



Trusts and Succession (Scotland) Act 2024

2024 asp 2

PART 1

TRUSTS

CHAPTER 8

POWERS OF THE COURT

PROSPECTIVE

Application in respect of defective exercise of fiduciary power etc.

68 Application in respect of defective exercise of fiduciary power etc.

- (1) **This section** applies where a relevant person—
- (a) considers that a trustee has taken a decision in purported exercise of a fiduciary power but that taking it was a defective exercise of the power, or
 - (b) reasonably apprehends that a trustee is about to take a decision in purported exercise of a fiduciary power but that taking it would be a defective exercise of the power.
- (2) The relevant person may apply to the court for an appropriate remedy in respect of the decision taken or as the case may be of the decision which is about to be taken.
- (3) The grounds on which the court may grant such a remedy are—
- (a) that the trustee, in taking the decision, either has considered (or would be considering) the wrong question or has not considered (or would not be considering) the correct question,
 - (b) that the trustee, in taking the decision, either has failed (or would be failing) to take a relevant consideration into account or has taken (or would be taking) an irrelevant consideration into account,
 - (c) that taking the decision was (or would be) ultra vires,
 - (d) that taking the decision was (or would be) fraud on a power,

Status: This version of this cross heading contains provisions that are prospective.

Changes to legislation: There are currently no known outstanding effects for the Trusts and Succession (Scotland) Act 2024, Cross Heading: Application in respect of defective exercise of fiduciary power etc.. (See end of Document for details)

- (e) that in taking the decision the trustee failed (or would be failing) to act honestly or in good faith,
 - (f) where the application is made in respect of a decision mentioned in [paragraph \(a\) of subsection \(1\)](#)—
 - (i) that no reasonable person, properly instructed as to the facts and the law, could have come to the decision, or
 - (ii) that in some other way the decision was perverse,
 - (g) where the application is made in respect of a decision mentioned in [paragraph \(a\) of subsection \(1\)](#), that the decision would not have been taken but for the trustee being in error as to fact or law, and
 - (h) where the application is made in respect of a decision mentioned in [paragraph \(b\) of subsection \(1\)](#), that to take the decision would be perverse.
- (4) Where the application is made in respect of a decision mentioned in [paragraph \(a\) of subsection \(1\)](#), [paragraph \(a\) of subsection \(3\)](#) applies whether or not the trustee purported to consider the correct question.
- (5) For the purposes of [subsection \(3\)\(g\)](#), the error—
- (a) must relate to the factual or legal situation at the time the decision in question was taken, and
 - (b) need not be as to the effect or consequence of that decision.
- (6) Nothing in this section limits the power of the court, when considering whether it is appropriate to grant a remedy on the ground described in [subsection \(3\)\(g\)](#), to take into account the purpose (or likely purpose) of the relevant person making the application (for example, that the application is being made wholly or mainly for the purpose of avoiding the tax consequences of the trustee’s decision).
- (7) In [this section](#)—
- (a) “appropriate remedy” means—
 - (i) where the application is made in respect of a decision mentioned in [paragraph \(a\) of subsection \(1\)](#), reduction (whether partial or full), rectification, or declarator, and
 - (ii) where the application is made in respect of a decision mentioned in [paragraph \(b\) of that subsection](#), interdict, and
 - (b) “relevant person” means—
 - (i) the truster, a trustee, a beneficiary or a potential beneficiary,
 - (ii) any protector or supervisor, and
 - (iii) any other person if that other person has a patrimonial interest in the exercise of the fiduciary power in question (or in its not being exercised).
- (8) [This section](#) applies—
- (a) irrespective of when the trust was created, but
 - (b) only as regards a decision taken (or, as the case may be, which it is reasonably apprehended will be taken) after the section comes into force.

Commencement Information

II S. 68 not in force at Royal Assent, see [s. 88\(3\)](#)

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