether to take item 7 in private. Is the committee content to take that item in private?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

Social Security Information-sharing (Scotland) Amendment Regulations 2024 [Draft]

Council Tax (Variation for Unoccupied Dwellings) (Scotland) Amendment Regulations 2023 [Draft]

09:32

The Convener: Under item 3, we are considering two instruments that are subject to the affirmative procedure. No points have been raised on the instruments. Is the committee content with the instruments?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Common Organisation of the Markets in Agricultural Products (Fruit and Vegetables) (Amendment) (Scotland) Regulations 2023 (SSI 2023/311)

Animal Welfare and Food Safety (International Professional Qualification Recognition Agreement Implementation) (Miscellaneous Amendment) (Scotland) Regulations 2023 (SSI 2023/312)

09:32

The Convener: Under item 4, we are considering two instruments that are subject to the negative procedure. No points have been raised on the instruments. Is the committee content with the instruments?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (Commencement No 3) Regulations 2023 (SSI 2023/310 (C 22))

Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (Miscellaneous) 2023 (SSI 2023/333)

09:32

The Convener: Under item 5, we are considering two instruments not subject to parliamentary procedure. No points have been raised on the instruments. Is the committee content with the instruments?

Members *indicated agreement.*

Trusts and Succession (Scotland) Bill: Stage 2

09:33

The Convener: Under item 6, we are considering the Trusts and Succession (Scotland) Bill at stage 2. I ask members to refer to their copy of the bill, the marshalled list of amendments and the groupings of amendments.

We are joined by the Minister for Victims and Community Safety, Siobhian Brown, and four Scottish Government officials. I remind the minister's officials that they cannot participate in any stage 2 proceedings, but they can communicate with the minister directly.

We have a number of amendments to the bill to consider and dispose of. If votes are required today, I will call for members to vote yes first, then for members to vote no and then for any abstentions. Members should vote by raising their hand. The clerks will collate the vote and pass it to me to read out confirmation of the result. We will take stage 2 slowly, so that we have time to manage the process properly.

Section 1—Appointment of additional or new trustee by court: general

The Convener: Amendment 52, in the name of Jeremy Balfour, is grouped with amendments 1, 53, 2, 3, 6, 44 and 45.

Jeremy Balfour (Lothian) (Con): Good morning. Before I go into detail on the amendment, I put on record my thanks to all those who engaged with the committee at stage 1, in both oral and written evidence. I also thank those who have got in touch with me about stage 2 amendments. In particular, I thank the Law Society of Scotland for helping with what I have been working on.

In section 1, amendment 52 would leave out the word "expedient" and insert "necessary" at line 12 on page 1. The amendment would provide that the court may appoint an additional trustee under section 1(1)(a) only if the court considers it necessary to do so.

I lodged amendment 52 because allowing a court to appoint an additional trustee when it considers it expedient to do so would represent a weakening of the common-law position in Scotland, which refers to the word "necessary". The amendment would reinstate the position as it is in the common law; it would not change that. That position has worked well over the past number of years and does not need to be altered.

Amendment 53 would clarify that the mere nomination of a sole trustee does not make that individual a trustee unless they have

"accepted office in writing or ... after intimation of their appointment ... acted in a"

fashion that

"indicates that they have accepted office"

as a trustee. The practical reason for the amendment is that, unless we make that amendment, a group of trustees could—in theory—include a trustee who does not want to do the job or is not ready for it. The office of trustee should not be forced on a sole nominee who has not accepted that office and who does not wish to accept it—that person must give their consent. Amendment 53 would clarify that area of law.

I look forward to hearing what the Scottish Government has to say about the other amendments in the group before I respond to them.

I move amendment 52.

The Minister for Victims and Community Safety (Siobhian Brown): Good morning. Amendments 1, 2, 3, 44 and 45, which are in my name, form a package that is aimed at increasing the safeguards in relation to sole trustees, which the committee raised a particular concern about after hearing evidence directly from trustees. Amendments 1 and 2 will prevent resignation by a sole capable trustee unless they first assume an additional trustee or unless a judicial factor is appointed to administer the trust. That will prevent a sole capable trustee from resigning their role and leaving only an incapable sole trustee.

Section 5 as introduced contains the default rule that trustees will have the power to resign office, subject to some exceptions. The power of resignation is more expansive than existing powers under legislation, but the section has no procedural requirements for trustee resignation, such as a requirement for intimation to co-trustees.

Amendment 3 makes it clear that trustees must intimate their resignation to co-trustees. That will prevent one person from being left as a sole trustee without their knowledge. The amendment sets out that trustees will require to intimate their resignation to all other trustees who are traceable or to any judicial factor and that the resignation will be effective from the date of intimation.

Amendments 44 and 45 make necessary consequential adjustments.

Trusts are used in a wide variety of circumstances, and it is important that the general law on trusts does not hinder the flexibility of trusts to provide a solution to a wide range of problems. Ultimately, whether a sole trustee is appointed is a matter for the truster, who determines how a trust is to be administered. There may be valid reasons for the choice of appointing a sole trustee, and the person who is best placed to decide that is the truster. Appointment of a sole trustee carries potential future difficulties for the administration of a trust, but the matter is best left to an informed truster.

Taken together, the amendments give trusts added protection when a truster has chosen to use a sole trustee or circumstances have led to there being a sole trustee. The amendments address the concerns that the committee raised in its stage 1 report.

Amendment 6 responds to significant practical difficulties that co-trustees may have in removing a trustee who was appointed as a trustee in their professional capacity and is no longer a member of their profession but does not meet the criteria set out in section 7(1) of the bill as introduced. The matter came to light following the failure of McClure Solicitors, where the Scottish Government has heard that trustees appointed in a professional capacity will agree to resign office only in exchange for payment of a sum of money. The sum may be just short of the legal costs that the trust property would likely incur if a court application to remove a trustee was raised.

Together, that potentially leaves co-trustees and beneficiaries in a difficult position, and the administration of a trust may grind to a halt with all the difficulties that that may cause. The bill introduces an important distinction between lay and professional trustees. I believe that it is important that trustees who are appointed in their professional capacity are held to a different and higher standard than lay trustees. Although the bill cannot resolve wider issues caused by the collapse of McClure Solicitors, we can learn lessons about how failure impacts trusts and their management.

Amendment 6 adds to section 7 of the bill on removal of trustees by co-trustees in narrowly defined cases. As provided for by new subsection (1A) to be inserted, a trustee who is a member of a regulated profession and has been appointed or assumed for the trust as a professional trustee—a class of trustee provided for in section 27(2) of the bill—that is, a person who in the course of business provides professional services in relation to managing the affairs of a trust, may be removed from office by their co-trustees in the circumstances set out in new subsection (1B).

New subsection (1B) sets out that such a trustee may be removed where they are no longer a member of a regulated profession—for example, that could be through retirement or removal from the roll—or are no longer able to practice. That

also covers situations where a person may remain a member but does not have a practising certificate or is suspended from practice, since different regulatory regimes may approach that differently.

Moving on to Jeremy Balfour's amendments 52 and 53, under section 22 of the Trusts (Scotland) Act 1921, the court has the power to appoint new trustees. The Court of Session also has the common-law power to appoint new trustees. The Scottish Law Commission consulted on those powers and felt that the current law could be simplified. It recommended a statutory provision, which is section 1 of the bill. I understand that there has been some concern that the use of "expedient" in section 1 is a lower standard than the current common-law position under which the court may appoint a new trustee only where necessary. However, I note that necessity is not always a requirement of the current statutory power.

The court's power of appointment can be exercised only if such appointment is shown to be expedient for the administration of the trust or where there is no capable or traceable trustee. That should be sufficient to avoid any significant risk of unnecessary or vexatious applications under that section, and also broad enough to allow courts to usefully intervene where trusts find themselves in administrative difficulty.

Moving on to amendment 53, although I understand that the member has taken an interest in the use of sole trustees and wants to see more protection for them, my view is that amendment 53 has the potential to make the law more uncertain and create unintended effects for sole trusteeships. For example, it is not clear whether such acceptance should apply where a trustee is appointed or assumed under sections 1, 2, or 3 of the bill or how the general conveyance of the trust property to them, under section 4, would operate in relation to the amendment. In addition, the amendment does not take into account situations through which an existing trustee becomes a sole trustee, for instance, through the resignation or death of co-trustees.

The position at common law on acceptance is well settled. No one can be compelled to be a trustee and acceptance does not have to be in writing. The fact of taking on the administration is enough to indicate acceptance. I remind the committee that the bill is not an attempt to codify the law of trust, but is instead meant to clarify the law and resolve issues that arise in practice. I am not aware of any stakeholder suggesting that acceptance of office was a significant practical issue for trustees or sole trustees. The amendment could cause the kind of uncertainty that we are trying to clear up. However, if the committee were to agree to the amendment, I would need to carefully consider how that interacts with the other sections in the bill where trustees can be appointed, with a view to possibly making amendments for stage 3.

09:45

If the member presses amendments 52 and 53 to a vote, I ask committee members to reject them, as they do not arise from the committee's recommendations at stage 1. I ask committee members to support my amendments 1, 2, 3, 6, 44 and 45 in the group.

Jeremy Balfour: I thank the minister for her explanation of her amendments. I particularly welcome amendment 6, which brings clarity regarding the difference between someone acting as a professional trustee and someone who does so on a voluntary, or different, basis. I hope that that will bring some clarity. I also welcome her other amendments in the group.

I will press my amendments 52 and 53. Amendment 52 simply clarifies the common law and reflects what the courts have been doing for some years, so I do not think that it changes anything: it clarifies what is happening.

I will also press amendment 53. I have had conversations with lawyers and with the Law Society, who think that the issue needs to be clarified. Whether or not the amendment is accepted by the committee, I hope that there can be some further discussion with the Scottish Government to clarify the issue, but it would be good to have that in the bill at this stage.

The Convener: If committee members have no questions, I have one point to make regarding the amendments, which I very much welcome, because of the experience of McClure Solicitors. I know that my constituents, committee members and people across the United Kingdom will certainly be pleased that that sorry situation is having a positive effect upon the bill and will help people in future.

I invite Jeremy Balfour to wind up and to press or withdraw amendment 52.

Jeremy Balfour: I press amendment 52.

The Convener: The question is, that amendment 52 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Balfour, Jeremy (Lothian) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

Against

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

The Convener: The result of the division is: For 3, Against 2, Abstentions 0.

Amendment 52 agreed to.

Section 1, as amended, agreed to.

Sections 2 to 4 agreed to.

Section 5—Resignation of trustee

Amendment 1 moved—[Siobhian Brown]—and agreed to.

Amendment 53 moved—[Jeremy Balfour].

The Convener: The question is, that amendment 53 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Balfour, Jeremy (Lothian) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

Against

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

The Convener: The result of the division is: For 3, Against 2, Abstentions 0.

Amendment 53 agreed to.

Amendments 2 and 3 moved—[Siobhian Brown]—and agreed to.

Section 5, as amended, agreed to.

After section 5

The Convener: Amendment number 4, in the name of the minister, is grouped with amendments 46, 7, 10, 13-17, 19, 20, 59, 26, 27, 49, 41, 50, 43 and 51. I remind members that amendments 43 and 51 are direct alternatives, and that they can both be moved and decided on: the text of the amendment that is last agreed to is what will appear in the bill.

Siobhian Brown: Amendment 4, in my name, will add a new section confirming that a resignation power may be exercised on an incapable trustee's behalf by a guardian. If such a trustee is a sole trustee, or where there is no other trustee who is both capable and traceable, the guardian's power of resignation cannot be exercised unless an additional trustee is assumed or appointed, or a judicial factor is appointed to administer the trust. The power of the guardian to appoint a new trustee is restricted to the power to appoint only one trustee. That is consistent with our wider policy position that administration of the trust should lie with the trustees, insofar as that is reasonably practical.

Amendments 4, 7, 10, 13 to 17, 19, 20, 26, 27 and 41 address an issue that was highlighted by the Scottish Parliament information centre in its research briefing paper. At several points the bill makes provision for representation of the interests of beneficiaries who are aged under 16. For instance, section 10 provides for the guardian of a child beneficiary to be able to consent to the discharge of a trustee on behalf of that child beneficiary. The definition of "guardian" in section 74, however, does not refer to those parental rights in relation to a child beneficiary. The amendments will resolve that issue and cover the various avenues by which a person might obtain parental responsibilities and parental rights in relation to a minor beneficiary or a potential beneficiary. The categories of person are restricted to those having the specific responsibility or right to act as a beneficiary's legal representative, and include persons who hold parental rights in relation to a beneficiary or potential beneficiary under the equivalent legislation in England, Wales and Northern Ireland.

On amendment 43, the bill uses a familiar definition of "incapable", which is similar but not identical to the definition of "incapable" that is found in the Adults with Incapacity (Scotland Act) 2000. Stakeholders and the committee have rightly pointed out that significant and far-reaching changes to mental health legislation have been recommended, so it is clearly undesirable for the meaning of "incapable" in trust law to differ from the usual widely understood definition while those recommended changes are explored. I see merit in ensuring that the bill does not diverge from general law on capacity, and in ensuring that it will keep pace with any changes in that area. Amendment 43, which is in my name, will therefore align the definition of "incapable" that is used in the bill with that in wider incapacity legislation.

However, bearing in mind the recommendations for reform of incapacity legislation and the committee's recommendations on the bill, I think that it is sensible that ministers be able to amend the definition in line with any future changes. Any such changes would be subject to the affirmative procedure. Clearly, the precise nature of changes that might be made in the future cannot be anticipated at this stage, so conferring such a power on ministers will help to ensure flexibility to allow trust law to keep pace with our understanding of incapacity.

At the same time, it is made clear that a person without legal capacity includes a child. The term "legal capacity" is used twice in the bill when

discussing supervisors and protectors; I believe that it is helpful to set out what we mean by "legal incapacity" in the bill. Amendment 43 makes it clear that legal incapacity includes the non-age of an appointed supervisor or protector.

Some types of trust, for instance testamentary trusts, can be drafted well in advance of when we expect them to take effect. An individual may appoint their child as a protector in expectation that when they die the child will be at an age to enable them to assume the role. However, the early death of a truster could frustrate those intentions.

I will move on to Jeremy Balfour's amendments. I understand that amendment 46 is in response to concerns that have been raised about having to assess the capacity of a fellow trustee. I disagree that that will place an unfair burden on trustees. Stakeholders have noted that it is helpful for the administration of smaller trusts to have, in clear-cut cases, a mechanism to remove trustees that does not involve going to court.

First, trusteeship is by its very nature burdensome. It comes with duties as well as powers, which should be recognised by individuals when they agree to take on the role.

Secondly, I point out to the committee that, although trustees have the power to remove an incapable trustee, they do not need to exercise it. In less-certain cases, trustees will have the option to go to court to remove a trustee and so do not have to take the legal decision themselves. The Scottish Law Commission also recognised that in its report. In cases where there is any doubt, the appropriate route is to seek removal by the court. In other words, the power in section 7 is just one tool in the trustees' toolbox.

Finally, as I set out in my letter to the committee last week, I intend to use the explanatory notes to make it clear that a trustee who considers themselves to have been unfairly removed by their co-trustees on any of the grounds that are mentioned in section 7 can raise legal proceedings to challenge that decision. That is the ultimate safeguard—that any trustee who thinks that they have been removed unfairly can challenge their removal in court.

This is about finding the right balance between ensuring that trusts can be managed effectively and avoiding the need to go to court and spend trust funds in order to do so—for instance, in every case of trustees wishing to remove by majority an incapacitated co-trustee. I believe that the balance in section 7 is right and that there are enough safeguards in place to prevent abuse of the power.

Jeremy Balfour's amendment 46 would tilt the balance too far in the opposite direction, so the very real problem of incapable trustees continuing to hold office because trusts cannot afford a court application to remove them would continue, with all the problems and issues that that causes for administration of trusts.

I thank Jeremy Balfour for amendment 59, which seeks to amend section 55 of the bill. My view, however, is that the amendment is unnecessary. It is clear to me that the section as drafted will achieve exactly what the amendment is seeking to clarify. Section 55(4) states that

"Approval on behalf of a person who is incapable may be given by any person authorised to give it".

That is clear. If a guardian does not have powers relating to the matter, they cannot authorise any approval on behalf of the incapable adult, for the purposes of section 55.

I am concerned that, by agreeing to amendment 59, Parliament would inadvertently give the impression that section 55 means something else, or would create uncertainty as to what is meant. I am willing to use the explanatory notes to set out the view in more detail, so I urge Jeremy Balfour not to move amendment 59. If he does, I ask the committee to reject it.

Amendments 49, 50 and 51 in Jeremy Balfour's name would introduce a presumption that a trustee is capable and that it would be for the court to determine otherwise. In addition, they would confer on Scottish Ministers a power to define "incapable" by regulations that would be subject to affirmative procedure. The presumption would apply only in certain circumstances, including where a truster appoints a new trustee under section 2 of the bill and, under section 12, where an incapable trustee cannot make a decision. Those provisions were considered carefully by the SLC: as drafted, the amendments would make the administration of trusts much more difficult than it needs to be.

To give an example, under section 12, a decision is binding on the trustees as a whole,

"if made by a majority of those ... able to make it."

It goes on to provide that incapable trustees are not eligible to take part and may not be counted when calculating the majority. Amendment 50 would have the practical effect of ensuring that incapable trustees do count towards calculating the majority, which is a recipe for administrative deadlock. To resolve that issue, trusts would have to apply to the court and the beneficiaries would ultimately bear the legal costs.

Under the bill as introduced, any trustee who considered themselves to have been unfairly replaced or excluded from decision making by the co-trustees can raise legal proceedings to challenge that decision. There are, therefore, already sufficient safeguards in place.

I ask the committee to reject Jeremy Balfour's amendments, which were not recommended by the committee at stage 1.

I move amendment 4.

10:00

Jeremy Balfour: Amendment 59 provides clarification of the current law. The effect of the amendment would be to clarify that any person who is authorised under the Adults with Incapacity (Scotland) Act 2000, or the law of any country other than Scotland, must have relevant powers that allow them to give approval on behalf of an incapable adult.

The reason for lodging amendment 59 is that, again, appointments under the Adults with Incapacity (Scotland) Act 2000 extend only so far as the specific powers that are conferred on the person who is appointed under the act. Again, amendment 59 will bring clarity on that. I accept that the minister thinks that clarity is already in place, but the amendment will help us, as interpretation of the act takes place.

It would be fair to say that the committee took a lot of evidence on capacity and the appropriate person, and that there was a lot of discussion on it. I have thought long and hard about amendment 51. The minister wrote to the committee to say that the majority of stakeholders were happy with the definition in the Adults with Incapacity (Scotland) Act 2000, and that was the case. However, we took evidence from other stakeholders—academics and others—who thought that the definition might change, and that it does not give absolute clarity for trust law.

I am proposing that the Scottish Government take time to reflect on that further, and also that any definition in regulations would come to the committee in due course. That would allow stakeholders and the Scottish Government to do further work on it and, depending on when the bill—if it becomes an act—comes into force, would also give time to see where we are with regard to any definition in the Adults with Incapacity (Scotland) Act 2000. The power would also allow for clarity in the future that any other new definition could be made by regulations—as the minister's amendment does. It would give flexibility, which both my amendment and the Government's amendment do.

The decision for the committee is whether it is comfortable with the definition in the 2000 act, or thinks that we need more time to take more evidence and for the Scottish Government to scrutinise the matter more. My view is that that would be helpful.

Amendment 50 relates to an area on which we have taken evidence. The minister is right that there is a balancing act between the role of trustees who want to remove a trustee and the role of those who do not. My view is that it should not be for the individual who has been removed to have to go to court, but for the trustees who are removing that person, if there is not an agreement to go to court.

The minister almost made the argument for me in her statement, with regard to cost. Her comment was that it could cost the trust money if it had to bring forward such an action.

That argument is true for someone who wants to remain a trustee. There is provision for expenses at the end of the proceedings, but someone who wanted to bring such an action would have to find the initial money—both legal and court fees—to do so. I say that the balance is wrong in that regard; that should be the role of the trustees who want to remove the individual. We should put that burden on the trustees rather than on the person who is being removed.

It would be fair to say that, regardless of the outcome on amendment 50, having to use such a power should be the exception. In most cases people will step down voluntarily, but I say that in the exceptional case the cost should lie with the trust and not with the trustee.

I will support the Government's other amendments.

The Convener: Thank you, Mr Balfour. It seems that no other colleagues have any comments.

Minister, would you like to wind up?

Siobhian Brown: As I have said, if Mr Balfour's amendments were to be agreed to, trusts would incur more cost in removing a trustee, and the amendments might also make that process more difficult. I am comfortable with the definition in the 2000 act.

Amendment 4 agreed to.

Section 6 agreed to.

After section 6

The Convener: We turn to group 3, which is on executors of persons unlawfully killed. Amendment 5, in the name of the minister, is grouped with amendments 38 and 39.

Siobhian Brown: I believe that I speak for all of us when I say that it is unacceptable that a convicted murderer can continue to act as executor on their victim's estate.

The present position in Scots law appears to be uncertain, with some experts suggesting that the law has one effect while others disagree. The

leading practitioners' textbook on the administration of estates suggests that the appointment of a murderer is valid but should ordinarily be declined, but one well-known case shows that a convicted killer cannot be relied on to decline office.

I take this opportunity to thank the campaigners for all their work on the issue.

Amendments 5, 38 and 39, in my name, will clarify the law. An executor who is convicted of, or is being prosecuted for, the murder or culpable homicide of the deceased will be regarded as unfit for that office and can therefore be removed by the court. An application to remove can be made at the appropriate sheriff court, and the provision will be retrospective. For example, an executor who was convicted of murder before the provision came into force could be removed from office.

In addition, where a sheriff is considering an application for the appointment of an executor dative and is satisfied that the person seeking appointment has been convicted of, or is being prosecuted for, the murder or culpable homicide of the deceased, they must refuse the application. That practical solution will both provide a resolution and help to ease the distress of other persons who might find themselves in such a situation. Importantly, it will also provide the necessary legal certainty that means that the administration of the deceased's estate cannot be called into question because of concerns about the validity of the executor's appointment.

I move amendment 5.

The Convener: It seems that no other member wishes to comment, but I will make one remark. When we were working through the earlier stages of the bill process, we were all on the same page. We wanted to achieve a good outcome on this, because it is such a challenging area. I hope that amendment 5 will do that.

Amendment 5 agreed to.

Section 7—Removal of trustee by co-trustees

Amendment 46 moved—[Jeremy Balfour].

The Convener: The question is, that amendment 46 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Balfour, Jeremy (Lothian) (Con)
Mundell, Oliver (Dumfriesshire) (Con)

Against

Kidd, Bill (Glasgow Anniesland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

The Convener: The result of the division is: For 2, Against 3, Abstentions 0.

Amendment 46 disagreed to.

Amendment 6 moved—[Siobhian Brown]—and agreed to.

Section 7, as amended, agreed to.

Sections 8 and 9 agreed to.

Section 10—Discharge where trustee has resigned, died or been removed from office

Amendment 7 moved—[Siobhian Brown]—and agreed to.

Section 10, as amended, agreed to.

Section 11 agreed to.

Section 12—Making of decision

The Convener: The next group is on decision making, powers of trustees and the validity of certain transactions and documents. Amendment 8, in the name of the minister, is grouped with amendments 9, 12, 54 to 56 and 22.

Siobhian Brown: Section 12 is, generally, a default section, which applies to a trust unless the trust deed provides otherwise. The SLC's policy intention on the issue is quite clear, as are the explanatory notes. However, the effect of section 12(1), as drafted, does not appear as intended to accommodate arrangements under a trust that will provide for trustees to take decisions other than by majority.

I am aware that some stakeholders have questioned the status of existing trusts that require a specific trustee to be involved in making a decision. The clear policy intention is that such trusts should continue to operate as they do currently. Amendment 8 resolves the issue by making it clear that section 12(1) is a default rule, which can be departed from by express provision in the trust deed, or where that is implied or required by a context where there is no trust deed.

In its stage 1 report, the committee asked me to consider defining a number of terms that had been highlighted by stakeholders. I wrote to the committee, setting out that I would consider that further. One such point was the definition of "beneficiary" in the context of public trusts, which was raised by the Law Society of Scotland. It said that the definition that is used in the bill is geared towards private trusts and is not particularly suited to public trusts. Since stage 1, I have examined

the matter further and the Scottish Government has spoken to the Law Society.

In the context of trustee decision making in a public trust, the matter could be helpfully clarified. Section 12 provides a default rule that a decision binds the trustees only if it is made by a majority of those who are, for the time being, able to make it. Importantly, a trustee is not to be regarded as able to make a decision where they have, or might have, a personal interest in the decision, but that can be overridden by the trust deed or in specific circumstances. One such circumstance is where all beneficiaries know of the personal interest and consent to the trustee acting.

Although that circumstance may work in the context of a private trust, it would be unlikely to work in the context of a public trust. Amendment 9 sets out that section 12(2)(a) may be disregarded where the trust is a public trust and the decision is intended to benefit a section of the public of which a trustee is a member. In that circumstance, the trustee in question should not be disqualified from participating in the decision-making process by reason of their being a member of the section of the public that the decision is intended to benefit. However, a trustee is not permitted to participate in decisions in which that trustee has a particular interest that is specific to them as an individual. In other words, where the trustee's personal interest in the decision is greater than, or goes beyond, their general interest in the decision as a member of the section of the public that the decision is intended to benefit, they should not be allowed to participate in the decision-making process.

10:15

Amendment 12 concerns section 22. That section relates to section 2 of the Apportionment Act 1870, which provides that all rent, annuities, dividends and other periodical payments in the nature of interest should be considered as accruing from day to day, and may be expressly disapplied by the trust deed.

I am concerned about the potential unintended tax consequences of the power that is conferred on trustees by that section. In order to avoid the risk of the imposition of higher taxes, amendment 12 adjusts the provision on trust law to set out the default provision that trustees have the discretion to decide whether either to time-apportion income in accordance with section 2 of the 1870 act or to treat income as accruing when it arises.

Amendment 22, in my name, sets out that a simple majority of the trustees must sign a document in order for it to be validly executed.

There is a tension between sections 40 and 73 of the bill. Section 40 provides that

"a deed ... is valid if executed by a majority of such of the body of trustees as are both capable and traceable.

On the other hand, section 73 inserts into the Requirements of Writing (Scotland) Act 1995 a provision that takes no account of whether the trustees are incapable or untraceable.

Incapable and untraceable trustees should, for a number of reasons, be included in the total number of trustees for the purposes of calculating the number that is required to form a majority in order to validly execute trust deeds. Whether a trustee is incapable or untraceable will change over time. If the number of trustees required to execute a trust deed is tied to these matters, the number of trustees required to validly execute a trust deed will also change over time. It would not be possible simply to look at the number of trustees in office at the time of execution of the deed, or at the number of signatures on a deed, in order to ascertain whether the document was validly executed. Instead, there would be a requirement to look behind the document to establish whether any of the trustees who were in office at the time that the deed was executed were incapable or untraceable at that time. That is impractical and would create uncertainty for any person who was seeking to rely on deeds that were executed by trustees.

If incapable or untraceable trustees in office make it difficult for the active trustees to command a majority to execute deeds, the bill already provides sufficient mechanisms for their removal from office. That includes sections 6 and 7 of the bill, which allow the court, or in some cases trustees, to remove a co-trustee.

I move on to Jeremy Balfour's amendment 54. The effect of section 30 is to render ineffective a provision in a trust deed that purports, in a blanket fashion, to limit a trustee's liability for breach of fiduciary duty, or to indemnify a trustee for such a breach. There is, however, an exception for a provision that authorises a particular transaction, or a particular class of transactions, that would otherwise be in breach of fiduciary duty.

The policy intention behind this section is to protect beneficiaries from overly broad clauses that seek to limit a trustee's liability or indemnity clauses. It is there to protect trust property and, by extension, beneficiaries, from acts of trustees that breach their fiduciary duties. The SLC is well aware that broad provisions risk abuse, especially as it might be seen to encourage trustees to misuse their office to their personal advantage.

Amendment 54 would have the opposite effect from what the SLC intends. It would widen the range of circumstances that can be covered by provisions to limit liability or indemnify trustees for breaches of duty. That would all be to the potential

detriment of beneficiaries, who would find that their usual rights of recourse against trustees who have breached their trustee duties were either weakened or unavailable.

With regard to amendment 55, I understand the point that Jeremy Balfour is making, and I am happy to support it.

Finally, I can see that amendment 56 would be a useful addition to section 39 and I am happy to support it, although I might need to think about how it interacts with other provisions in the bill, with a view to bringing forward stage 3 amendments to make the necessary adjustments.

I urge members to support amendment 8 and the other amendments in my name in this group.

I ask members to support Jeremy Balfour's amendments 55 and 56. However, if Mr Balfour wishes to press amendment 54, which was not recommended by the committee at stage 1, I ask the committee to reject it.

I move amendment 8.

Jeremy Balfour: With regard to amendment 54, again, it is interesting that, during the evidence session, there was sometimes a conflict between those with an academic background in trust law and those who practise it day in, day out. The Law Society of Scotland helped me to draft amendment 54, and I think that it reflects what practitioners are looking for with regard to day-to-day working. Amendment 54 would extend the effect of protective clauses in the trust deed to all actions and decisions of the trustees and give them that protection.

A trust deed may contain a provision purporting to limit liability or indemnity for breach of a fiduciary duty. That is most likely to be relevant where a trustee is also a beneficiary, and where a trustee's fiduciary duty would be likely to put their personal interests in conflict with their duty as a trustee. That is often expressly permitted, sometimes with qualifications, in a trust deed. It seems that such protection will continue to be effective because of section 30(2). However, such protection is usually seen to apply more widely than transactions, and it might be more appropriate to allow protective clauses to extend to all actions or decisions of the trustees. That will give greater scope for trustees. As we know, it is sometimes proving more and more difficult to find trustees to do the job, so I hope that such protections will encourage more trustees to come forward.

I am grateful to the minister for her support of amendment 55, which would allow the court to determine that the trust property should bear none of the damages, where that is appropriate.

I am grateful to the minister for accepting amendment 56 and I am certainly happy to work with her if there needs to be some tidying up at stage 3. Amendment 56 is simply a clarification of the provisions on the validity of certain transactions that are entered into by a trustee and extends to transactions in the exercise of powers in the trust deed, as well as those powers that are implied by sections 13(1) and 16(1).

I am happy to support the minister's other amendments in the group.

The Convener: As members have no questions to put or points to make, I ask the minister to wind up.

Siobhian Brown: In relation to amendment 54, I understand the Law Society's intention, but the amendment is drafted in far too wide a way and it defeats the bill's intention altogether. I ask that committee members reject it.

Amendment 8 agreed to.

Amendments 9 and 10 moved—[Siobhian Brown]—and agreed to.

Section 12, as amended, agreed to.

Sections 13 to 17 agreed to.

After section 17

The Convener: The next group is on investments and sale of property. Amendment 11, in the name of the minister, is grouped with amendment 47.

Siobhian Brown: In its stage 1 report, the committee recognised that the power may already exist for trustees to choose to invest in a way that allows them to consider objectives beyond maximising financial returns, subject to the terms of the trust deed. Nevertheless, it recommended that the bill should be amended to put that matter beyond doubt, and amendment 11 does that. I am grateful to the committee for its work on this matter.

Amendment 11 is intended to be a restatement of the current legal position, taking account of case law but making the position clearer for users of the legislation for trust deeds in future. It will make clear that, unless the trust deed provides otherwise, non-financial considerations in the form of ethical, social and environmental considerations, which are sometimes known as ESG—environmental, social and governance—factors, can be taken into account by trustees when choosing between alternative investments that may perform equally well and are subject to overall trust purposes.

It might be helpful to the committee if I give an example to illustrate how the provision might work

in practice. If a trust is established with purposes that make no reference to, and have no connection with, environmental goals, this section will allow trustees to properly take environmental considerations into account when choosing investments for the trust.

If the trustees obtain advice from an appropriate financial adviser that the environmentally friendly investment has the best financial prospects, or has financial prospects that are equally as good as those for any other investment, trustees may properly decide that the environmentally friendly investment is a suitable investment. This section will give trustees the confidence to take into account non-financial considerations when making decisions about investing trust property in line with the trust purposes.

Amendment 11, in my name, already sets out that trustees can take into account non-financial considerations when considering investment decisions. My amendment will be of some assistance to trustees of a charitable trust in the situation described by Jeremy Balfour. However, I have serious concerns about the effect of the member's amendment 47. First, it singles out heritable property and thereby calls into doubt whether such trustees must achieve best value for moveable property. Secondly, no substantial work or consultation with either the Office of the Scottish Charity Regulator or the charity sector has been undertaken on whether such a power is needed or even wanted.

By singling out charities that take the form of trusts, a two-track system for Scottish charities would be created, as those charities that take the form of a trust account for only 12 per cent of Scottish charities. At a minimum, that would cause unnecessary complexity in the law. In addition, it could have unintended and unforeseen consequences to existing charities, of all legal forms, as well as those that may be set up in the future.

OSCR has expressed to the Scottish Government that amendment 47 raises a number of issues that require further detailed consideration, including its impact on charity trustees' duties, the fact that a truster's intentions could be disregarded, and the different treatment of charities depending on their legal form. OSCR has suggested that this matter could form part of the wider review of charity regulation that the Scottish Government will undertake.

Ultimately, amendment 47 is about charity law, not trust law, and it would be inappropriate to make such a sweeping change to charity law in this bill. When the member put this question to John McArthur at stage 1, he said:

"I think that we are in danger of mixing up charity law and trust law ... I would be slightly concerned that if we go down the route that you are suggesting, there would be a conflict between charity law and trust law."—[*Official Report, Delegated Powers and Law Reform Committee*, 16 May 2023; c 12.]

I am of a similar view. If amendment 47 were passed, I consider that it would have significant unintended effects on the charity sector. Therefore, I ask the committee to reject amendment 47, which was not recommended at stage 1, and I ask members to support amendment 11.

I move amendment 11.

The Convener: Thank you, minister. Before I bring in Mr Balfour, I just have a reminder that any comments should go through the chair.

10:30

Jeremy Balfour: I welcome amendment 11, which is in the minister's name, and will support it. The committee highlighted that issue in our report.

Amendment 47, which was lodged by me, comes after consultation with a number of third sector charities and from my personal experience both as a trustee and having worked in the third sector. I am of the view that the amendment does not change the law in Scotland in any way but that, like amendment 11 in the Scottish Government's name, it simply clarifies the law so that trustees who work in the charitable sector are clear about it.

Amendment 47 suggests that, when a charity sells heritable property, it does not need always to get best value, if that property is being passed on to another charity. The practical effect of that is to allow charities to support other charities without necessarily getting maximum income. Amendment 47 does not force trustees to do that—it simply clarifies that they can look at it if they want.

I do not believe that that changes the law. Opinions from senior counsel outline the situation as it is in my amendment. All that I seek to do is simply to clarify the law—as amendment 11 also seeks to do—so that charities that are trusts can go forward in their work. The reason for relating the amendment simply to "heritable property" is that that will often be the largest and most valuable asset. That brings clarification.

Amendment 47 is not a new law but a clarification of the law. I ask the committee to support it.

Rhoda Grant: For clarification, are trustees under an obligation at the moment to sell to the highest bidder, or can they take a lower offer? Jeremy Balfour said that amendment 47 clarifies

the law, but I wonder whether the law, as it stands, does what he suggests?

Siobhian Brown: There is a bit of confusion, in that that is to do with charity law and, at the moment, only 12 per cent of charities are trusts. There are serious concerns from OSCR, which is why we will not support amendment 47.

Rhoda Grant: That does not really answer my question. I wonder what the obligation is on charitable trusts at the moment. Does amendment 47 change it, or does it remain the same?

Siobhian Brown: We feel that amendment 47 would change the law between trusts and charities.

The Convener: As there are no other questions, I ask the minister to wind up.

Siobhian Brown: As I have previously stated, due to the serious concerns from OSCR, I ask the committee to reject amendment 47.

Amendment 11 agreed to.

Amendment 47 moved—[Jeremy Balfour].

The Convener: The question is, that amendment 47, in the name of Jeremy Balfour, be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Balfour, Jeremy (Lothian) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

Against

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

The Convener: The result of the division is: For 3, Against 2, Abstentions 0.

Amendment 47 agreed to.

Sections 18 to 21 agreed to.

Section 22—Time apportionment

Amendment 12 moved—[Siobhan Brown]—and agreed to.

Section 22, as amended, agreed to.

Sections 23 and 24 agreed to.

Section 25—Trustees' duty to provide information other than on request

Amendments 13 to 15 moved—[Siobhian Brown]—and agreed to.

Section 25, as amended, agreed to.

Section 26—Trustees' duty to provide information on request

Amendments 16 and 17 moved—[Siobhian Brown]—and agreed to.

The Convener: We move to the duty to provide information. Amendment 18, in the name of the minister, is grouped with amendment 21.

Siobhian Brown: Amendments 18 and 21 are my response to the committee's request for the Government to review the stage 1 evidence on the trustees' duty to provide information, with a particular focus on potential beneficiaries. Stakeholders questioned whether the duties that will be imposed on trustees should cover potential beneficiaries who might never stand to benefit from trust property, and would therefore be too onerous.

When it comes to information rights, there is a balance to be struck between the rights of those who might benefit from the trust property as a whole and the rights of individual potential beneficiaries. I recognise that requiring trustees to inform potential beneficiaries about their position under a trust could lead to costs being incurred on the trust property, but against that, those who benefit or might benefit from the trust property have a fundamental role in holding the trustees accountable. They cannot do that if they are not properly informed.

Officials have explored the matter further with stakeholders and with the Scottish Law Commission. Amendments 18 and 21 deal with the problem of vexatious requests for information about trusts made by people who are technically potential beneficiaries but who have no real chance of becoming a beneficiary under the trust.

The shift in the balance of trustees' information duties will ultimately help beneficiaries and potential beneficiaries who are likely to benefit from the trust property. First, it will not affect their right to trust information and, secondly, it will reduce the likelihood of costs that relate to vexatious requests for information being incurred against a trust property.

I move amendment 18.

Amendment 18 agreed to.

Amendments 19 to 21 moved—[Siobhian Brown]—and agreed to.

Section 26, as amended, agreed to.

Sections 27 to 29 agreed to.

Section 30—Provision purporting to limit liability for, or indemnify for, breach of fiduciary duty

Amendment 54 moved—[Jeremy Balfour].

The Convener: The question is, that amendment 54 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Balfour, Jeremy (Lothian) (Con)
Mundell, Oliver (Dumfriesshire) (Con)

Against

Kidd, Bill (Glasgow Anniesland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

The Convener: The result of the division is: For 2, Against 3, Abstentions 0.

Amendment 54 disagreed to.

Section 30 agreed to.

Sections 31 to 34 agreed to.

Section 35—Damages for loss resulting from trustee's act or omission in ordinary course of administration

Amendment 55 moved—[Jeremy Balfour]—and agreed to.

Section 35, as amended, agreed to.

Sections 36 to 38 agreed to.

Section 39—Validity of certain transactions entered into by trustees

Amendment 56 moved—[Jeremy Balfour]—and agreed to.

Section 39, as amended, agreed to.

Section 40—Validity of certain deeds and other documents bearing to be executed by trustees

Amendment 22 moved—[Siobhian Brown]—and agreed to.

Section 40, as amended, agreed to.

Section 41—Abolition of restrictions on accumulation and on creation of future interests

The Convener: Amendment 57, in the name of Jeremy Balfour, is grouped with amendment 58.

Jeremy Balfour: Amendment 57 deals with section 41. The amendment would bring within the scope of the section existing trusts where the truster has expressly provided for anticipated changes in the law on trust deeds. The reason for lodging the amendment is that changes to the law on accumulation periods have been anticipated for some time. Granters of existing trusts might have expressly provided for such changes in the trust deed and should be able to benefit from the new provisions.

The effect of amendment 58, if it is agreed to, would be to bring charitable trusts within the scope of section 41, but restrictions would be retained on the accumulation of income for public trusts that are not charitable trusts. The bill as introduced excludes public trusts that are charitable trusts from the abolishment of restrictions on the accumulation of income. As such, charitable trusts will remain subject to the existing rules on accumulation of income. In my view, that is not appropriate, and the scope of the section should be extended to include charitable trusts.

Trustees of charitable trusts are, under charity and tax law, subject to other rights and duties to manage funds appropriately, and they are subject to oversight by the Office of the Scottish Charity Regulator and His Majesty's Revenue and Customs. Those rights and duties apply to all charities, whatever their legal form, and they empower OSCR and HMRC to control inappropriate accumulation of income by charities without reference to the expressed restrictions on that accumulation in trust law, which apply only to charities that are constituted as trusts.

There might be reasons that are consistent with a charitable trust's purpose for income to be accumulated—for example, to generate funds for the next cycle of charity work or for a specific project—and retention of the prohibition of accumulation of income for charitable trusts might inhibit appropriate accumulation and would have little practical purpose when inappropriate accumulation is sufficiently controlled by charity and tax law.

Removal of the existing trust law restrictions on accumulation would bring trusts into line with other legal forms that are available for constitutional charities, whereas retention of the restrictions might make trusts less attractive as a vehicle for constituting charitable work in circumstances in which a trust would otherwise be the most appropriate form.

Non-charitable public trusts are not subject to the same charity and tax law controls as charitable trusts, and there is a case for retaining the existing trust law restrictions on accumulation by public trusts that are not charities. That would guard against excessive long-term accumulation in non-charitable public trusts that are set up to pursue schemes that might take decades to materialise. I think that the amendments will bring clarity.

I move amendment 57.

10:45

Siobhian Brown: Section 41 is about how long trusts can accumulate income for. The current law in the area is complex, uncertain and inconsistent, and the SLC's recommendation to repeal the existing rules met with universal support. However, some stakeholders have questioned why charitable trusts are treated differently from other types of trusts, meaning that they cannot accumulate income. Amendment 58, in Jeremy Balfour's name, would allow them to do so.

I have serious concerns about the effect of amendment 58. Trusters who set up public or charitable trusts almost invariably want the benefits to be provided immediately, so I do not think that the exclusion will create any practical difficulties. More important is that, during stage 1 evidence, I laid out my concerns that accumulations in charitable trusts over a long period of time could fall foul of the charity test that is set out in sections 7 and 8 of the Charities and Trustee Investment (Scotland) Act 2005. I also told the committee of my concern that it might not meet the definition of "charitable purposes" that is applicable for UK tax purposes as provided by the Charities Act 2006.

Since then, the Scottish Government has corresponded with OSCR, which has said that if there were no statutory limit on accumulation by charities, it would have serious concerns about whether a trust that had a directed long-term accumulation was meeting the charity test, and therefore the trust's charitable status could be brought into question. The committee did not recommend the change in its stage 1 report.

On amendment 57, I understand that some trusters might have anticipated the change that will be brought about by section 41 of the bill and might have drafted their trust deed with that in mind. That is especially the case given the time between the SLC making its recommendations and the introduction of the bill. Amendment 57 would allow trust property to be disposed of in line with a truster's wishes, where the change was anticipated during this time. However, as drafted, amendment 57 might not quite achieve the intended aim, so I might have to revisit the matter again at stage 3.

On the basis that amendment 58 could have unintended consequences for the Scottish charity sector in respect of the work of OSCR, I urge the committee to reject it. I ask members to agree to amendment 57.

Jeremy Balfour: I am grateful for the minister's support for amendment 57. If it needs tidying up, I would be happy to work with her and her officials on that.

On amendment 58, the minister has almost answered the question whether, if a child protected trust accumulates income for too long, the intervention would come from OSCR. However, under the bill as drafted, if, for example, the charity planned to do something in three years' time, it could not accumulate money for a three-year period. Now, if any accumulation went on for an excessive period of time and OSCR had concerns, it could intervene and talk to the trustees about it, as could HMRC.

The concern that the minister has expressed—that any accumulation could go on for years and years—is already dealt with by the power that OSCR has. I am concerned that, in the bill as drafted, child protected trusts could not look to make any short-term or medium-term financial accumulation of income to be spent later. Amendment 58 would give OSCR intervention powers, which it already has, and would ensure that the trust is accountable to OSCR and to HMRC.

Amendment 57 agreed to.

Amendment 58 moved—[Jeremy Balfour].

The Convener: The question is, that amendment 58 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Balfour, Jeremy (Lothian) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

Against

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

The Convener: The result of the division is: For 3, Against 2, Abstentions 0.

Amendment 58 agreed to.

Section 41, as amended, agreed to.

Section 42—Private purpose trusts: general

The Convener: Amendment 23, in the name of the minister, is in a group on its own.

Siobhian Brown: During stage 1, the committee heard evidence about how private purpose trusts are defined in section 42 of the bill and whether that definition is sufficient to distinguish between private purpose trusts with a beneficiary and "regular" trusts.

The definition of the term "private purpose trust" is important for the operation of the bill as a whole and for the SLC's policy intentions. For example, several provisions in the bill expressly do not apply to private purpose trusts.

The Scottish Government has explored the matter further with the SLC, so amendment 23 will alter the definition of "private purpose trust" in the bill. It clarifies that such a trust exists where the trust property is held by, or is vested in, a trustee for the furtherance of a specific purpose which is not a charitable or other public purpose and, in contrast to a regular trust, is not constituted

"solely for the benefit of a specific beneficiary (or potential beneficiary).

That reinforces the distinction between beneficiary trusts, which have as their sole purpose the benefit of a specific beneficiary or potential beneficiary, and private purpose trusts, whose purposes are not solely to benefit a specific beneficiary or potential beneficiary.

I move amendment 23.

Amendment 23 agreed to.

Section 42, as amended, agreed to.

Sections 43 to 48 agreed to.

Section 49—Protectors

The Convener: Amendment 24, in the name of the minister, is in a group on its own.

Siobhian Brown: Protectors have proved to be successful in other trust jurisdictions and the SLC concluded that they are almost certainly competent under Scots law, albeit that their appointment is not common. Section 49 of the bill clarifies that protectors can be appointed under Scots law and provides a list of example powers that might be conferred on protectors by a trust deed.

The list was designed to be wide since the office of protector is relatively novel in Scots law, but I have listened to the concerns that were raised by stakeholders about some of the powers, and I recognise the committee's concern. That is why amendment 24 will remove those powers from the illustrative list in section 49. That does not, however, limit the generality of the powers that can be conferred on the protector.

I move amendment 24.

Amendment 24 agreed to.

Section 49, as amended, agreed to.

Sections 50 to 54 agreed to.

Section 55—Agreement or approval for purposes of section 54(2)

Amendment 59 moved—[Jeremy Balfour]—and agreed to.

Section 55, as amended, agreed to.

Section 56—Giving of approval by court

The Convener: Amendment 60, in the name of Jeremy Balfour, is grouped with amendments 31, 32 and 42.

Jeremy Balfour: Amendment 60 would clarify the reference in section 55(5)(c), which provides for potential beneficiaries rather than ascertained persons specifically. It would make what is in the bill slightly clearer and, to my mind, clarity is always a good thing.

I am happy to support the other amendments in the group.

I move amendment 60.

Siobhian Brown: During the stage 1 debate, the issue of certain types of trust being used for tax avoidance purposes was raised. In the past, trusts had a reputation of being a vehicle used primarily to avoid tax. That has changed in the past couple of decades, following the introduction of the trust registration service. Nevertheless, I have thought about the comments made in the debate and have considered what more could be done to the bill to prevent trusts being used to avoid the payment of tax that would otherwise be due.

Section 64 of the bill includes a statutory court power, exercisable by the Court of Session, to grant a remedy, if that is considered appropriate, when a trustee makes a decision that would not have been made but for the trustee being in error as to fact or law. In such circumstances, the granting of a remedy by the court could have the effect of wholly or partially reducing the trustee's decision. One particular concern, which was not raised by any stakeholder during stage 1 but was discussed by the SLC, is the potential use of that provision to avoid the consequences of a failed tax avoidance scheme entered into by trustees. That has the potential to make Scottish trusts a more attractive vehicle by which to avoid tax than trusts governed by other UK jurisdictions.

Amendment 31 provides the court with some guidance on how to exercise its wide discretion in relation to the granting of a remedy. The amendment signals to the court, and to potential applicants, the wider public policy considerations engaged in such applications. If the purpose of applying to the court is simply to avoid the tax consequences of a trustees' decision, the court has the discretion to refuse any remedy—and would have had the discretion to do so anyway.

Regarding amendment 32, the SLC looked at how a court can provide guidance, directions and advice to assist trustees who encounter problems relating to the administration of the trust and recommended that that power should be suitably re-stated in primary legislation. When the bill was

introduced, it was our view that primary legislation was not necessary because the courts already had the power to make provision by court rules. However, stakeholders, including the Senators of the College of Justice, thought that a provision should be retained in primary legislation to avoid doubt about those matters.

It was not our intention to cast doubt on that useful method for trustees to obtain advice about administrative difficulties encountered in a trust. I have listened to the views of stakeholders and of the committee, which is why amendment 32 in my name makes clear provision for the court to assist trustees and others who have questions about the administration of a trust. My officials have shared that amendment with the Lord President and his office has confirmed that he welcomes the provision being set out in primary legislation.

Amendment 42 responds to the committee's recommendation regarding the role of the court in hearing trust applications. Evidence was taken during stage 1 about the legal cost of applications raised in the sheriff court, relative to the cost of those raised in the Court of Session. Although some suggested that there was no significant difference, others took the opposite view.

The Scottish Government does not have data on such costs. As the Law Society said in its stage 1 briefing to MSPs, such information is difficult to capture accurately with reference to trust cases. I sought information from the Scottish Courts and Tribunal Service, the Law Society of Scotland, the Society of Trust and Estate Practitioners and the Faculty of Advocates to try to get an accurate picture of the legal costs, but that did not prove helpful because, for a variety of reasons, none could provide the information I requested.

I understand that the committee also ran into obstacles when it corresponded with the SCTS and the auditor of the court. The auditor, for instance, said that it is relatively infrequent for trust cases to be received for account and that those that are received

"vary in their individual circumstances and complexity so it would be difficult to find any particularly meaningful insight from any average figure."

Despite that, I understand the committee's point about the importance of flexibility being added to the bill so that future provision could be made for a greater choice between the courts when it comes to making different types of trust application.

Amendment 42 would do that. It would confer on the Scottish ministers a power, with the consent of the Lord President of the Court of Session, to vary the definition of "court" in section 74 of the bill, which would allow changes to be made regarding which court can hear different types of trust application. For example, the bill as introduced allows the Court of Session to grant trustees additional powers of administration or management in relation to the trust property. Regulations could be made in the future so that the sheriff court may grant those additional powers.

After consultation with the Lord President, I have made provision for the consent of the Lord President, given their role as head of the judiciary. Given that the power would be available across a range of statutory provisions in this case, I believe that providing for the consent of the Lord President is sensible.

The regulations would be subject to affirmative procedure.

I understand the point made by Jeremy Balfour's amendment 60 and am happy to support it.

I urge members to support amendments 60, 31, 32 and 42.

11:00

The Convener: Do members have any comments?

Jeremy Balfour: I welcome the minister's amendment 42. It is interesting how difficult it has been for both the Scottish Government and this committee to find the appropriate information. Amendment 42 future proofs the bill. Both the Court of Session and the Sheriff Court are always evolving, as is practice. I welcome amendment 42 so that, if things change in the future, that power is there for the Scottish Government to exercise with the consent of the Lord President.

I welcome amendment 42 and press amendment 60 in my name.

The Convener: You have gone a bit ahead there. Do colleagues have any questions or points on the amendments in the group? They do not, so I call Mr Balfour.

Jeremy Balfour: I press amendment 60.

Amendment 60 agreed to.

Section 56, as amended, agreed to.

Sections 57 to 60 agreed to.

Section 61—Alteration of trust purposes on material change in circumstances

The Convener: Amendment 25, in the name of the minister, is grouped with amendments 28 to 30.

Siobhian Brown: Section 61 is about the alteration of trust purposes, and attempts to balance the truster's wishes against the wishes of

beneficiaries by allowing for a period of 25 years or the lifetime of the truster, whichever is longer, before an application can be made to court. A 25-year time limit was chosen by the SLC because the section is predominantly intended to deal with long-term trusts and the problems that can arise in relation to them; 25 years is an easily workable default rule, which it considers represents a short generation. The committee heard from stakeholders that the provision is welcome, but recommended that applications to court should be made in exceptional circumstances.

I have re-considered the provision after further consultation between my officials and the Law Society, STEP and the SLC. I believe that allowing the court to decide applications on the evidence is sufficient protection to do away with the default time limit altogether.

If amendments 25, 28, 29 and 30 are agreed to, section 61 would no longer stipulate a default time period during which the purposes of a trust cannot be altered. In effect, it would reverse the position set out when the bill was introduced, setting out a maximum time period of 25 years or the lifetime of the truster, whichever is longer, during which the truster may by trust deed exclude the jurisdiction of the court under section 61.

The amendments ensure flexibility for trusters who may wish to exclude the jurisdiction of the courts for a short time and protect against the risk that those unhappy with the terms of a trust may mount an early application before any material change of circumstances has occurred.

Adding a caveat that would allow relevant persons to raise an application in exceptional circumstances would not be in line with the general policy underpinning the section, which is about the problems caused by long-term trusts, and it would be relatively difficult to legislate for what is meant by “exceptional circumstances”. Any caveat might be abused by persons disappointed by the distribution of the trust property, who could raise, or threaten to raise, court proceedings. Ultimately, the legal expenses of defending such an action would come from trust property and would be at the expense of existing beneficiaries.

I move amendment 25.

The Convener: As members do not have any comments or questions, I ask the minister to wind up.

Siobhian Brown: I am happy to move on.

Amendment 25 agreed to.

Amendments 26 to 30 moved—[Siobhian Brown]—and agreed to.

Section 61, as amended, agreed to.

Sections 62 and 63 agreed to.

Section 64—Application in respect of defective exercise of fiduciary power etc

Amendment 31 moved—[Siobhian Brown]—and agreed to.

Section 64, as amended, agreed to.

After section 64

Amendment 32 moved—[Siobhian Brown]—and agreed to.

Section 65—Expenses of litigation

The Convener: Amendment 33, in the name of the minister, is grouped with amendments 34 to 37 and 40.

Siobhian Brown: Under the current law, it is usually the case that trustees are personally liable to pay litigation expenses to successful opponents but have a right of relief against the trust estate. Section 65 sets out the new default position, which is that

“a trustee does not incur personal liability”

and will only do so where certain grounds exist and the court exercises its discretion to make an order for expenses against the trustee personally under one of those grounds.

Amendments 33 to 37 respond to concerns about the impact of section 65(2) of the bill, which were raised by the Law Society and STEP among others. The amendments remove section 65(2) and as a whole the section as amended makes a significant shift away from the likelihood that a trustee would incur personal liability for litigation expenses when compared with what we understand is current practice.

Section 65(3) allows the court wide discretion to deal with litigation expenses and allows the court to take into account all the circumstances when deciding how to exercise its discretion. Amendment 35 adds to the list of circumstances in which the court may exercise its discretion to find a trustee personally liable for expenses of litigation the scenario where

“the trust property is ... insufficient to meet the expenses incurred”

in litigating. That ensures that those who may wish to do so cannot abuse trusts to raise vexatious litigation and easily avoid the legal costs of doing so.

Trustees would be able, by application under a new subsection, to ask the court to determine liability before expenses are incurred, so that the trustees would be proceeding with any litigation with their eyes open.

Section 65, as already discussed, is of general application to any litigation to which trustees may

be party. Under the section as introduced, the court can impose personal liability on trustees for litigation expenses in certain circumstances, including where the trust property is insufficient to meet the expenses or the trustee has brought about the litigation by breach of duty.

That is, however, limited to the Court of Session and therefore the provision restricts itself to setting out a statutory regime for how litigation expenses incurred in the Court of Session shall be determined. That is not the policy intention, however, and I have listened to evidence from stakeholders, such as the Sheriffs and Summary Sheriffs Association, who have pointed out that litigation will also take place in the sheriff courts, not just at the Court of Session.

Accordingly, amendment 40 clarifies the position so that the power that is conferred on the courts by section 65 can be exercised by the Court of Session and by the appropriate sheriff court. I ask members to support my amendments in this group.

I move amendment 33.

Amendment 33 agreed to.

Amendments 34 to 37 moved—[Siobhian Brown]—and agreed to.

Section 65, as amended, agreed to.

Sections 66 to 72 agreed to.

After section 72

The Convener: The next group is on time limit for cohabitant claim on intestacy. Amendment 48, in the name of Jeremy Balfour, is the only amendment in the group.

Jeremy Balfour: The bill before us is the Trusts and Succession (Scotland) Bill, which will, in due course—we hope—become an act. I think that it would be fair to say, however, that it is heavy on trusts and very light on succession. There is disappointment at that amongst the legal profession, which saw the bill as an opportunity to reform succession law much more widely.

As we heard in evidence both from academics and from those in practice, the question of what those changes should be might have been more controversial and harder to address. However, I think that most would agree that succession law as it currently stands is not fit for the 21st century.

I am aware that the Scottish Government has said that there will be no further legislation on succession law in the current session of Parliament, but perhaps the minister could outline in the stage 3 debate what plans the Government has to extend any consultation on the matter. The Scottish Law Commission has done its work—it is now for the Government to put something out for consultation. I am sure that the committee, and others in Parliament, would be interested to know whether or not there is likely to be a further consultation in the next two and half years, within the current session of Parliament.

Specifically on amendment 48, it seeks to insert a new section amending the Family Law (Scotland) Act 2006 to extend the deadline for a cohabitant to submit a claim from six to 12 months. Clearly, every individual case is different with regard to the grieving process, and the extension would simply give a cohabitant individual a bit more time to consider their views on what they should do. Clearly any time limit will affect some people, but extending the current limit from six to 12 months would give people a bit longer to think through the emotion of what has happened to them. This amendment will, I hope—if it is accepted by the committee—protect some vulnerable individuals.

I move amendment 48.

Siobhian Brown: Where an intestate deceased person was in a cohabiting relationship at the time of death, the survivor can make an application to the court for financial provision. In doing so, they must adhere to a strict time limit, which is six months from the date of death. In evidence that the committee took from a number of stakeholders about the effect of that time limit, it was suggested that the period was unduly short. I see merit in the suggestion to extend the time limit to 12 months, and I am happy to support it.

11:15

However, as the Law Society of Scotland pointed out in its stage 1 briefing, other issues encountered by those who attempt to apply for financial provision on the death of a cohabitee might require to be addressed. If the committee were to agree to amendment 48, I would therefore propose not to commence the provision until we had had an opportunity to consider those other issues and address them, if necessary.

As the committee knows, the SLC recently reported on financial provision on the breakdown of a cohabiting relationship otherwise than by death and, in that report, recommended a new definition of the term “cohabitant”. The Scottish Government has committed to considering a longer-term programme of implementation of SLC reports over the parliamentary session, and the list of those reports includes those on moveable transactions, trusts and judicial factors, as well as the report on cohabitation.

On 6 September, I wrote to the SLC, setting out that detailed work on the report on cohabitation was about to begin. Separately, I also said that I

am considering a consultation on the recommendations that were made in that report, which would provide an opportunity to seek views on any proposed changes to the law on financial provision for cohabitees on intestacy. I say in response to Mr Balfour's comments that I will write to the committee about the consultation ahead of stage 3.

I urge members to support amendment 48.

Jeremy Balfour: I thank the minister for her comment about writing to the committee—I am sure that we all look forward to receiving that information from her. I am pleased that the Government is willing to support amendment 48 and I hope that the provision will come into force some time in my lifetime.

Amendment 48 agreed to.

Section 73 agreed to.

After section 73

Amendment 38 moved—[Siobhian Brown]—and agreed to.

Section 74—Interpretation

Amendments 39 and 40 moved—[Siobhian Brown]—and agreed to.

Amendment 49 moved—[Jeremy Balfour].

The Convener: The question is, that amendment 49 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Balfour, Jeremy (Lothian) (Con)
Mundell, Oliver (Dumfriesshire) (Con)

Against

Kidd, Bill (Glasgow Anniesland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

The Convener: The result of the division is: For 2, Against 3, Abstentions 0.

Amendment 49 disagreed to.

Amendment 41 moved—[Siobhian Brown]—and agreed to.

Section 74, as amended, agreed to.

After section 74

Amendment 42 moved—[Siobhian Brown]—and agreed to.

Before section 75

The Convener: Amendment 50, in the name of Jeremy Balfour, was debated with amendment 4. Does Jeremy Balfour wish to move amendment 50?

Jeremy Balfour: I am not moving amendment 50.

Bill Kidd (Glasgow Anniesland) (SNP): So that we can vote on the amendment, I move amendment 50.

The Convener: The question is, that amendment 50 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

Against

Balfour, Jeremy (Lothian) (Con)
Mundell, Oliver (Dumfriesshire) (Con)

Abstentions

Grant, Rhoda (Highlands and Islands) (Lab)
Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

The Convener: The result of the division is: For 0, Against 2, Abstentions 3.

Amendment 50 disagreed to.

Section 75—Persons who are incapable

The Convener: Amendment 43, in the name of the minister, was debated with amendment 4. I remind members that, as amendments 43 and 51 are direct alternatives, they can both be moved and decided on. The text of whichever amendment is the last agreed to will appear in the bill.

Amendment 43 moved—[Siobhian Brown]—and agreed to.

The Convener: Jeremy Balfour, do you wish to move amendment 51?

Jeremy Balfour: I am not moving the amendment.

Bill Kidd: I move amendment 51, convener.

The Convener: The question is, that amendment 51 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

Against

Balfour, Jeremy (Lothian) (Con)
Mundell, Oliver (Dumfriesshire) (Con)

Abstentions

Grant, Rhoda (Highlands and Islands) (Lab)
Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

The Convener: The result of the division is: For 0, Against 2, Abstentions 3.

Amendment 51 disagreed to.

Section 76—Persons who are untraceable

Amendments 44 and 45 moved—[Siobhian Brown]—and agreed to.

Section 76, as amended, agreed to.

Section 77 agreed to.

Schedule 1 agreed to

Sections 78 and 79 agreed to.

Schedule 2 agreed to.

Sections 80 and 81 agreed to.

Long title agreed to.

The Convener: That ends consideration of amendments at stage 2. I thank the minister and her officials for their attendance today.

11:23

Meeting continued in private until 11:44.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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