

## Trusts and Succession (Scotland) Bill — Stage 2

### Section 5

#### Siobhian Brown

- 1 In section 5, page 3, line 6, leave out <if the trustee is a sole trustee> and insert <where subsection (2A) applies>

#### Siobhian Brown

- 2 In section 5, page 3, line 8, at end insert—
- <(2A) This subsection applies where—
- (a) the trustee is a sole trustee, or
  - (b) the trustee is, in the trustee’s opinion, the only remaining trustee who is both capable and traceable.>

#### Siobhian Brown

- 3 In section 5, page 3, line 9, at end insert—
- <(3A) Any resignation given under this section—
- (a) must be intimated to —
    - (i) all of the other trustees who are traceable, and
    - (ii) any judicial factor appointed to administer the trust, and
  - (b) is effective from the date on which such intimation is given.>

### After section 5

#### Siobhian Brown

- 4 After section 5, insert—
- <Resignation of incapable trustee**
- (1) Where a trustee is incapable, the power in section 5(1) may be exercised by the trustee’s guardian (“G”) on behalf of the trustee (and in such a case, the resignation will, for the purposes of this Act, be treated as a resignation by the trustee).
  - (2) But where subsection (3) applies, G may do so only after—
    - (a) an additional trustee is assumed under section 3,
    - (b) an additional trustee is appointed—
      - (i) under section 1 or 2, or
      - (ii) by G, or
    - (c) a judicial factor is appointed to administer the trust.
  - (3) This subsection applies where—
    - (a) the incapable trustee is a sole trustee, or

- (b) in G’s opinion, no other trustee exists who is both capable and traceable.
- (4) Any resignation given by G on behalf of the incapable trustee in breach of subsection (2) is of no effect.
- (5) Section 4(2) (general conveyance of trust property) applies to an appointment of a trustee by G under subsection (2)(b)(ii) as it applies to an appointment of a trustee under section 1(1)(b) or 2(1).
- (6) Section 5(3A) applies to a resignation given by G on behalf of an incapable trustee in accordance with this section as it applies to a resignation given by a trustee under section 5.
- (7) This section applies—
  - (a) irrespective of when the trust was created, but
  - (b) only as respects a resignation given after this section comes into force.>

### After section 6

#### Siobhian Brown

5 After section 6, insert—

#### **<Removal of certain trustees by court: unfitness**

- (1) For the purposes of section 6(1)(a), a trustee to whom subsection (2) applies is to be regarded as unfit to carry out the duties of a trustee (and so may be removed from office).
- (2) This subsection applies to any trustee—
  - (a) who is—
    - (i) an executor nominate of a testator (“T”),
    - (ii) a trustee of a trust established by T under a testamentary writing, or
    - (iii) an executor dative appointed in respect of the estate of a deceased person (“D”), and
  - (b) who—
    - (i) is being prosecuted in Scotland for the murder or culpable homicide of T or, as the case may be, D,
    - (ii) has been convicted, whether before or after the coming into force of this section, in Scotland of such an offence as regards T or, as the case may be, D,
    - (iii) is being prosecuted in a jurisdiction outside Scotland for an offence which, in the opinion of the court, is equivalent to the murder or culpable homicide of T or, as the case may be, D, or
    - (iv) has been convicted, whether before or after the coming into force of this section, in a jurisdiction outside Scotland of such an offence as regards T or, as the case may be, D.
- (3) For the purposes of subsection (2)(b), a trustee is to be regarded as being prosecuted for an offence if—
  - (a) a prosecutor has initiated proceedings against the trustee in respect of the offence, and

- (b) those proceedings have not been dismissed or resulted in the conviction or acquittal of the trustee in respect of the offence.
- (4) This section is without prejudice to any power of the court to find that a trustee to whom subsection (2)(a) applies (but to whom subsection (2)(b) does not apply) is unfit to carry out the duties of a trustee as a result of—
  - (a) having acted (or being suspected of having acted) in a manner that caused or contributed to the death of T or, as the case may be, D, or
  - (b) having otherwise been involved (or being suspected of having otherwise been involved) in the death of T or, as the case may be, D.>

## **Section 7**

### **Siobhian Brown**

- 6** In section 7, page 3, line 32, at end insert—
- <(1A) Except in so far as the trust deed expressly provides otherwise, a trustee who is—
- (a) a member of a regulated profession (such as a solicitor, accountant, financial adviser or teacher), and
  - (b) appointed or assumed as trustee to provide professional services in relation to managing the affairs of trusts in the course of business,
- may, in the circumstances described in subsection (1B), be removed from office by a majority of the other trustees.
- (1B) The circumstances are that the trustee—
- (a) is no longer a member of the regulated profession in question, or
  - (b) is such a member, but is not entitled to practise as such.>

## **Section 10**

### **Siobhian Brown**

- 7** In section 10, page 5, line 25, leave out <the guardian of the beneficiary> and insert <an appropriate person in relation to the beneficiary (see section 74(1A))>

## **Section 12**

### **Siobhian Brown**

- 8** In section 12, page 6, line 7, at beginning insert <Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise),>

### **Siobhian Brown**

- 9** In section 12, page 6, line 20, at end insert—

- <( ) For the purposes of subsection (2)(a), a trustee of a public trust is not to be regarded as having a personal interest in a decision insofar as—
- (a) the decision is intended to benefit a particular section of the public, and
  - (b) the trustee in question may derive a benefit from the decision solely as a result of being a member of that section of the public.>

**Siobhian Brown**

- 10** In section 12, page 6, line 23, leave out <the guardian of the beneficiary> and insert <an appropriate person in relation to the beneficiary (see section 74(1A))>

**After section 17**

**Siobhian Brown**

- 11** After section 17, insert—

**<Exercise of power of investment: further provision**

- (1) For the purposes of section 17(1) and (2), where two or more proposed investments are suitable for the trust, the trustees may (except in so far as the trust deed, expressly or by implication provides otherwise) take into account appropriate non-financial considerations in determining which investment to make.
- (2) An appropriate non-financial consideration may be (either or both)—
  - (a) a consideration that one investment is more consistent with the purposes of the trust than the other investment,
  - (b) an ethical, social or environmental consideration.
- (3) This section—
  - (a) does not apply as respects a trust created before the section comes into force, and
  - (b) is without prejudice to any other power of trustees to take into account non-financial considerations in relation to determining investments.>

**Section 22**

**Siobhian Brown**

- 12** In section 22, page 13, line 6, leave out from <not> to end of line 8 and insert<—
- (a) to be apportioned as mentioned in that section, or
  - (b) not to be apportioned in such manner, but instead to accrue as they arise.>

**Section 25**

**Siobhian Brown**

- 13** In section 25, page 14, line 26, leave out <the person's guardian> and insert <an appropriate person in relation to that person (see section 74(1A))>

**Siobhian Brown**

- 14 In section 25, page 14, line 29, leave out <the person's guardian> and insert <an appropriate person in relation to that person>

**Siobhian Brown**

- 15 In section 25, page 15, line 13, leave out <the guardian of> and insert <an appropriate person in relation to>

**Section 26**

**Siobhian Brown**

- 16 In section 26, page 15, line 23, leave out <that person's guardian> and insert <an appropriate person in relation to that person (see section 74(1A))>

**Siobhian Brown**

- 17 In section 26, page 15, line 30, leave out <guardian> and insert <appropriate person>

**Siobhian Brown**

- 18 In section 26, page 15, line 34, at end insert—
- <( ) Subsections (1) and (8) do not apply where—
- (a) a person is a potential beneficiary (or an appropriate person in relation to, solicitor or assignee of, such a person), and
  - (b) that person's interest in the trust is, or would be, so remote as to be of negligible value.>

**Siobhian Brown**

- 19 In section 26, page 16, line 33, leave out <guardian,>

**Siobhian Brown**

- 20 In section 26, page 16, line 33, at end insert—
- <( ) an appropriate person in relation to a beneficiary or potential beneficiary,>

**Siobhian Brown**

- 21 In section 26, page 16, line 37, at end insert—
- <( ) Subsection (9) does not apply where—
- (a) a person is—
    - (i) a descendant of the trustor,
    - (ii) a potential beneficiary (or an appropriate person in relation to, solicitor or assignee of, such a person), or
    - (iii) a descendant or ancestor of a beneficiary or potential beneficiary, and

- (b) that person's interest in the trust is, or would be, so remote as to be of negligible value.>

#### **Section 40**

##### **Siobhian Brown**

- 22 In section 40, page 23, line 22, leave out from <such> to the end of line 23 and insert <the trustees of that body.>

#### **Section 42**

##### **Siobhian Brown**

- 23 In section 42, page 24, line 26, leave out <for the benefit of the trustee alone> and insert <solely for the benefit of a specific beneficiary (or potential beneficiary)>

#### **Section 49**

##### **Siobhian Brown**

- 24 In section 49, page 27, leave out lines 28 and 29

#### **Section 61**

##### **Siobhian Brown**

- 25 In section 61, page 33, line 26, leave out subsections (1) to (7) and insert—
- <(1) The court may, if satisfied—
    - (a) in the case of an inter vivos trust, that there has been a material change in circumstances since the trust was created (or that such a change is reasonably to be regarded as in prospect), or
    - (b) in the case of a testamentary trust—
      - (i) that there has been a material change in circumstances since the testamentary writing was executed (or that such a change is reasonably to be regarded as in prospect), and
      - (ii) that the testator is dead,alter the trust purposes in so far as it is, in the opinion of the court expedient to do so to offset or counter the effect, or as the case may be the prospective effect, of the change in circumstances.
  - (2) The power in subsection (1) is exercisable on the application of a person mentioned in subsection (8) in relation to any trust other than a commercial trust or a private purpose trust.
  - (3) Any other person mentioned in subsection (8) may oppose the application.
  - (4) As respects an inter vivos trust, if the trust deed provides expressly that the purposes of the trust may not be altered by the court during (either or both)—
    - (a) the lifetime of the trust,

(b) such period of up to 25 years from the date of the creation of the trust (as may be specified in the deed),

no application may be made under this section in contravention of that provision.

(5) A provision in an inter vivos trust deed that provides expressly that the purposes of the trust may not be altered by the court for a period longer than one mentioned in subsection (4)(b) is to be read as specifying that the purposes may not be altered until (the later of)—

(a) the death of the truster, or

(b) a period of 25 years has elapsed since the date of the creation of the trust.

(6) Subject to subsection (7), as respects a testamentary trust, if the trust deed provides expressly that the purposes of the trust may not be altered by the court during such period of up to 25 years from the date of death of the testator, no application may be made under this section in contravention of that provision.

(7) The court may, if satisfied that there was a period between the change of circumstances mentioned in subsection (1)(b)(i) and the date of death, during which the testator (either or both)—

(a) was incapable,

(b) was unaware (or could not reasonably be supposed to have been aware) of the change and its effect on the trust,

determine that the period provided for in paragraph (6) began to run, not from the date of death, but from the date of the change of circumstances or, if the court thinks fit, from the commencement of the period of incapacity or unawareness.

(7A) A provision in a testamentary trust deed that provides expressly that the purposes of the trust may not be altered by the court for a period longer than one mentioned in subsection (6) is to be read as specifying that the purposes may not be altered until a period of 25 years has elapsed since the date of death of the testator.>

**Siobhian Brown**

26 In section 61, page 34, line 30, leave out <guardian,>

**Siobhian Brown**

27 In section 61, page 34, line 30, at end insert—

<( ) an appropriate person in relation to a beneficiary or potential beneficiary (see section 74(1A)),>

**Siobhian Brown**

28 In section 61, page 34, line 35, leave out subsection (9)

**Siobhian Brown**

29 In section 61, page 35, line 1, leave out <(9)> and insert <(1)>

**Siobhian Brown**

30 In section 61, page 35, line 16, leave out <(9)> and insert <(1)>

## Section 64

### Siobhian Brown

31 In section 64, page 37, line 38, at end insert—

- <( ) Nothing in this section limits the power of the court, when considering whether it is appropriate to grant a remedy on the ground described in subsection (3)(g), to take into account the purpose (or likely purpose) of the relevant person making the application (for example, that the application is being made wholly or mainly for the purpose of avoiding the tax consequences of the trustee’s decision).>

## After section 64

### Siobhian Brown

32 After section 64, insert—

*<Directions relating to trust matters and the estates of deceased persons*

#### **Applications in relation to trusts and to the estates of deceased persons**

- (1) Trustees, protectors or supervisors under a trust deed, or any other person with an interest in the trust property, may apply to the Court of Session for a direction on questions relating to—
  - (a) the investment, distribution, management or administration of the trust estate, or
  - (b) the exercise of any power vested in, or the performance of any duty imposed on, the trustees notwithstanding that such direction may affect contingent interests in the estate, whether of persons in existence at, or of persons who may be born after, the date of the direction.
- (2) An executor (nominate or dative) of a person who dies after the coming into force of this section may, whether or not there is a testamentary trust, apply to the Court of Session for a direction on questions relating to—
  - (a) the investment, distribution, management or administration of the person’s estate,
  - (b) the exercise of any power vested in, or the performance of any duty imposed on, the executor notwithstanding that such direction may affect contingent interests in the estate, whether of persons in existence at, or of persons who may be born after, the date of the direction.
- (3) In subsection (1)—

“protector” is to be construed in accordance with section 49(1)(a), and  
“supervisor” is to be construed in accordance with section 45(1).>

## Section 65

### Siobhian Brown

33 In section 65, page 38, line 21, leave out subsection (2)



**Siobhian Brown**

- 34 In section 65, page 38, line 38, leave out <or>

**Siobhian Brown**

- 35 In section 65, page 39, line 5, at end insert <, or  
( ) the trust property is (or is likely to be) insufficient to meet the expenses incurred.>

**Siobhian Brown**

- 36 In section 65, page 39, line 6, after <(3)> insert <(a) to (f)>

**Siobhian Brown**

- 37 In section 65, page 39, line 9, leave out subsections (5) and (6) and insert—  
<( ) Where a trust is party to an ongoing civil litigation the court may, on the application of a party, make a determination about the personal liability (or relief from such liability) of a trustee for expenses yet to be incurred.>

**After section 73**

**Siobhian Brown**

- 38 After section 73, insert—

**<Amendment of Confirmation of Executors (Scotland) Act 1858**

After section 6 of the Confirmation of Executors (Scotland) Act 1858, insert—

**“6A Restrictions on appointment of executor dative**

- (1) This section applies where a sheriff is in receipt of a petition for the appointment of a person (“P”) as an executor dative in respect of the estate of a deceased person (“D”).
- (2) The sheriff must refuse the petition if satisfied that P is a person falling within subsection (3).
- (3) A person falls within this subsection if that person—
  - (a) is being prosecuted in Scotland for the murder or culpable homicide of D,
  - (b) has been convicted, whether before or after the coming into force of this section, in Scotland of such an offence as regards D,
  - (c) is being prosecuted in a jurisdiction outside Scotland for an offence which, in the opinion of the sheriff, is equivalent to the murder or culpable homicide of D, or
  - (d) has been convicted, whether before or after the coming into force of this section, in a jurisdiction outside Scotland of such an offence as regards D.
- (4) For the purposes of subsection (3), a person is to be regarded as being prosecuted for an offence if—
  - (a) a prosecutor has initiated proceedings against the person in respect of the offence, and

- (b) those proceedings have not been dismissed or resulted in the conviction or acquittal of the person in respect of the offence.
- (5) If, despite subsection (1) or any rule of law to the contrary, a person falling within subsection (3) is appointed as an executor dative in respect of D’s estate—
  - (a) the person’s appointment as executor dative is not invalid by reason of the fact that the person falls within subsection (3), but
  - (b) the appointment does not prevent the removal of that person from office following the making of an application under section 6 of the Trusts and Succession (Scotland) Act 2024 (as read with section 6A of that Act) on the ground that the person is unfit to carry out the duties of a trustee.
- (6) This section is without prejudice to any power of a sheriff to refuse a petition for the appointment of P in any case where—
  - (a) P does not fall within subsection (3), but
  - (b) P —
    - (i) has acted (or is suspected of having acted) in a manner that caused or contributed to the death of D, or
    - (ii) has otherwise been involved (or is suspected of having otherwise been involved) in the death of D.”.>

## Section 74

### Siobhian Brown

39 In section 74, page 42, line 25, after <6,> insert <(Removal of certain trustees by court: unfitness),>

### Siobhian Brown

40 In section 74, page 42, line 25, after <63,> insert <65>

### Siobhian Brown

41 In section 74, page 43, line 10, at end insert—

<(1A) In this Act, “appropriate person” means—

- (a) in relation to a beneficiary or, as the case may be, potential beneficiary, who has not attained the age of 16 years—
  - (i) a parent or guardian who has the parental responsibility or parental right to act as that person’s legal representative under section 1(1)(d) or 2(1)(d) of the Children (Scotland) Act 1995 (“the 1995 Act”),
  - (ii) a person in whom that parental responsibility or parental right is vested by virtue of section 11(2)(b) of the 1995 Act,
  - (iii) a person having that parental responsibility or parental right by virtue of section 11(12) of the 1995 Act,
  - (iv) a person in whom that parental responsibility or parental right is vested by virtue of a permanence order (as defined in section 80(2) of the Adoption and Children (Scotland) Act 2007),

- (v) a parent or guardian who has the right, in relation to the beneficiary or potential beneficiary, to act as that person’s legal representative, by virtue of having parental responsibility for that person under Part 1 of the Children Act 1989 (“the 1989 Act”),
  - (vi) a person having that right, in relation to the beneficiary or potential beneficiary, by virtue of having parental responsibility for that person by virtue of—
    - (A) section 12(2) of the 1989 Act,
    - (B) section 14C of the 1989 Act, or
    - (C) section 25(3) of the Adoption and Children Act 2002,
  - (vii) a parent or guardian who has that right, in relation to the beneficiary or potential beneficiary, by virtue of having parental responsibility for that person under Part 2 or Part 15 of the Children (Northern Ireland) Order 1995 (S.I. 1995/755) (“the 1995 Order”),
  - (viii) a person having that right, in relation to the beneficiary or potential beneficiary, by virtue of having parental responsibility for that person under Article 12(2) of the 1995 Order, or
- (b) in relation to a beneficiary or, as the case may be, potential beneficiary, who is incapable, that person’s guardian.>

#### **After section 74**

##### **Siobhian Brown**

42 After section 74, insert—

##### **<Power to amend jurisdiction in relation to trusts**

- (1) The Scottish Ministers may by regulations make provision conferring on or removing from the Court of Session or, as the case may be, the appropriate sheriff court, power to decide particular types of cases relating to trusts under this Act.
- (2) In particular, the Scottish Ministers may—
  - (a) make provision modifying section 74 in so far as it relates to the definitions of “the court” and “the appropriate sheriff court” for the purposes of this Act, and
  - (b) make such incidental, supplementary or consequential provision (including provision modifying this Act or another enactment) relating to the jurisdiction of the Court of Session or the appropriate sheriff court as they consider appropriate for the purposes of giving full effect to the conferral or removal of a power.
- (3) Regulations under this section may only be made with the consent of the Lord President of the Court of Session.
- (4) Regulations under this section are subject to the affirmative procedure.>

#### **Section 75**

##### **Siobhian Brown**

43 Leave out section 75 and insert—

### **<Meaning of incapable and related expressions**

- (1) In this Act—
  - (a) “incapable” (and related expressions) is to be construed in accordance with section 1(6) of the Adults with Incapacity (Scotland) Act 2000 (fundamental definitions), but with the modification that the reference in the closing words of that definition to any provision of that Act is to be read as to any provision of this Act,
  - (b) a reference to a person having legal capacity is a reference to a person who—
    - (i) is not incapable, and
    - (ii) does not otherwise lack legal capacity (for example, by reason of non-age).
- (2) The Scottish Ministers may by regulations—
  - (a) make provision modifying the effect of the definition of “incapable” in the Adults with Incapacity (Scotland) Act 2000 as it applies for the purposes of this Act by virtue of this section, or
  - (b) amend this section to replace or modify the definition of “incapable” for the purposes of this Act.
- (3) Regulations under this section are subject to the affirmative procedure.>

### **Section 76**

#### **Siobhian Brown**

- 44 In section 76, page 44, line 2, after <2(1),> insert <5(3A)(a)(i),>

#### **Siobhian Brown**

- 45 In section 76, page 44, line 11, after <section> insert <5(3A)(a)(i),>