S66 PG must authorise gifts

S68 expenses claimed by guardian

S73 PG can recall powers. Ultimately sheriff can decide.

S74 GO can be varied

S75 Guardian can resign

Application in respect of H 2011 SLT (Sh Ct) 178- Solicitor applies to be financial guardian and other person wants to be welfare guardian. 87 and in a care home- no capacity. House needs to be sold to pay for fees of care home. She has a will and left the house to someone. Informed beneficiary that the house must be sold to pay fees. They wanted to draft codicil to leave 70% of estate to beneficiary and 30% to two charities. Sheriff held that under the act that the court could not write a codicil for the testator. When she made the will, a file note was included only for the beneficiary to get the house, not the money if the house was sold. Guardianship order was not granted.

Revocation of wills

Generally a will can be revoked up until the death of the testator as it is not activated until death. If the testator has promised or bound himself in a contract to give his estate to a particular person, then that is legally binding and must be given effect to. This cannot be revoked.

Paterson v Paterson (1893) 20R 48- A mother agreed to make an irrevocable settlement on her son. The son gave his mother a loan of money and paid her rent on the strength of the agreement. She signed a minute of agreement to that effect- written contract. She went back on the agreement. She did not leave her son anything in her will. Under challenge by the son, the will was set aside by the court. Her previous will was given effect to so her son inherited.

Hutchison v Graham's Exec 2006 SCLR 587- Agreement between grandmother and granddaughter. GD paid GM's mortgage and the GM made a standard security in favour of her GD. Both signed an agreement that the GM would only dispose of her property to her GD. GM made a will giving GD everything. Later the GM made a new will, revoking the old will and leaving everything to her daughter. GD raises action seeking court to declare the will in her favour was irrevocable. Held that the GM was entitled to make a new will. The agreement that the two women had signed gave a remedy if the GM breached it. The remedy was that GD was entitled to be paid back the loan with interest. However the agreement that they signed did not make the first will irrevocable.

The agreement has to be in the correct form or it will not stand otherwise.

- Testator- signs deed, includes will, trust disposition and settlement.
- Codicil- document attached to will if you change a little bit.

Is it a will?

A will requires no particular form or words, and therefore the court can look at external evidence when trying to decide if a deed is actually a will. They will consider the circumstances in which the will is found, who made it as well as other factors.

Firstly they will look at whether the testator shows an intention to testate. Instructing a solicitor to draft a will is not classed as an intention to testate. A normal signature is required.

Draper v Thomason 1954 SC 136- Mrs Tupper died in 1952. In 1936 she sent a letter to her sister. She signs a letter Conny. It leaves everything to her nephew, Billy. Rest of letter is normal gossip. Are the provisions in letter a will? Is the signature Conny sufficient- she always signed under this name. Did she make a will or intend to? Held that it was a will.

Rhodes v Peterson 1971 SC 56- other made a former will through her solicitor in 1965. Year later she writes a letter to her daughter, telling her daughter that she was to inherit the house, the contents and her jewellery. She signed the letter "lots of love, Mum". Is it a will? Lord Hunter held it was. It was more than just an intention.

Jollie v Lennie 2014 CSOH 45- Mother had married twice. Will made in 2004 to leave most of estate to second husband. Year later daughter went to go on holiday and pops past her mum. Conversation where mother says she is not sure about her will. Takes out her handbag and gives document to daughter. Asks what it was and mother replies "Shh". It was an a5 piece of paper folded into quarter and undamaged. Realised next day it was will giving estate to brother and her. Kept in bag for two years. The will is damaged. Mother dies in 2010. She realises official will is governing her mums estate and hunts for handwritten will. She eventually finds it. It is extremely badly damaged with words missing and bits eroded completely. The daughter had to raise Court of Session action to prove tenor of document. She had pieced together by memory the contents. One friend had witnessed the will. Daughter was successful. She and her brother's children got the mother's estate.

Hamilton v Gibson 2015 Edinburgh Sheriff Court April 2015- Lady called Mel Gibson. After death they found a notebook, and one entry was a handwritten will saying everything was to go to one sister. It was signed by Mel Gibson. Held it was a will as it showed testamentary effect.

Requirements of Writing (Scotland) Act 1995-

In force August 1995. Under s1(2) (c) all wills, trusts and codicils must be in writing- cannot be done verbally. A will must be signed by the grantor or it will be void otherwise. The last page must be signed to indicate completeness. It must be signed by their own hand, however guiding the wrist of someone who has difficulties is okay. Any signatures by rubber stamps are not valid. The signature does not need to be legible and the full name as stated

instructed- she died intestate without a will at all. Question put to COS whether or not B had left the wife an outright gift or whether it was a trust- held it was a gift, and no trust was actually set up.

Style Financial Services Ltd v Bank of Scotland (no 2) 1998 SLT 8- question whether a trust was set up. Goldberg was a large retail company, they set up style as a subsidiary company to run a credit card system. They then sold Style to the Royal bank of Scotland. They still collected payments for Style in their shops and paid them over at a later date. They went into insolvency owing money to Style. Style argued a trust had been set up between them based on a clause in the agreement. Wording in question was "on behalf of, or for the account of...." Had a trust been set up?- held no trust was set up because the agreement was set up on commerce and no trust was set up between the two companies.

Under the Requirements of Writing (Scot) Act 1995 s1 need written document in certain circumstances.

Trusts created involuntarily- created by rules of law

Constructive trusts:- trust is construed by law from the relationship of the parties:

Situation 1-existing trust and then a third party knows about the trust and holds trust property, then they are accountable to the trust for their situation.- if they make money or profit as a result of this it has to be paid back into the trust itself. (e.g. a bank manager holding money for a trust- constructive trustee)

Huisman v Soepboer 1994 SLT 682- Three dutchmen (H,S and K) get together to buy a farm- they set up a joint venture to buy the farm and share the profits equally. Mr S had concealed the fact that he had taken title to the farm in the name of a company rather than in his sole name. The agreement had been that he would take the title in his sole name. Mr S sold the farm and the other two claimed he concealed the price. This was a breach of his fiduciary position- not good faith. The profit that S made was a constructive trust and he was liable to the two partners for the profit that he made.

Situation 2- where someone in a position of trust gains an advantage by virtue of being in that position.- Solicitors and clients, Mother and child, principal and agent.

Cherry Trs v Patrick 1911 2SLT 313- (situation 2) Cherry was a wholesale supplier of alcohol- became a trustee on a trust that comprised of a pub. Even after he became a trustee, he kept on supplying the pub with alcohol at a discounted rate, then his actions were challenged by beneficiaries that he was acting in induced benefit and that the profits he made were a constructive trust that had to be paid over. Any profit made in a fiduciary position you cannot keep- it must be paid over to the trust.

Resulting Trusts- to rebound or spring back- resultari- the trust has not worked properly and has rebound back to the truster.

Anderson v Smoke (1898) 25R 493- Anderson set up trust for son Archibald and he gave two daughters £2000 to administer the trust. The son got £1000 and then died. The

declarator that they could continue to be trustees. Held that the change of name did not effect their character.

Parish Council of Kilmarnock v Ossington's Trustees (1896) 23R 833- the Truster said the trustee was to be the chairman of the Peroquial board of the parish of kilmarnock. Later this was abolished and replaced by a parish council. The question was whether the new council could continue to act as a trustee- held no they could not because the peroquial board was different from the Parish council.

Appointment of single or further trustees-

Acceptance of appointment of office- trustee has the choice to accept the role or not. If you do accept the role your acceptance can be expressed or implied, and you get an immediate right to the property.

Time of acceptance- no legal time limit

Form of acceptance- usually in writing, but verbal acceptance is possible.

Implied acceptance- can be personally barred from later claiming you are not a trustee.

Ker v City of Glasgow Bank (1879) 6R 575 (affirmed 6R (HL) 52)- man allowed his name to be used as a trustee in a stock transfer form. He signed his name with the word trustee after it. he was held to have accepted the post of trustee by implication.

Can resign under Trust (Scot) Act 1921 s3(a)

Cannot force someone to be a trustee or use specific implement

Appointment of new trustees

If one trustee dies, or resigns, other existing trustees take their office.

1. By the truster- may have reserved the right in the trust deed so that their self or someone they have named can name new trustees. Can do that to appoint new trustees or change existing trustees. In private trusts there is always the right of the truster to appoint new trustees- radical right of appointment.
2. By existing trustees- historically trustees had no power to appoint new trustees unless it was otherwise stated in the trust deed.

Changed by Trust (Scot) Act 1921 s3(b)

Applies also to ex officio trustees Winning Petr 1999 SC 51

Munro's tees v Young (1887) 14R 574- conflict between trust deed and statute- spouses set up anti-nuptial trust- only they themselves could appoint new trustees.

If a sole trustee wants to step down, they must appoint a new trustee first.

3. Appointment by the court

At common law

vary the trust as they wanted a restatement of the objects of the trust and secondly they wanted to expand the beneficiaries. It came before lord young in the outer house and he said the trustees did not have to show the trust purposes had failed or were impossible to fulfil to justify the cy pres doctrine. Court would sanction a scheme where the change to the trust purpose was expedient provided the expediency was sufficiently compelling. Lord Young held the test of expediency had been satisfied and granted the variations sought by the trustees.

Statutory variation of public trusts-

Law reform (Miscellaneous provisions) (Scotland) Act 1990-

Sections 9-10 allow Courts to authorise variation or reorganisation of public trusts. This can be done through the Sheriff court, and overlaps with cy pres. Impossibility must be proved and the decision must be intimated to the Lord Advocate.

Under s9 Court will allow variation if 1 of 4 statutory grounds are established and the new scheme enables the resources of the trust to be applied to better effect within the spirit of the deed, having regard to changes in social and economic conditions since the time the trust was created.

4 grounds:

(a) the purposes of the trust have been fulfilled so far as is possible or can no longer be given effect to;

(b) that the purposes of the trust provide a use for only part of the trust property; or

(c) That the purposes of the trust were expressed by reference to an area which has ceased to have effect for these purposes or by reference to a class of persons or area which has ceased to be suitable or appropriate for the trust (Geographical area has changed); or

(d) that the purposes of the trust have been adequately provided for by other means, or have ceased to be entitled to charitable status for revenue matters or have otherwise ceased to provide a suitable and effective method of using trust property, having regard to the spirit of the deed

Beneficiaries can be changed. To vary the trust you only need to fit into one of the above points of criteria to be able to raise the action in the Sheriff court rather than the Court of Session.

Section 10 deals with the variation of small public trusts with an annual income of less than £5000. Trustees can modify trust purposes under section 10 (3). They can also transfer property to another trust, wind up the trust or amalgamate it with another trust. All this is done by trustees by resolution if one of the 4 grounds apply, and all trustees have agreed.

There are certain conditions and considerations-

- Need to consider locality of the trust
- Has both trusts got the same charitable status?
- Is it economical to amalgamate?
- All trustees from both trusts must consent to amalgamation
- Actions become effective 2 months after resolution has been advertised
- Lord Advocate as the power to intervene in all public trusts
- Anyone with an interest can challenge the resolution

Variation of charitable trusts

Charities and Trustee Investment (Scotland) Act 2005 set up a new regime only for charities. They must be recognised by the OSCR on the Scottish Charity Register. Not all public trusts are charitable. S39 allows a charitable trust to be reorganised if approved by the OSCR without the approval of the Court. OSCR can approve the scheme or apply to go to Court under s40.

Rights in relation to third parties

Contract law-

Trustees are personally liable for the contracts they entered into. The third party should be able to assume the trustee has sufficient money to meet the demands of the contract. Even if trustees employ an agent to work on their behalf, they will incur liability personally. Liability is joint and several and personal liability ends on the death of the trustee.

Judicial factor- No personal liability provided in good faith and told 3rd party of his position (person employed to carry out decisions on your behalf)

Scottish Brewers Ltd v J. Douglas Pearson 1996 SLT (Sh Ct) 50- Sale of Heritage by tees to third parties – Warrandice at least fact and deed probably even absolute warrandice- if fact and deed warrandice is granted they have no personal liability.

Third parties are entitled to reclaim fees from trust estate if they raise a court action unless this is unreasonable, reckless or a breach of duty. Cost of Appeal – need consent of all beneficiaries. If expenses are awarded against the trustees they can be reimbursed by the trust estate. If court action has to be raised to rectify mistake made by trustee, they cannot claim the cost of court action from trust estate.

Excluding personal liability-

It is extremely difficult to exclude personal liability. Signing documents as a trustee could be sufficient. There must be some sort of express notice given to third parties to warn that they are acting only as trustees. If there is a clear agreement on this point then only the trust estate will be liable. Look at all circumstances of case; nature of contract; subject matter of contract; capacity and duty of parties to make the contract.

Protection of third parties-

If the buyer is in good faith and paid value, they get the title to the property. If a 3rd party buys a property owned by the trust and it is a breach of trust to transfer it to him he is a buyer in bad faith and action can be reduced- To be in bad faith the third party must know that there is a breach of trust.

S2(1) 1961 Trust (S) Act- If trustee enters contract to do any activities in s 4 (1) (a) – (ee) of 1921 act, the 3rd party is protected. This is so even if transaction is in bad faith.- will always get good title.

Trustee's probity

Probity is honesty and integrity- trustees must act with a high degree of probity whilst administering the trust. They must act in good faith at all times and always act in the interests of the beneficiaries. There cannot be a conflict between the interests of the trustees and the interests of the beneficiaries. Trustees are prohibited from making a profit from the trust directly or indirectly. They must separate their own interests from that of the trust. It is to enter into any transaction in which they have a personal interest. These transactions are voidable and may be reduced. Any transaction can be challenged by a beneficiary, another trustee, the truster and the creditors of the truster. Third parties cannot challenge the actions of a trustee. If a trustee makes any profit from a transaction, it is a constructive trust and must be paid over to the trust itself. If a challenge is brought, the trustee has the onus to prove he was not auctor in rem suam (acting in his own cause).

Transacting with the trust estate- cannot transact with the trust estate.

Expressly prohibited are:

- The trustee as an individual buying property from the trust for himself
- Selling property to the trust
- Borrowing money to and from the trust
- Selling goods to and from the trust
- Any contract to supply goods.

Mags of Aberdeen v University of Aberdeen (1877)4R(HL)48 1613- Aberdeen council was given money to hold on trust to fund two professorships at Aberdeen university. In 1704 the council invested the funds and bought land over in Torry. 1797 the council's master sells the land to the treasurer of the borough of Aberdeen. In 1801 the town council get fishing rights to the land and start to make money from it- income from the fisheries. 1876- Aberdeen University bring action of declarator that the land was held in trust for their benefit. Appealed to House of Lords- Held that the trustees were not entitled to sell and buy the trust property. The sale that had taken place in 1797 was sale to themselves and so it was an illegal sale. Fishing rights belonged to Aberdeen University and Aberdeen council as