
DRAFT TRUSTEE BILL 2008

ARRANGEMENT OF SECTIONS

PART 1
PRELIMINARY AND GENERAL

Section

1. Short title and commencement
2. Definitions

PART 2
THE OFFICE OF TRUSTEE

3. Capacity of trustees
4. Number of trustees
5. Power to appoint new trustees
6. Power to appoint additional trustees
7. Power to remove trustees
8. Appointment and removal of trustees: supplemental
9. Disclaimer
10. Retirement of trustees
11. Vesting of trust property in new or continuing trustees

PART 3
DUTIES AND LIABILITY OF TRUSTEES

12. Fiduciary duty and duty of care of trustees
13. Exclusion of duty of care
14. Duty to provide information

PART 4
POWERS OF TRUSTEES TO DELEGATE FUNCTIONS

15. Power to delegate to agents
16. Power to appoint nominees and custodians
17. Review by trustees of agents, nominees and custodians

18. Liability of trustees for agents, nominees and custodians

PART 5

GENERAL POWERS OF TRUSTEES

19. Power to insure
20. Powers of investment
21. Powers concerning debts, settlement and compounding liabilities
22. Power of maintenance for beneficiaries who are minors
23. Power of advancement of capital to beneficiaries
24. Power of purchase, sale and to issue receipts
25. Powers of two or more trustees
26. Exoneration of trustees in respect of certain powers of attorney
27. Implied indemnity of trustees

PART 6

POWERS OF THE COURT

28. Power of the Court to appoint new trustees
29. Vesting orders as to land
30. Vesting order consequential on judgment for sale or mortgage of land
31. Vesting order consequential on judgment for specific performance and other orders
32. Effect of vesting order
33. Power to appoint person to convey
34. Vesting orders as to stock and choses in action
35. Persons entitled to apply for orders
36. Powers of new trustee appointed by Court
37. Power to charge costs on trust estate

- 38. Trustees of charities
- 39. Payment into Court by trustees
- 40. Power to give judgment in absence of a trustee
- 41. Power to relieve trustee from personal liability
- 42. Power to make beneficiary indemnify for breach of trust

PART 7

MISCELLANEOUS AND REPEALS

- 43. Amendments to Succession Act 1965
- 44. Repeals

SCHEDULE

REPEALS

ACTS REFERRED TO

Age of Majority Act 1985	1985, No.2
[Charities Bill 2007]	
Conveyancing Act 1881	44 & 45 Vict., c.41
[Land and Conveyancing Law Reform Bill 2006]	
Pensions Act 1990	1990, No. 25
Pensions Acts 1990 to 2008	
Succession Act 1965	1965, No.27
Trustee Act 1893	56 & 57 Vict., c.53
Trustee (Authorised Investments) Act 1958	1958, No.8

DRAFT TRUSTEE BILL 2008

BILL

Entitled

AN ACT TO CONSOLIDATE AND REFORM THE LAW RELATING TO TRUSTEES, TO REPEAL THE TRUSTEE ACT 1893 AND THE TRUSTEE (AUTHORISED INVESTMENTS) ACT 1958 AND TO PROVIDE FOR RELATED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART 1

PRELIMINARY AND GENERAL

Short title and commencement

1.—(1) This Act may be cited as the Trustee Act 2008.

(2) This Act comes into operation on such day or days as the Minister for Justice, Equality and Law Reform may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

Definitions

2.—In this Act, unless the context otherwise requires—

“beneficiaries” includes a beneficiary;

“convey” and “conveyance” applied to any person include the execution by that person of every necessary or suitable assurance for conveying, assigning, appointing, surrendering or otherwise transferring or disposing of land of which he or she is seised or possessed, or in respect of which he or she is entitled to a contingent right, either for his or her whole estate or for any less estate, together with the performance of all formalities required by law to the validity of the conveyance;

“the Court” means the High Court or, subject to its jurisdictional limits in respect of land, the Circuit Court;

“deed” includes a deed executed in accordance with the terms of section 62(2)(b) of the *Land and Conveyancing Law Reform Bill 2006*;¹

“functions”, in connection with a trustee, includes duties and powers;

“pay” and “payment” as applied in relation to stocks and securities, and in connection with the expression “into court” include the deposit or transfer of stocks and securities in or into court;

“property” includes all property both real and personal and any part of such property;

“settlor” means the person who settles property on trust;

“transfer,” in relation to stock or securities, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee;

“trust” and “trustee” include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property;

Explanatory note

The definitions in this section largely reflect those in section 50 of the *Trustee Act 1893*, subject to relevant modernisation and other amendments to take account of, for example, changes to be made by the *Land and Conveyancing Law Reform Bill 2006*: see paragraph 1.103.

PART 2

THE OFFICE OF TRUSTEE

Capacity of trustees

3. — (1) From the coming into force of this Act, a minor (within the meaning of section 2 of the Age of Majority Act 1985) is prohibited from acting as a trustee, and any purported appointment of a minor to act as trustee in relation to any settlement or trust shall be void from when the appointment would take effect.

¹ This refers to section 62(2)(b) of the *Land and Conveyancing Law Reform Bill 2006* as passed by Seanad Éireann.

(2) Subject to *subsection (1)*, where a minor is named in the original trust instrument, if any, and appointed in writing, he or she shall be permitted to act as an additional trustee when he or she reaches the age of majority (as defined in section 2 of the Age of Majority Act 1985).

Explanatory note

This section is new² and implements the recommendations in paragraph 2.12.

Number of trustees

4.—(1) From the coming into force of this Act, and subject to the remaining provisions of this section and to *section 25*, either—

(a) two or more individual trustees, or

(b) a corporate trustee,

shall be required to perform the duties of trustees under this Act.

(2) This section does not apply to a charitable trust within the meaning of the *Charities Bill 2007*.

(3) This section is without prejudice to the application of section 21 of the *Land and Conveyancing Law Reform Bill 2006*.³

(4) This section is without prejudice to the requirements of the Pensions Acts 1990 to 2008.

Explanatory note

This section is new and implements the recommendations in paragraphs 2.22, 2.25 and 2.141.

² Where an explanatory note indicates that a section is new, this indicates that there is no equivalent section in the *Trustee Act 1893*.

³ This refers to section 21 of the *Land and Conveyancing Law Reform Bill 2006* as passed by Seanad Éireann.

Power to appoint new trustees

5.—(1) The person or persons referred to in *subsection (2)* may appoint, in writing, a person to be a new trustee in the circumstances referred to in *subsection (3)*.

(2) The person or persons who may exercise the power conferred by *subsection (1)* are—

- (a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or
- (b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or
- (c) the personal representative or personal representatives of the last surviving or continuing trustee, or
- (d) the liquidator of a corporate trustee which is in liquidation or has been wound-up, but only if there is no person nominated for that purpose in the instrument, if any, creating the trust and only where the corporate trustee is the sole trustee, or
- (e) the beneficiaries, provided they are all of full age and capacity and (taken together) are absolutely entitled to the property subject to the trust.

(3) The circumstances in which the power conferred by *subsection (1)* may be exercised are where a trustee, either original or substituted, and whether appointed by a court or otherwise—

- (a) is dead,
- (b) desires to be discharged from all or any of the trusts or powers reposed in or conferred on him or her,
- (c) refuses to act as trustee,
- (d) is, subject to *section 3*, a minor,
- (e) is made a ward of court⁴ or in respect of whom an enduring power of attorney comes into effect, or
- (f) is, in the case of a corporate trustee, in liquidation or has been wound-up.

(4) On the appointment of a new trustee under this section for the whole or any part of trust property —

- (a) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, in the case of a trust established prior to the coming into force of this Act, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part, and

⁴ The draft Scheme of the *Mental Capacity Bill 2008*, published by the Government in September 2008, proposes to replace the ward of court system with a guardianship system. This would largely implement the recommendations in the Commission's *Report on Vulnerable Adults and the Law* (LRC 83-2006).

(b) it shall not be obligatory to appoint more than the number of trustees originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where, in the case of a trust established prior to the coming into force of this Act, only one trustee was originally appointed, a trustee shall not be discharged under this section from his or her trust unless there will be at least two trustees to perform the trust, and

(c) any assurance or thing required for vesting the trust property, or any part of the trust property, jointly in the persons who are the trustees, shall be executed or done.

Explanatory note

This section implements the recommendations in paragraphs 2.38, 2.46, 2.49, 2.58, 2.63, 2.65, 2.68, 2.70, 2.94 and 2.98 concerning the appointment of new (substituted) trustees. Subject to the changes recommended in those paragraphs, subsections (1) to (3) largely replicate section 10(1) of the *Trustee Act 1893* and subsection (4) largely replicates section 10(2)(b) to (d) of the 1893 Act.

Power to appoint additional trustees

6.—(1) The person or persons referred to in *subsection (2)* may appoint, in writing, a person to be an additional trustee or additional trustees at any time.

(2) The person or persons who may exercise the power conferred by *subsection (1)* are —

(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or

(b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or

(c) the personal representative or personal representatives of the last surviving or continuing trustee, or

(d) the liquidator of a corporate trustee which is in liquidation or has been wound-up, but only if there is no person nominated for that purpose in the instrument, if any, creating the trust and only where the corporate trustee is the sole trustee, or

(e) the beneficiaries, provided they are all of full age and capacity and (taken together) are absolutely entitled to the property subject to the trust.

Explanatory note

This section is new and implements the recommendation in paragraph 2.49. A limited power to appoint additional trustees is contained in section 10(2)(a) of the *Trustee Act 1893*.

Power to remove trustees

7.—(1) The person or persons referred to in *subsection (2)* may remove, in writing, a trustee in the circumstances referred to in *subsection (3)*.

(2) The person or persons who may exercise the power conferred by *subsection (1)* are —

- (a) the person or persons nominated for the purpose of removing trustees by the instrument, if any, creating the trust, or
- (b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or
- (c) the personal representative or personal representatives of the last surviving or continuing trustee, or
- (d) the liquidator of a corporate trustee which is in liquidation or has been wound-up, but only if there is no person nominated for that purpose in the instrument, if any, creating the trust and only where the corporate trustee is the sole trustee, or
- (e) the beneficiaries, provided they are all of full age and capacity and (taken together) are absolutely entitled to the property subject to the trust.

(3) The circumstances in which the power conferred by *subsection (1)* may be exercised are where a trustee, either original or substituted, and whether appointed by a court or otherwise —

- (a) is dead,
- (b) desires to be discharged from all or any of the trusts or powers reposed in or conferred on him or her,
- (c) refuses to act as trustee,
- (d) is, subject to *section 3*, a minor,
- (e) is made a ward of court⁵ or in respect of whom an enduring power of attorney comes into effect, or
- (f) is, in the case of a corporate trustee, in liquidation or has been wound-up.

(4) Subject to *section 4(1)*, where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed, as if he or she were dead, or, in the case of a corporation, as if the corporation desired to be discharged from the trust, and the provisions of *section 5* shall apply accordingly.

⁵ The draft Scheme of the *Mental Capacity Bill 2008*, published by the Government in September 2008, proposes to replace the ward of court system with a guardianship system. This would largely implement the recommendations in the Commission's *Report on Vulnerable Adults and the Law* (LRC 83-2006).

Explanatory note

This section is new and implements the recommendations in paragraphs 2.60, 2.73 and 2.151 concerning the removal of trustees.

Appointment and removal of trustees: supplemental

8. — (1) Every new trustee appointed under *section 5* or additional trustee appointed under *section 6*, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him or her, shall have the same powers, authorities, and discretions, and may in all respects act, as if he or she had been originally appointed a trustee by the instrument, if any, creating the trust.

(2) The provisions of *sections 5 and 6* that apply to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those that apply to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of those sections.

(3) *Sections 5 and 6* apply only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions contained in it.

(4) The person or persons who may exercise the powers in *sections 5 and 6* shall not lose the authority conferred by the instrument, if any, creating the trust unless that person,

- (a) refuses to exercise the authority, or
- (b) lacks the capacity to exercise the authority.

(5) A trustee who is compulsorily removed as trustee shall not be entitled to exercise the powers of appointment in this Act.

(6) The powers given in *sections 5 and 6* to the personal representative or personal representatives of the last surviving or continuing trustee shall be and shall be deemed always to have been exercisable by the executor or executors for the time being of such surviving or continuing trustee who have proved the will of their testator or by the administrator or administrators for the time being of such trustee, without the concurrence of any executor who has renounced or has not proved.

(7) *Sections 5 and 6* and this section apply to trusts created either before or after the commencement of this Act.

Explanatory note

In respect of subsections (1) to (3) and (6), this section implements supplemental recommendations concerning the appointment of new (substituted) trustees and

additional trustees. Subject to the changes recommended, subsections (1) to (3) and (7) largely replicate section 10(5) to (8) of the *Trustee Act 1893*. Subsections (4) to (6) are new and implement the recommendations in paragraphs 2.78, 2.83 and 2.88, respectively; subsection (6) is based on section 36(4) of the English *Trustee Act 1925*.

Disclaimer

9.—(1) A person who has disclaimed the position of trustee shall be precluded from exercising the powers conferred by *section 5* or *section 6*.

(2) (a) A person who is appointed an executor of a will and nominated as a trustee and who proves the will shall be presumed to have accepted the office of trustee, but that person may be discharged of his or her duties in accordance with *section 10*.

(b) A person who is appointed an executor of a will and nominated as a trustee but who does not prove the will shall be presumed not to have accepted the office of trustee, and shall be deemed to have disclaimed the office of trustee, unless there is evidence to the contrary.

Explanatory note

Subsection (1) implements the recommendation in paragraph 2.85 and largely corresponds to section 10(4) of the *Trustee Act 1893*. Subsection (2) is new and implements the recommendation in paragraph 2.122.

Retirement of trustees

10. — (1) Subject to the provisions of this section and *section 4(1)*, a person may, in writing, retire as trustee at any time in respect of all or any of the trusts or powers reposed in or conferred on him or her where any part of the trust property is held on trusts distinct from those relating to any other part or parts of the trust property.

(2) Where there are more than two trustees, if one of them by deed declares that he or she wishes to be discharged from the trust, and if his or her co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, then the trustee who wishes to be discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged from the trust under this Act, without any new trustee being appointed in his or her place.

(3) Any assurance or thing required for vesting the trust property in the continuing trustees alone shall be executed or done.

(4) This section applies notwithstanding a contrary intention expressed in the instrument, if any, creating the trust, and nothing in a trust instrument shall, therefore, be interpreted as restricting the right of a trustee to retire under this section.

(5) The beneficiaries, provided they are all of full age and capacity and (taken together) are absolutely entitled to the property subject to the trust may direct a trustee to retire.

(6) This section does not apply to a charitable trust within the meaning of the *Charities Bill 2007*.

(7) This section applies to trusts created either before or after the commencement of this Act.

Explanatory note

Subsection (1) implements the recommendation in paragraph 2.133 that a person may retire as trustee at any time and the recommendation in paragraph 2.139 that this applies where the retirement concerns all, or some, of the duties involved. Subsections (2), (3) and (7) reflect existing limited provisions on retirement in section 11 of the *Trustee Act 1893*. Subsection (4) implements the recommendation in paragraph 2.133 that nothing in a trust instrument shall restrict the right of a trustee to retire, and this reverses the contrary provision currently in section 11(3) of the 1893 Act. Subsection (5) implements the recommendation in paragraph 2.137. The reference in subsection (1) to section 4(1), combined with the text of subsection (6), implements the recommendation in paragraph 2.141.

Vesting of trust property in new or continuing trustees

11.—(1) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

(2) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3) This section does not extend to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under any Act other than this Act.

(4) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

Explanatory note

This section largely replicates section 12 of the *Trustee Act 1893* on the vesting of trust property, which does not require reform but which is required in the new legislative code. This section thus forms part of the general consolidation and codification aspect of this Report.

PART 3

DUTIES AND LIABILITY OF TRUSTEES

Fiduciary duty and duty of care of trustees

12.—(1) Every trustee shall, as a fiduciary, perform the trust honestly and in good faith for the benefit of the beneficiaries, and any provision that purports to exclude or limit this fiduciary duty is void.

(2) Without prejudice to the fiduciary duty in *subsection (1)*, every trustee shall exercise such care and skill as is reasonable in the circumstances having regard in particular—

(a) to any special knowledge or experience that he or she has or holds himself or herself out as having, and

(b) if he or she acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

(3) Subject to *section 13*, the duty of care in *subsection (2)* —

- (a) shall apply where a trustee carries out any function under this Act, and
- (b) replaces any general common law duty of care of trustees.

Explanatory note

This section is new. Subsection (1) implements the recommendation in paragraph 1.32 that trustee legislation should include an explicit statement of the fiduciary nature of the office of trustee and also implements the recommendations in paragraphs 4.26 and 4.29 that this cannot be excluded or limited in any way. Subsection (2), which largely reflects section 1 of the English *Trustee Act 2000*, implements the recommendations in paragraphs 3.15, 3.23 and 3.26 (concerning the trustee's general duty of care) and paragraph 4.47 (that there should be distinction between any type of trustee in terms of relieving them of liability). Subsection (3)(a) implements the recommendations in paragraph 3.26 on the generality of the trustee's duties. Subsection (3)(b) implements the recommendation in paragraph 3.29 that the statutory duty of care replaces any general common law duty of care of trustees (no comparable statement is made in respect of the fiduciary duty).

Exclusion of duty of care

13.—(1) Subject to *subsection (2)*, the duty of care in *section 12(2)* shall not apply to a trustee if and as far as a contrary intention is expressed by means of exclusion or limitation in the instrument, if any, creating the trust, and the duty of care in *section 12(2)* shall, therefore (but subject to *subsection (2)*), have effect subject to the terms of that instrument and to any exclusion or limitation provisions contained in it.

(2) Any exclusion or limitation referred to in *subsection (1)* —

(a) shall be drafted in clear, unequivocal and unambiguous terms, and

(b) shall be brought to the attention of the settlor prior to the execution of the instrument creating the trust.

(3) Notwithstanding *subsection (1)*, a trustee shall in all cases be required to comply with the duty to provide information in *section 14*, and any provision that purports to exclude or limit the duty in *section 14* is void.

(4) Where a breach of trust has occurred before the coming into force of this section, no liability shall attach to a trustee where he or she honestly believed that such

breach of trust would be governed by any exclusion or limitation referred to in *subsection (1)*.

(5) Subject to *subsection (4)*, this section applies to trusts created either before or after the commencement of this Act.

Explanatory note

This section is new. Subsection (1) implements the recommendation in paragraph 4.22. Subsection (2) implements the recommendations in paragraphs 4.36 and 4.42. Subsection (3) implements the recommendations in paragraphs 4.26 and 4.32. Subsection (4) implements the recommendation in paragraph 4.55. Subsection (5) implements the recommendation in paragraph 4.56. The English *Trustee Act 2000* contains some provisions on exclusion of liability, but they differ in a number of ways from the recommendations in this Report.

Duty to provide information

14. — (1) The trustees shall provide the beneficiaries with a copy of any deed of settlement.

(2) The trustees may, in the exercise of their discretion, provide to the beneficiaries any documents other than the deed of settlement.

(3) In any application to the Court under this Act, the Court may, in exercise of its discretion, provide to the beneficiaries any documents other than the deed of settlement.

(4) In this section, “deed of settlement” includes any will as proved.

Explanatory note

This section is new and implements the recommendation in paragraph 5.60.

PART 4

POWERS OF TRUSTEES TO DELEGATE FUNCTIONS

Power to delegate to agents

15.—(1) Subject to the provisions of this section and this Part, the trustees may authorise any person to exercise any or all of their delegable functions as their agent on such terms as the trustees may determine.

(2) In the case of a trust, other than a charitable trust within the meaning of the *Charities Bill 2007*, the delegable functions of the trustees consist of any function other than the following —

- (a) any function relating to whether or in what way the assets of the trust should be distributed or otherwise dealt with during the period of the trust,
- (b) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital,
- (c) any power to appoint a person to be a trustee of the trust, or
- (d) any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.

(3) The trustees may delegate the powers referred to in this section to one or more of their number, but not to a beneficiary (even if the beneficiary is also a trustee).

(4) The trustees may not authorise two or more persons to exercise the same function unless they are to exercise the function jointly.

(5) Where it is reasonably necessary to do so, and subject to the provisions of the trust instrument, trustees shall have the power —

- (a) to permit an agent to appoint a substitute,
- (b) to restrict the liability of an agent or his or her substitute to the trustees or the beneficiaries, and

(c) to permit an agent to act in circumstances capable of giving rise to a conflict of interest.

(6) Trustees may, out of the trust funds, remunerate agents, provided that the amount does not exceed such remuneration as is reasonable in the circumstances, and may reimburse the agent for any expenses properly incurred by the agent.

Explanatory note

This section is new and implements the recommendations in paragraphs 6.20, 6.22, 6.23, 6.30 and 6.33. It reflects comparable provisions in sections 11 to 14 of the English *Trustee Act 2000*.

Power to appoint nominees and custodians

16.—(1) Subject to the provisions of this section and this Part, the trustees may—

(a) appoint a person to act as their nominee in relation to such of the assets of the trust as they determine (other than settled land), and

(b) take such steps as are necessary to secure that those assets are vested in a person so appointed.

(2) (a) Subject to the provisions of this section and this Part, the trustees may appoint a person to act as a custodian in relation to such of the assets of the trust as they may determine.

(b) For the purposes of this Act a person is a custodian in relation to assets if he or she undertakes the safe custody of the assets or of any documents or records concerning the assets.

(3) An appointment under this section shall be in or evidenced in writing.

(4) A person may not be appointed as a nominee or a custodian unless either the person carries on a business which consists of or includes acting as a nominee or custodian or the person is a body corporate controlled by the trustees.

(5) Where it is reasonably necessary to do so, and subject to the provisions of the trust instrument, trustees shall have the power—

- (a) to permit a nominee or custodian to appoint a substitute,
- (b) to restrict the liability of a nominee or custodian or his or her substitute to the trustees or the beneficiaries, and
- (c) to permit a nominee or custodian to act in circumstances capable of giving rise to a conflict of interest.

(6) Trustees may, out of the trust funds, remunerate a nominee or custodian, provided that the amount does not exceed such remuneration as is reasonable in the circumstances, and may reimburse the a nominee or custodian for any expenses properly incurred by the nominee or custodian.

Explanatory note

This section is new and implements the recommendations in paragraphs 6.40, 6.44, 6.48 and 6.50. It reflects comparable provisions in sections 16 to 20 of the English *Trustee Act 2000*.

Review by trustees of agents, nominees and custodians

17.—(1) While any agent, nominee or custodian continues to act for the trust, the trustees—

- (a) shall keep under review the arrangements under which the agent, nominee or custodian acts and how those arrangements are being put into effect,
- (b) if circumstances make it appropriate to do so, shall consider whether there is a need to exercise any power of intervention that they have, and
- (c) if they consider that there is a need to exercise such a power, shall do so.

(2) In this section, “power of intervention” includes—

- (a) a power to give directions to the agent, nominee or custodian, and
- (b) a power to revoke the authorisation or appointment.

Explanatory note

This section is new and implements the recommendations in paragraphs 6.35 and 6.52. It reflects comparable provisions in section 22 of the English *Trustee Act 2000*.

Liability of trustees for agents, nominees and custodians

18.—(1) A trustee is not liable for any act or default of an agent, nominee or custodian unless he or she has failed to comply with the duties applicable to him or her in *section 12*—

- (a) when entering into the arrangements under which the person acts as agent, nominee or custodian, or
- (b) when carrying out his or her duties under *section 17*.

(2) If a trustee has agreed a term under which the agent, nominee or custodian is permitted to appoint a substitute, the trustee is not liable for any act or default of the substitute unless he or she has failed to comply with the duties applicable to him or her in *section 12*—

- (a) when agreeing that term, or
- (b) when carrying out his or her duties under *section 17* in so far as they relate to the use of the substitute.

(3) A failure by the trustees to act within the limits of the powers conferred by this Part—

- (a) in authorising a person to exercise a function of theirs as an agent, or
 - (b) in appointing a person to act as a nominee or custodian,
- does not invalidate the authorisation or appointment.

(4) Nothing in this Part shall exempt a trustee from any liability which he or she would have incurred if this Act had not been passed, in case he or she permits any assets of the trusts to remain in the hands or under the control of the agent, nominee or custodian for a period longer than is reasonably necessary to enable the agent, nominee or custodian (as the case may be) to pay or transfer those assets to the trustee.

(5) Nothing in this Part shall authorise a trustee to do anything which he or she is in express terms forbidden to do, or to omit anything which he or she is in express terms directed to do, by the instrument, if any, creating the trust.

Explanatory note

This section also implements the recommendations in paragraph 6.52. Subsections (1) to (3) largely reflect comparable provisions in section 23 and 24 of the English *Trustee Act 2000*. Subsections (4) and (5) replicate section 17(3) and (5) of the *Trustee Act 1893*.

PART 5

GENERAL POWERS OF TRUSTEES

Power to insure

19.—(1) The trustees may insure trust property against risks of loss or damage due to any event, and may pay the premiums for such insurance out of the income or capital of the property or out of the income or capital of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income or capital.

(2) Without prejudice to *subsection (1)* —

(a) the trustees may insure trust property up to its replacement value, and

(b) where it is reasonable in all the circumstances of the trust, but only in such circumstances, the trustees shall insure trust property, and

(2) In the case of property held on a bare trust, the power to insure is subject to any direction given by the beneficiaries—

(a) that any property specified in the direction is not to be insured, or

(b) that any property specified in the direction is not to be insured except on such conditions as may be so specified.

(3) Property is held on a bare trust if it is held on trust for—

(a) a beneficiary who is of full age and capacity and absolutely entitled to the property subject to the trust, or

(b) beneficiaries each of whom is of full age and capacity and who (taken together) are absolutely entitled to the property subject to the trust.

(4) If a direction under *subsection (3)* is given, the power to insure, so far as it is subject to the direction, ceases to be a delegable function for the purposes of *section 14*.

(5) Subject to a contrary intention expressed in the trust instrument, if any, this section applies to trusts created either before or after the commencement of this Act.

Explanatory note

This section implements the recommendations in paragraph 7.12, 7.18, 7.21, 7.23 and 7.25. It considerably expands the existing power to insure in section 18 of the *Trustee Act 1893* and is comparable to section 19 of the English *Trustee Act 1925*.

Powers of investment

20.—(1) Subject to the provisions of this section and this Part, a trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his or hands, whether at the time in a state of investment or not, in prescribed authorised investments, and may also from time to time vary any such investment.

(2) In making an authorised investment of trust funds a trustee shall take due account of—

- (a) the nature of the liabilities of the trust,
- (b) an appropriate diversification of investments, including appropriate diversification of credit and counterparty risks, and
- (c) an appropriate liquidity of investments.

(3) A trustee shall review the investment of trust funds at intervals of not more than 12 months, including where the trusts funds remain in their original form.

(4) The Minister for Finance, having regard to the matters set out in *subsection (2)*, shall from time to time by order prescribe certain investments, including securities, shares and land, to be authorised investments for the purpose of the exercise of the power of investment conferred by this section, and the Minister may specify in such order such conditions as he or she considers proper in respect of the investment of trust funds.

(5) Every order made under this section shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling it is passed by either House within the subsequent 21 days on which that House has sat after it is laid before it, the order is annulled accordingly, but without prejudice to the validity of anything previously done under it.

(6) Before making an order under this section the Minister for Finance shall consult such persons and bodies as he or she considers appropriate as to the terms of the proposed order.

(7) Nothing in this section or in any order made under it shall authorise a trustee to do anything which he or she is expressly forbidden to do by the instrument, if any, creating the trust nor shall it prevent a trustee from doing anything which he or she is expressly permitted to do by the instrument, if any, creating the trust.

(8) In this section, “prescribed authorised investments” means investments authorised by an order made under *subsection (4)*.

(9) The power of investment conferred by this section is subject to any consent required by the instrument, if any, creating the trust with respect to the investment of the trust funds.

(10) A trustee lending money on the security of any property on which he or she can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he or she reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report.

(11) Nothing in this section shall prevent the trust instrument, if any, from directing the trustees to follow a specific investment policy, including an ethical or socially responsible investment policy.

(12) The power conferred by this section is subject to the jurisdiction to vary trusts conferred by *section XX* of the *Land and Conveyancing Law Reform Bill 2006*.⁶

(13) Nothing in this section shall affect the powers of investment of a trustee of a scheme to which the Pensions Acts 1990 to 2008 applies.

(14) Notwithstanding the repeal by this Act of the Trustee (Authorised Investments) Act 1958, as amended, the Trustee (Authorised Investments) Order 1998 (S.I. No.28 of 1998), as amended by the Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002 (S.I. No.595 of 2002), shall continue to have full force and effect as if made under this section until revoked and replaced by an order made under this section.

Explanatory note

This section implements the recommendations in paragraphs 8.27, 8.30, 8.32, 8.34, 8.38, 8.40, 8.45, 8.46 and 8.48 concerning the power of investment. It consolidates, with

⁶ At the time of writing (November 2008), the Commission understands that the Government proposes to amend the *Land and Conveyancing Law Reform Bill 2006* to include a court jurisdiction to allow for variation of trusts, with a view to implementing the recommendations on variation of trusts in the Commission’s *Report on the Variation of Trusts* (LRC 63-2000).

amendments, the existing powers of investment in sections 1 to 9 of the *Trustee Act 1893*, as amended by the *Trustee (Authorised Investments) Act 1958*.

Powers concerning debts, settlement and compounding liabilities

21.—(1) A trustee may—

- (a) accept any property before the time at which it is transferable or payable, or
- (b) sever and apportion any blended trust funds or property, or
- (c) pay or allow any debt or claim on any evidence he or she may reasonably deem sufficient, or
- (d) accept any composition or security for any debt or property claimed, or
- (e) allow time for payment of any debt, or
- (f) compromise, compound, abandon, submit to arbitration, or otherwise settle, any debt, account, dispute, claim, or other matter relating to the trust,

and for any of those purposes may enter into such agreements or arrangements and execute such documents as seem to him or her expedient, without being personally responsible for any loss occasioned by any act or thing so done by him or her in accordance with the fiduciary duty in *section 12(1)*.

(2) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions contained in it.

(3) This section applies to trusts created either before or after the commencement of this Act.

Explanatory note

This section implements the recommendations in paragraphs 9.15 and 9.16. It consolidates, with amendments, the existing powers concerning debts, settlement and compounding liabilities in section 21 of the *Trustee Act 1893*, taking into account the comparable wording in section 60(8) of the *Succession Act 1965*.

Power of maintenance for beneficiaries who are minors

22.—(1) Subject to *subsection (2)*, where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property—

- (a) during the minority of any such person, if his or her interest so long continues, the trustees may, at their sole discretion, pay to his or her parent or guardian, if any, or otherwise apply for or towards his or her maintenance, education, or benefit, the whole or such part, if any, of the

income of that property as may, in all the circumstances, be reasonable, whether or not there is—

- (i) any other fund applicable to the same purpose, or
- (ii) any person bound by law to provide for his maintenance or education, and

(b) if such person on attaining the age of 18 years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under *subsection (3)* to him or her, until he or she either attains a vested interest therein or dies, or until failure of his interest.

(2) In deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes set out in *subsection (1)*, the trustees shall have regard to the age of the minor and his or her requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

(3) During the minority of any such person, if his or her interest so long continues, the trustees shall accumulate all the residue of that income by investing it, and any profits from so investing it from time to time in authorised investments, and shall hold those accumulations as follows—

(a) If any such person—

(i) attains the age of 18 years, or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest or,

(ii) on attaining the age of 18 years or on marriage under that age becomes entitled to the property from which such income arose,

the trustees shall hold the accumulations in trust for such person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him or her made under any statutory powers during his or her infancy, and so that the receipt of such person after marriage, and though still a minor shall be a good discharge, and

(b) in any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes, and so that, if such property is settled land, such accumulations shall be held upon the same trusts as if the same were capital money arising from it, but the trustees may, at any time during the minority of such person if his or her interest so long continues, apply those accumulations, or any part of it, as if they were income arising in the then current year.

(4) This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis

to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be five per cent per annum.

(5) This section applies to a vested annuity in the same manner as if the annuity were the income of property held by trustees in trust to pay the income of it to the annuitant for the same period for which the annuity is payable, but in any case accumulations made during the minority of the annuitant shall be held in trust for the annuitant or his or her personal representatives absolutely.

(6) This section does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of this Act.

(7) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions contained in it.

Explanatory note

This section implements the recommendations in paragraph 10.23 that trustees should have a general power of maintenance for beneficiaries before they reach the age of 18. It is based on section 31 of the English *Trustee Act 1925*.

Power of advancement of capital to beneficiaries

23. — (1) Subject to *subsection (2)*, trustees may at any time pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his or her attaining any specified age or on the occurrence of any other event, or subject to a gift over on his or her death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he or she belongs.

(2) The power in *subsection (1)* is subject to the following conditions—

(a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property, and

(b) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share, and

(c) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and has reached the age of majority and consents in writing to such payment or application.

(3) The power conferred by this section is subject to the jurisdiction to vary trusts conferred by *section XX* of the *Land and Conveyancing Law Reform Bill 2006*.⁷

(4) This section does not apply to trusts created before the commencement of this Act.

(5) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions contained in it.

Explanatory note

This section implements the recommendations in paragraph 10.27, 10.30, 10.32, 10.34, 10.35 and 10.40 that trustees should have a general power of advancement of capital to a beneficiary. It is based on section 32 of the English *Trustee Act 1925*.

⁷ At the time of writing (November 2008), the Commission understands that the Government proposes to amend the *Land and Conveyancing Law Reform Bill 2006* to include a court jurisdiction to allow for variation of trusts, with a view to implementing the recommendations on variation of trusts in the Commission's *Report on the Variation of Trusts* (LRC 63-2000).

Power of purchase, sale and to issue receipts⁸

24.—(1) Where a trustee has a duty or power to purchase and sell property, he or she may, subject to such conditions, if any, applying to that duty or power, purchase and sell or concur with any other person in purchasing and selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.

(2) A duty or power to purchase, sell or dispose of land includes a duty or power to purchase, sell or dispose of part thereof, whether the division is horizontal, vertical, or made in any other way.

(3) The powers in *subsections (1) and (2)* applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions contained in it; and also subject to any restriction imposed by statute law or the general law of trusts or any court order relating to the trust assets.

(4) Where trustees are authorised by the instrument, if any, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in, or mortgage of all or any part of the trust property for the time being in possession.

⁸ As mentioned in footnote 1 of this Appendix, the draft Bill in this Appendix implements the recommendations in this Report that involve the reform and modernisation of the law of trusts, including the replacement of most of the *Trustee Act 1893* (as amended) with a modern legislative code. As pointed out in the Introduction to the Report, the Commission will complete its review of the law of trusts in Project 21 of its *Third Programme of Law Reform 2008-2014*, which concerns the effect on trust law of the impending repeal of the *Settled Land Acts 1882 to 1890* by the *Land and Conveyancing Law Reform Bill 2006*. On completion of that project, the replacement in full of the 1893 Act would be possible, including a complete reform of the provisions concerning powers of purchase and sale.

(5) The power in *subsection (4)* applies notwithstanding anything to the contrary contained in the instrument, if any, creating the trust.

(6) The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him or her under any trust or power shall be a sufficient discharge for the same, and shall (except where a person has prior knowledge of an intended breach of trust by a trustee) effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof,

(7) *Subsection (6)* applies to trusts created either before or after the commencement of this Act.

Explanatory note

This section implements the recommendations in paragraphs 11.10, 11.11, 11.18, 11.21, 11.24, 11.26 and 11.31 that trustees should have a general power of purchase, sale and to issues receipts. Subsections (1) to (3), concerning the power of purchase and sale, are based on section 12 of the English *Trustee Act 1925*, in effect an updated version of section 13 of the *Trustee Act 1893*. Subsections (4) and (5), concerning the power to borrow, is based on section 16 of the English *Trustee Act 1925*. Subsections (6) and (7), dealing with the issue of receipts, largely replicates section 20 of the *Trustee Act 1893*.

Powers of two or more trustees

25.—Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the power may be exercised or performed by the survivor or survivors of them for the time being.

Explanatory note

This section largely replicates section 22(1) of the *Trustee Act 1893* on the power of two or more trustees, which does not require reform but which is required in the new legislative code. This section thus forms part of the general consolidation and codification aspect of this Report.

Exoneration of trustees in respect of certain powers of attorney

26.—(1) Subject to *subsection (2)*, a trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who craved the

power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his or her so acting or paying.

(2) Nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the some remedy against the person to whom the payment is made as he or she would have had against the trustee.

Explanatory note

This section largely replicates section 23 of the *Trustee Act 1893* on the exoneration of trustees in respect of certain powers of attorney, which does not require reform but which is required in the new legislative code. This section thus forms part of the general consolidation and codification aspect of this Report.

Implied indemnity of trustees

27.— A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him or her notwithstanding his or her signing any receipt for the sake of conformity, and shall be answerable and accountable only for his or her own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any agent, nominee or custodian, or other person with whom any trust moneys, or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless this happens through his or her own wilful default; and may reimburse himself or herself, or pay or discharge out of the trust fund, all expenses incurred in or about the execution of his or her trusts or powers.

Explanatory note

This section largely replicates section 24 of the *Trustee Act 1893* on the implied indemnity of trustees. Subject to the inclusion of references to “agent, nominee or custodian” this section thus forms part of the general consolidation and codification aspect of this Report.

PART 6

POWERS OF THE COURT

Power of the Court to appoint new trustees

28.—(1) The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, including in the cases where co-trustees have not consented to such an appointment and where a person is incapable of acting as trustee, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

(2) Without prejudice to *subsection (1)*, the Court may remove a trustee and appoint a new trustee where—

- (a) the trustee person becomes bankrupt, is convicted of an indictable offence, or is sentenced to a term of imprisonment, or
- (b) in the case of a corporate trustee, it is placed in liquidation or wound up.

(3) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(4) Nothing in this section shall be interpreted as conferring a power to appoint an executor or administrator.

Explanatory note

This section largely replicates section 25 of the *Trustee Act 1893* on the power of the Court to appoint new trustees. It also implements the recommendation in paragraph 2.108 and 2.156 concerning the removal of trustees by the Court on the grounds of, for example, personal or corporate insolvency. It also implements the recommendation in paragraph 2.123 that, where co-trustees have not consented to the appointment of a new trustee or where a person is incapable of acting as trustee, an application to the Court is required.

Vesting orders as to land

29.—(1) The Court may, subject to the provisos in *subsection (3)*, make an order (in this Act called a vesting order) vesting the land in any of the cases referred to in *subsection (2)* in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.

(2) The cases where a vesting order may be made under *subsection (1)* are—

- (a) where the Court appoints or has appointed a new trustee,
- (b) where a trustee entitled to or possessed of any land, or entitled to a contingent right in any land, either solely or jointly with any other person cannot be found,
- (c) where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land,
- (d) where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he or she is living or dead,
- (e) where there is personal representative to a trustee, and
- (f) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right in and land, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for 28 days after the date of the requirement.

(3) The making of a vesting order under *subsection (1)* is subject to the following provisos—

- (a) where the order is consequential on the appointment of a new trustee, the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees, and
- (b) where the order relates to a trustee entitled jointly with another person, and such trustee cannot be found, the land or right shall be vested in such other person, either alone or with some other person.

Explanatory note

This section largely replicates section 26 of the *Trustee Act 1893* on the power of the Court to make a vesting order, which does not require reform but which is required in the new legislative code. This section thus forms part of the general consolidation and codification aspect of this Report.

Vesting order consequential on judgment for sale or mortgage of land

30.—Where any court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right in the land, or under the will of a deceased person for payment of whose debts the judgment was given or order made, and is a party to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act; and the Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as that Court thinks fit in the purchaser or mortgagee or in any other person.

Explanatory note

This section largely replicates section 30 of the *Trustee Act 1893* on the power of the Court to make a vesting order consequential on a judgment for sale or mortgage of land,

which does not require reform but which is required in the new legislative code. This section thus forms part of the general consolidation and codification aspect of this Report.

Vesting order consequential on judgment for specific performance and other orders

31.—Where a judgment is given for the specific performance of a contract concerning any land, or for the partition, or sale in lieu of partition, or exchange, of any land, or generally where and judgment is given for the conveyance of any land, the Court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his or her lifetime a party to the contract or transactions concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act, and thereupon the Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

Explanatory note

This section largely replicates section 31 of the *Trustee Act 1893* on the power of the Court to make a vesting order consequential on a judgment for specific performance and other orders such as partition, which does not require reform but which is required in the new legislative code. This section thus forms part of the general consolidation and codification aspect of this Report.

Effect of vesting order

32.—A vesting order under any of the foregoing sections shall in the case of a vesting order consequential on the appointment of a new trustee, have the same effect as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate as the Court directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

Explanatory note

This section largely replicates section 32 of the *Trustee Act 1893* on the general effect of a vesting order, which does not require reform but which is required in the new legislative code. This section thus forms part of the general consolidation and codification aspect of this Report.

Power to appoint person to convey

33.—In all cases where a vesting order can be made under any of the foregoing provision, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect, as an order under the appropriate provision.

Explanatory note

This section largely replicates section 33 of the *Trustee Act 1893* on the power of the Court to appoint person to convey, which does not require reform but which is required in the new legislative code. This section thus forms part of the general consolidation and codification aspect of this Report.

Vesting orders as to stock and choses in action

34.—(1) The Court may, subject to the provisos in *subsection (3)*, make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income from such stock, or to sue for or recover a chose in action, in any such person as the Court may appoint.

(2) The cases where a vesting order as to stock and choses in action may be made under *subsection (1)* are—

(a) where the Court appoints or has appointed a new trustee, or

(b) where a trustee entitled alone or jointly with another person to stock or to a chose in action—

(i) cannot be found, or

(ii) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled there to for 28 days next after a request in writing has been made to him or her by the person so entitled, or

(iii) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action for 28 days next after an order of the High Court for that purpose has been served on him, or

(c) where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead.

(3) The making of a vesting order as to stock and choses in action under *subsection (1)* is subject to the following provisos—

(a) where the order is consequential on the appointment by the Court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees, and

(b) where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the Court may appoint.

(4) In all cases where a vesting order can be made under this section, the Court may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(5) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the Court under this Act, may transfer the stock to himself or herself or any other person, according to the order.

(6) After notice in writing of an order under this section it shall not be lawful for any company to transfer any stock to which the order relates or to pay any dividends on the stock except in accordance with the order.

(7) The Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised.

Explanatory note

This section largely replicates section 35 of the *Trustee Act 1893* on the power of the Court to make vesting orders as to stock and choses in action, which does not require reform but which is required in the new legislative code. This section thus forms part of the general consolidation and codification aspect of this Report.

Persons entitled to apply for orders

35.—(1) An order under this Act for the appointment of a new trustee or concerning any property subject to a trust, may be made on the application of any person beneficially interested in the property, whether under disability or not, or on the application of any person duly appointed trustee thereof, or by any person with an interest in the trust.

(2) An order under this Act concerning any land, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

Explanatory note

This section largely replicates section 36 of the *Trustee Act 1893* as to the persons entitled to apply for orders, with the exception that it also implements the recommendation in paragraph 2.111 that an application may also be made by any person with an interest in the trust.

Powers of new trustee appointed by Court

36.—Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him or her, have the same powers, authorities, and discretions, and may in all respects act as if he or she had been originally appointed a trustee by the instrument, if any, creating the trust.

Explanatory note

This section largely replicates section 37 of the *Trustee Act 1893* as to the powers of a new trustee appointed by the Court, which does not require reform but which is required in the new legislative code. This section thus forms part of the general consolidation and codification aspect of this Report.

Power to charge costs on trust estate

37.—The Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance of such application, to be paid or raised out of the land or personal estate in respect of which the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just.

Explanatory note

This section largely replicates section 38 of the *Trustee Act 1893* as to the power of the Court to charge costs on a trust estate, which does not require reform but which is required in the new legislative code. This section thus forms part of the general consolidation and codification aspect of this Report.

Trustees of charities

38.—The powers conferred by this Act as to vesting orders may be exercised for vesting any stock or chose in action in any trustee of a charity or society over which the Court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the Court under its inherent or statutory jurisdiction.

Explanatory note

This section largely replicates section 39 of the *Trustee Act 1893* as to the application of vesting order to the trustees of charities, which does not require reform but which is required in the new legislative code. This section thus forms part of the general consolidation and codification aspect of this Report.

Payment into Court by trustees

39.—(1) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay them into the Court; and the money or securities shall, subject to rules of Court, be dealt with according to the orders of the Court.

(2) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into Court.

(3) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into court, but the concurrence of the other or others cannot be obtained, the Court may order the payment into court to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depository, the Court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into court, and every transfer payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid, or delivered.

Explanatory note

This section largely replicates section 42 of the *Trustee Act 1893* on payment into Court by trustees, which does not require reform but which is required in the new legislative code. This section thus forms part of the general consolidation and codification aspect of this Report.

Power to give judgment in absence of a trustee

40.—Where in any action the Court is satisfied that diligent search has been made for any person who, in the character of trustee, is made a defendant in any action, to serve him with a process of the Court, and that he or she cannot be found, the Court may hear and determine the action and give judgment against that person in his or her character of a trustee, as if he or she had been duly served or had entered an appearance in the action, and had also appeared by his or her counsel and solicitor at the hearing, but without prejudice to any interest he or she may have in the matters in question in the action in any other character.

Explanatory note

This section largely replicates section 43 of the *Trustee Act 1893* on the power of the Court to give judgment in the absence of a trustee, which does not require reform but which is required in the new legislative code. This section thus forms part of the general consolidation and codification aspect of this Report.

Power to relieve trustee from personal liability

41.—If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he or she committed such breach, then the court may relieve him or her either wholly or partly from personal liability for such breach of trust.

Explanatory note

This section implements the recommendation in paragraph 4.45. It is based on section 61 of the English *Trustee Act 1925*.

Power to make beneficiary indemnify for breach of trust

42.—(1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it thinks fit, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him or her.

(2) This section shall apply to breaches of trust committed as well before as after the passing of this Act, but shall not apply so as to prejudice any question in an action or other proceeding which was pending at the commencement of this Act.

Explanatory note

This section largely replicates section 45 of the *Trustee Act 1893* on the power of the Court to make a beneficiary indemnify for breach of trust, which does not require reform but which is required in the new legislative code. This section thus forms part of the general consolidation and codification aspect of this Report.

PART 7

MISCELLANEOUS AND REPEALS

Amendments to Succession Act 1965

43.—(1) Section 50(3) of the Succession Act 1965 is amended by the insertion of “a sole personal representative or” before “the personal representatives”.

(2) Section 57 of the Succession Act 1965 is amended by the insertion of “a sole personal representative or” before “the personal representatives” in each place where the words “the personal representatives” occur.

Explanatory note

This section implements the recommendation in paragraph 2.122.

Repeals

44.—From the coming into force of this Act, the Acts in the Schedule are repealed to the extent specified.

Explanatory note

This draft *Trustee Bill 2008* implements the recommendations in the Report that involve the reform and modernisation of the law of trusts, including the replacement of most of the *Trustee Act 1893* (as amended) with a modern legislative code. As pointed out in the Introduction to the Report, the Commission will complete its review of the law of trusts in Project 21 of its *Third Programme of Law Reform 2008-2014*, which concerns the effect on trust law of the impending repeal of the *Settled Land Acts 1882 to 1890* by the *Land and Conveyancing Law Reform Bill 2006*. On completion of that project, the replacement in full of the 1893 Act would be possible.

SCHEDULE

REPEALS

Conveyancing Act 1881, sections 42 and 43

Trustee Act 1893⁹

Trustee (Authorised Investments) Act 1958

Central Bank Act 1997, section 80

⁹ Subject to the points made in footnote 1 of this Appendix and the explanatory note to section 44.