

EXPLANATORY NOTES

Judicial Factors (Scotland) Act 2025
(asp 3)

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These notes relate to the Judicial Factors (Scotland) Act 2025 (asp 3)
which received Royal Assent on 27 January 2025

JUDICIAL FACTORS (SCOTLAND) ACT 2025

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Judicial Factors (Scotland) Act 2025. They do not form part of the Act and have not been endorsed by the Parliament.

2. These Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE ACT

3. The Act implements the Scottish Law Commission's recommendations in its Report on Judicial Factors[1]. It consolidates and updates the various Judicial Factors Acts dating from 1849 to 1889, and related legislation, and aims to put in place an updated and comprehensive regime in this area of the law. The Act is in 6 parts, as follows:

- Part 1 makes provision for the appointment of judicial factors by application to the Court of Session or the appropriate sheriff court. It makes clear that it is open to the Court of Session or the sheriff court to appoint a judicial factor in the course of other proceedings, gives the courts a power to appoint an interim judicial factor in certain circumstances, sets out the grounds for appointing a judicial factor, and lays out the necessary qualifications for a judicial factor. It makes provision for the factory estate to vest in a judicial factor and for a judicial factor to intromit with the estate, and for the remuneration of judicial factors. It places a duty on the Scottish Ministers to issue guidance about the appointment of judicial factors on the estates of missing persons.
- Part 2 deals with the functions a judicial factor has by virtue of appointment. It confers a general function of holding, managing, administering and protecting the factory estate for the benefit of those with an interest in the estate. It provides that a judicial factor has all the powers of a natural person beneficially entitled to the estate, with an illustrative list of such powers provided in schedule 1. It includes provision enabling a judicial factor to request relevant information in relation to the estate from bodies and individuals. In relation to the specific functions of judicial factors, the Act preserves the existing duty to prepare an inventory of the estate, and introduces a new duty to prepare a plan as to how the judicial factor proposes to hold, manage, administer and protect the estate, which must be

[1] Scottish Law Commission's Report on Judicial Factors.

approved by the Accountant of Court ("the Accountant"). It requires the judicial factor to regularly report to the Accountant, including by the submission of accounts, the factor's dealings with the factory estate.

- Part 3 makes provision about third parties acquiring title from or entering into dealings with judicial factors, including making it clear that the judicial factor stands in place of the factory estate in any such dealings.
- Part 4 sets out simplified administrative processes for the distribution, termination, recall and discharge of a judicial factor. It provides for the approval by the Accountant of a scheme for distribution of the factory estate, avoiding the need to refer the matter to the court where there is no dispute. Where there is an objection, the Accountant must refer the matter to the court. It sets out processes for distribution of the factory estate on application by interested parties, for the termination of a factory estate and the recall and discharge of judicial factors, the appointment of replacement judicial factors in the case of death or ceasing to perform duties, and for the resignation of judicial factors.
- Part 5 updates the current provision in relation to the requirements of the office of the Accountant of Court, particularly the function of supervising judicial factors. The Accountant currently has the power to direct a judicial factor as to how the duties of the office should be performed, and the power to require certain information from banks. These powers have been preserved and updated in the Act, with the Accountant being able to request any information relevant to their functions from any person or body, and the recipient of such a request, subject to certain exceptions, being under a duty to comply. The Act also imposes a duty on the Accountant to investigate any misconduct or failure by a judicial factor and report serious misconduct or material failure to the court.
- Part 6 contains miscellaneous and final provisions, including abolishing the power to appoint a curator bonis, an interpretation clause and provision for commencement of the Act.

CROWN APPLICATION

4. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that the Crown will be bound by an Act of the Scottish Parliament or Scottish statutory instrument unless the provision expressly exempts it. This Act applies to the Crown in the same way as it applies to everyone else.

COMMENTARY ON SECTIONS

Part 1 – Appointment of judicial factor

Appointment of judicial factor

5. Section 1 provides, at subsection (1), for the court to appoint a judicial factor on an estate if the conditions for appointment, set out in section 4, are met. For appointment to take place, an application must be made to the court by an interested person, defined in subsection (7) as a person that the court is satisfied has an interest in the appointment of a judicial factor on the estate. This might be a person who has an interest directly in the estate itself, or a person

whose interests are affected by the estate, for example the owner of a property which adjoins property forming part of the estate, where that estate property is in a state of disrepair such that damage might be caused to the neighbouring property.

6. Subsection (7) also contains a definition of "the court" for the purposes of this section and section 3. The effect of that definition is that the Court of Session and the appropriate sheriff court have jurisdiction to appoint a judicial factor under either section 1 or 3. In circumstances where none of the other sheriff courts have jurisdiction, Edinburgh sheriff court will have jurisdiction. The other sheriff courts will have jurisdiction where:

- a part of the estate comprising at least one fifth of its value is located in the sheriffdom of that court,
- the person who made the application to the court, or any other person with an interest in the estate, is resident in the sheriffdom of that court, or
- where the estate belongs to a person who is not an individual, such as a limited company, the person has their registered office or a place of business in the sheriffdom of that court.

7. Subsection (2) places a requirement on persons applying for the appointment of a judicial factor to notify every person with an interest in the estate. Subsection (3) provides a further route for appointment of a judicial factor on an estate, by providing that the court may appoint a judicial factor during the course of proceedings in that court. The conditions of appointment set out in section 4 again require to be met, and the proceedings must have some connection to the estate on which the court wishes to appoint a judicial factor. Appointment can be done by the court without an application having been made, or a person who is party to the proceedings can make an application provided they fall within the definition of "interested person" set out in subsection (7). Subsection (4) places a requirement on the clerk of court to notify every person with an interest in the estate that the court is minded to make an appointment under subsection (3)(a)(i), while subsection (5) places that requirement on a party who makes a motion for appointment under subsection (3)(a)(ii). Subsection (6) then sets out the circumstances in which the court may determine that intimation does not require to be given under subsection (2), (4) or (5).

8. Section 2 adds further intimation requirements which are to apply, in addition to those set out in section 1, in relation to the appointment or potential appointment of a judicial factor to the estate of a charity.

9. Subsection (1) places a requirement on persons applying for the appointment of a judicial factor to the estate of a charity to notify the Office of the Scottish Charity Regulator ("OSCR") (unless OSCR is the applicant), and to advertise to the general public, that the application has been made. Subsection (2) requires the clerk of court to notify OSCR, and advertise to the general public, where the court is minded to appoint a judicial factor to the estate of a charity under section 1(3)(a)(i), while subsection (3) places that requirement on a party making a motion for the appointment of a judicial factor in the course of other proceedings relating to the estate of the charity under section 1(3)(a)(ii). Subsection (4) sets out the circumstances in which the court may determine that advertisement need not be made to the general public. The court is not given the power to determine that OSCR need not be notified.

Interim judicial factor

10. Section 3(1) makes provision for the appointment of an interim judicial factor. This can be done while an application under section 1(1), or a motion under section 1(3)(a)(ii), for appointment of a permanent judicial factor is undergoing consideration. In either case, to appoint an interim judicial factor the court must consider that the appointment would be necessary or expedient, for example where a business partnership has deteriorated to the extent that the business is at risk unless immediate action is taken. Applications for the appointment of an interim judicial factor can be made by the original applicant under subsection 1(1), or, where a motion has been made under section 1(3)(a)(ii), by the applicant or another party to the proceedings provided they fall within the definition of "interested person" in section 1(7). The court may also appoint an interim judicial factor, pending determination of an application under section 1(1) or a motion under section 1(3)(a)(ii), without any application having been made. There is no requirement for the conditions of appointment set out in section 4 to apply in order for an interim judicial factor to be appointed.

11. Subsection (2) makes clear that the provisions of the Act apply to an interim judicial factor, unless the context requires otherwise or the court makes different provision when appointing the interim judicial factor. Subsection (3) requires the Accountant to review the progress being made by any interim judicial factory – since appointment of interim judicial factors will be open-ended, there will be no need for the court to order extensions to their appointment. The review provision therefore provides a mechanism by which to ensure that satisfactory progress is being made.

Conditions for appointment of judicial factor

12. Section 4 sets out the conditions which a court must consider to be satisfied in relation to an estate in order to appoint a judicial factor under section 1(1) or (3). If the court does not consider that the conditions are met, then it will not be competent for the court to appoint a judicial factor.

13. The first condition, set out in subsection (1)(a), is that an estate either requires to be managed, or requires actings to be carried out in relation to it. Subsection (2) provides that "actings" includes any actions required to hold, administer, or protect the estate for the benefit of any persons who have an interest in that estate. This is not an exhaustive list and so if other actions in relation to the estate are required then it may still be competent for the court to appoint a judicial factor on that estate.

14. The second condition, set out in subsection 1(b), is that the court must be satisfied either that it is not possible, practicable, or sensible for the person who would ordinarily be responsible for the required actings or management to carry them out, or that it would be to the advantage of the estate for a judicial factor to be appointed to carry them out. It might not be possible for a person to carry out actings if, for example, they are not old enough to legally do so. It might not be practical for a person to carry out actings if that person lives abroad, or it might not be sensible for a person to carry out actings where there is a dispute between partners of a partnership which would otherwise be responsible for the estate.

Qualification for appointment as judicial factor

15. Section 5(1) sets out the requirements which a person must fulfil in order for that person to be appointed as a judicial factor. A person must be an individual of full legal capacity, meaning over the age 16 and not subject to any legal incapacity which would prevent them carrying out any actions. The individual must, in the opinion of the court making the

appointment, be suitable to act as judicial factor on the estate. There is no requirement that they hold any specific qualification such as a legal or accounting qualification, although it is expected that in practice the majority of judicial factors appointed will be legal or financial professionals. Subsection (2) makes clear that the Scottish courts have jurisdiction in relation to the judicial factory even if the person who is appointed as judicial factor is domiciled outside of Scotland.

Finding of caution

16. Section 6 gives a power to any court which appoints a judicial factor to require the judicial factor to find caution for their performance of the functions of judicial factor, where there are exceptional circumstances which justify it. This means that the judicial factor would be required to lodge with the court a bond of caution, which would act as financial security to allow the court to recover from the judicial factor any financial losses suffered by the estate as a result of the judicial factor's actions in managing the estate.

Intimation and recording of notice of appointment

17. Section 7 requires the clerk of a court which appoints a judicial factor to notify the Accountant of the appointment, and to arrange for notice of the appointment to be recorded in the Register of Inhibitions[2]. Under subsection (3), the notice must include an address at which documents can be served on the judicial factor. Both the notification and the recording must be done as soon as reasonably practicable after the court has issued its order or decision (in the form of an interlocutor) confirming the appointment of the judicial factor. However, under subsection (2), if the court has required the judicial factor to find caution under section 6, then the clerk of court is not to send the notice for recording until the Accountant has confirmed that caution has been found.

18. Subsection (4) then provides that, if the judicial factory lasts for 5 years or longer, the judicial factor must re-record the appointment in the Register of Inhibitions 5 years after the original recording, and confirm to the Accountant when this has been done. This obligation repeats every 5 years for the duration of the judicial factory. Subsection (5) provides that all fees for recording or re-rerecording in the Register of Inhibitions are to be paid from the factory estate.

19. Section 8(1) places a requirement on the Scottish Ministers to periodically review the appropriateness of the recording of notices of appointment of judicial factors in the Register of Inhibitions. If the outcome of such a review is that another register would be more appropriate, then the Scottish Ministers may make regulations which change the requirement to record such notices in the Register of Inhibitions, and which specify which register is to be used instead. This can either be a register which already exists, or a bespoke register specifically for judicial factories. Any such regulations are subject to the affirmative procedure.

20. Subsection (2) provides that if the Scottish Ministers make regulations which specify that notices are to be registered in an existing register, then the regulations must also make the legal provision necessary for that register to be used.

[2] A register, maintained by the Registers of Scotland, of legal documents and proceedings which prevent the person affected by the document or proceedings from selling or transacting in relation to their property.

21. Subsection (3) provides that if the Scottish Ministers make regulations which specify that a bespoke register specifically for judicial factories is to be used, then the regulations must establish such a register, and may provide for another person, such as the Accountant, to be responsible for its maintenance. Subsection (3) then goes on to set out further detail which may be included in such regulations.

Vesting of estate in judicial factor

22. Section 9 provides for the whole of the factory estate to vest in the judicial factor on appointment, unless the court has required the judicial factor to find caution, under section 6. In that case, the factory estate will vest in the judicial factor on the date on which the Accountant confirms in writing, to both the court and the judicial factor, that this requirement has been met. When the estate vests in the judicial factor, the judicial factor has full legal rights in relation to the estate as though they were the owner of the estate. "Estate" is defined in section 53 as including moveable and heritable property.

23. Subsection (2) and (3) make clear that in relation to a judicial factor appointed on the estate of a solicitor under section 41 of the Solicitors (Scotland) Act 1980, the estate which vests in the judicial factor includes property or assets which are held by the solicitor on behalf of other people, such as clients, whether or not that property is held by the solicitor in their capacity as a solicitor. This means that funds held by the solicitor as, for example, a trustee or executor are also included in the factory estate.

Warrant to intromit with estate

24. Section 10 requires the clerk of the court which appoints a judicial factor to issue the judicial factor with a certified copy of the interlocutor confirming the appointment without delay. Subsection (2) provides that the certified copy gives the judicial factor evidence of their right to access and deal with the property which vests in them by virtue of section 9. Subsection (3) prevents the clerk of court from issuing the copy until any bond of caution required by virtue of section 6 has been received.

Remuneration and reimbursement of judicial factor

25. Section 11(1) entitles judicial factors to be remunerated for carrying out their functions as judicial factor. Subsection (2)(a) places a requirement on the Accountant to fix rates of such remuneration, after carrying out appropriate consultation. Paragraph (b) requires the Accountant to consult each individual judicial factor appointed and to set the frequency of payment for that judicial factor following that consultation.

26. Subsection (3) allows the Accountant to fix different payment rates in respect of different kinds of work that might be carried out by judicial factors, or for different circumstances. It also allows the Accountant to fix different rates for interim judicial factors. Subsection (4) requires the Accountant to review the rates of payment at least annually. Under subsection (5), the remuneration payable to a particular judicial factor does not require to be fixed in accordance with this section – for example, a rate of remuneration might be fixed for a particular judicial factor which is not based on any consultation having been carried out.

27. Subsection (6) allows judicial factors to appeal to the court which appointed that judicial factor in relation to both the rate and frequency of remuneration determined by the Accountant in relation to that judicial factor. Subsection (7) makes clear that there is no further right of

appeal in relation to a determination by the court following an appeal made under subsection (6). Subsection (8) allows the judicial factor to recover from the factory estate any outlays which the judicial factor incurs in carrying out their functions, whenever those outlays are incurred.

Guidance about the appointment of judicial factors on the estates of missing persons

28. Section 12 places a requirement on the Scottish Ministers to issue guidance about the appointment of judicial factors to the estates of missing persons. Under subsection (2), this guidance can be reviewed and revised by the Scottish Ministers. Subsection (3) requires the publication of the guidance when originally prepared, or when updated. It allows for the guidance to form part of another document, such as guidance about the appointment of judicial factors generally. Any such guidance might cover how to evidence a person as missing when making an application for appointment under section 1, the ability of a judicial factor to request specific powers under section 11, situations where the interests of the estate may not align with the wishes of the missing person, what happens if a missing person returns, and any interaction with the Presumption of Death (Scotland) Act 1977.

Part 2 – Functions of judicial factor

Functions of judicial factor

29. Section 13(1) provides that the general function of judicial factors is to hold, manage, administer, and protect the factory estate, for the benefit of those who have an interest in that estate. This is a fiduciary duty which is placed on judicial factors, whose actions in respect of the factory estate must always be for the benefit of persons with an interest in the estate. Subsection (2) clarifies that the general function is subject to variation by the court, in the interlocutor appointing the judicial factor (under section 14(1)), or subsequently following an application having been made to the court (section 14(2)).

30. Subsection (3) places judicial factors under a duty, when carrying out either the general function, or any of the factory functions, to exercise care, prudence, and diligence, and to take professional advice, such as from a solicitor or an accountant, when appropriate – consulting with the Accountant as to whether it is appropriate, if required, under subsection (4).

31. Subsection (5) prohibits judicial factors from delegating the general function or any factory function unless that delegation has been authorised in the appointing interlocutor or by the Accountant, or is provided for elsewhere in the Act or any other enactment. The factory functions are defined in subsection (7) as meaning the standard powers and the various functions conferred on judicial factors by virtue of sections 15 to 22 of the Act. These are subject, in either case, to: any variation made by the court in appointing the judicial factor or subsequently following an application having been made to the court; any other provision of law which impacts on the judicial factor's powers. The factory functions also include any additional function conferred on a particular judicial factor by the court under section 14(1) or (2). The standard powers are defined as meaning all of the powers of a natural person beneficially entitled to the estate. This means that the judicial factor is entitled to do anything in relation to the estate which an individual who owned the estate would be entitled to do. An illustrative list of such powers is set out in schedule 1, but a judicial factor may exercise a power which a natural person entitled to the factory estate would be entitled to carry out even where that power does not appear on the list in schedule 1.

32. Subsection (6) provides that, on the appointment date or the date on which the Accountant confirms that the requirement to find caution has been found (if applicable), the standard powers, as defined in subsection (8), are transferred to the judicial factor.

Power of court to specify functions of judicial factor

33. Section 14 sets out the powers that the court has in relation to the conferring of functions on a judicial factor. Subsection (1) relates to the interlocutor issued by a court appointing a judicial factor. Paragraph (a) allows the court to specify in the interlocutor that there is withheld from a judicial factor any function which would otherwise be conferred on the judicial factor by virtue of the Act, while paragraph (b) gives the court the power to confer on the judicial factor any function in addition to those ordinarily conferred.

34. Subsection (2) makes provision for the judicial factor to apply to the court after appointment for the conferral of a further function, or the removal of any function previously conferred (either by virtue of the appointing interlocutor or a previous application under this subsection). Subsections (3) and (4) require the judicial factor to notify the Accountant of any application under subsection (2), and the Accountant to investigate the matter and report to the court as to whether, in the Accountant's view, the application should be granted.

Power of judicial factor to require information

35. Section 15(1) grants to judicial factors the power to serve notice on any person requesting that the person supply information which the judicial factor reasonably considers relevant to their functions – this might include, for example, requests being made to banks for financial information relating to the estate. Subsection (3) places a requirement on persons receiving notice under subsection (1) to comply with the notice, unless, as set out in subsection (4) they are a reserved body by virtue of paragraph 3 of Part III of schedule 5 of the Scotland Act 1998, a Minister of the Crown, a department of the Government of the United Kingdom, or a public body operating wholly in relation to a reserved matter in accordance with the Scotland Act 1998. Such persons may choose to supply the information requested, but are not required to do so under the Act.

36. Subsection (5) provides that if the information can be obtained by the judicial factor under any other enactment, a person who receives notice sent under subsection (1) can, instead of supplying the information, direct the judicial factor to the other means by which the judicial factor can obtain the information, either free of charge or under another enactment, or both. For example, by accessing publicly available information registered with Companies House. Subsection (6) makes clear that, while this section does not authorise a person to charge a fee for supplying information in compliance with a notice sent under subsection (1), if another enactment authorises the charging of a fee for supplying that information then that fee may be charged. Subsections (7) and (8) make clear that this section does not override the provisions of data protection legislation as defined in the Data Protection Act 2018, meaning that a person is not required to supply information where to do so would be in breach of a provision of that legislation – but the provisions of the Act are relevant in determining whether or not that is the case.

Ingathering

37. Section 16 places judicial factors under a duty to ingather the factory estate, meaning the judicial factor must collect and take possession of all of the property which forms part of the estate. Subsection (2) gives the judicial factor the power to take steps to have the title to such property transferred to the judicial factor – this might include, for example, the registration

of a notice of title in the Land Register. Subsection (3) places the judicial factor under an obligation to notify creditors and debtors of the estate of their appointment as judicial factor, and to ensure that in relation to financial assets it is apparent to persons viewing those assets that they are held by the judicial factor in that capacity, to ensure that the assets of a judicial factory do not get mixed up with the personal or business assets of the judicial factor, or of another factory if the factor is appointed to more than one estate. For example, the judicial factor keeping the funds of the factory estate in their personal bank account would be in breach of this provision.

Inventory and management plan

38. Section 17(1) places an obligation on judicial factors to compile and send to the Accountant an inventory of the property comprising the factory estate, within 6 months of appointment. When sending the inventory to the Accountant, the judicial factor must also send any additional documents specified in rules of court. Subsections (2) and (3) set out the process for review of the inventory by the Accountant, and subsequent modification and approval. When the inventory has been approved, both the judicial factor and the Accountant must sign it, and the inventory is then treated as a definitive statement of the property within the factory estate as at the date the judicial factor was appointed. However, if additional information is discovered after that date, then under subsection (5) the judicial factor and the Accountant may take that into account in their dealings with the factory estate.

39. Section 18(1) requires judicial factors to send to the Accountant a plan setting out how the judicial factor intends to hold, manage, administer and protect the estate. The plan must be sent within 6 months of the date on which the judicial factor is appointed, and must be accompanied by any additional documents specified in rules of court.

40. Subsections (2) and (5) set out the process for review of the plan by the Accountant, and subsequent modification or approval. Under subsection (2), the Accountant must approve a plan submitted by a judicial factor, either without modification or subject to modifications specified by the Accountant. Subsection (3) allows the Accountant to request any further information from the judicial factor prior to determining whether to require modifications to a plan. If the Accountant has required modifications under subsection (2), then under subsection (4) the Accountant must require the judicial factor to resubmit the plan with those modifications made. Subsection (4) also allows the judicial factor to make their own modifications, in addition to those required by the Accountant, before submitting the plan. The effect of subsection (5) is that, where a plan has previously been modified and resubmitted and the Accountant requires further modification, the Accountant does not need to require the judicial factor to resubmit the plan. In such cases, subsection (8)(a) places the judicial factor under a duty to administer the estate in accordance with directions issued by the Accountant.

41. If a management plan is approved by the Accountant with no further modifications required, then under subsection (6) the judicial factor must review the plan at least annually, and at other times on the direction of the Accountant, and may modify the plan with the approval of the Accountant. In granting that approval the Accountant may specify further modifications that must be made. If the judicial factor does not make those modifications then under subsection (8)(b) the judicial factor must manage the estate in accordance with the directions of the Accountant. Subsection (7) requires the judicial factor to administer the estate in accordance with an approved plan. Subsection (9) places a reporting duty on the judicial factor in relation to dealings with the estate in accordance with the plan. Subsection (10)

provides for references in this section to "holding, managing, administering and protecting the estate" to apply to the extent that the individual judicial factor is required to perform those actions by virtue of the interlocutor appointing the judicial factor and any subsequent variation made to the judicial factor's duties by the court.

Submission of accounts etc.

42. Section 19 requires judicial factors to report to the Accountant in relation to the judicial factor's dealings with the estate to which the judicial factor is appointed. Subsection (2) requires that such reports include accounts, and provides for the judicial factor and the Accountant to agree on the format of reports and the way in which they are to be submitted. If the Accountant and the judicial factor are unable to reach agreement, then the Accountant may direct the format and manner of submission of the reports, and the judicial factor will be required to comply with that direction. Reports are to be submitted as soon as possible following the end of each reporting period. The reporting period is defined in subsection (3) and will be fixed by the Accountant for each individual judicial factor, with the first period starting on the date that the judicial factor is appointed. Subsection (4) provides that reporting periods will normally be between one and two years, although in exceptional circumstances the Accountant may specify in relation to a judicial factor a reporting period of less than one year. Subsection (5) allows the Accountant to extend a reporting period if the judicial factor can demonstrate why the extension is required, but such extension is in relation to the reporting year in which the application is made – subsequent reporting periods will revert to the previously fixed duration.

Investment

43. Section 20 places judicial factors under a duty to consider whether it would be appropriate to invest funds which form part of the factory estate and, if so, how such funds should be invested. If, following that consideration, the judicial factor is of the view that investment would be appropriate, they are placed under a further duty to make the appropriate investment.

Enforcing or defending claims

44. Section 21 places judicial factors under a duty to enforce any claim which it is competent to raise on behalf of the estate, or to defend any claim which is raised against the estate, if the judicial factor believes that it would be reasonable and prudent to do so. This will include claims in relation to breach of contract and delictual liability (where a civil legal wrong has been committed). Subsection (2) allows a judicial factor to seek the Accountant's views as to whether it would be reasonable and prudent to enforce or defend any particular claim, where the judicial factor requires advice on the matter.

Duty where estate object of dispute

45. Section 22 creates a specific duty where the sole or main reason for a judicial factor's appointment to a factory estate was that the factory estate was not being properly managed as a result of disagreement between the persons responsible for managing it as to how to do so. In these circumstances, the judicial factor must encourage the responsible persons to agree how the estate is to be managed. Subsection (3) authorises the judicial factor to act as a mediator or arbitrator, or to appoint a mediator or arbitrator, if the judicial factor considers one of these methods of dispute resolution to be the appropriate way to facilitate agreement. Subsection (4)

places the judicial factor under a further duty, where agreement between the relevant parties is not reached, to prepare a scheme, which the judicial factor considers fair, for either the ongoing management or the distribution of the estate – subsection (5) clarifies that this scheme might require the division and sale of the estate, or a part of the estate.

Part 3 – Dealing etc. with third parties and validity of certain transactions

46. Section 23 provides protection for third parties who acquire title to property either directly from a judicial factor, or from a person who derived their title from a judicial factor. Paragraph (a) has the effect that where a judicial factor's appointment is recalled after a third party has acquired title from the judicial factor (for example, where the judicial factor has sold a house which formed part of the factory estate to the third party), the judicial factor's recall cannot be used as a ground to challenge the third party's title. Under paragraph (b), third parties who have acquired title from a person other than a judicial factor, where the title has previously been held by a judicial factor, cannot have their title challenged on the basis that it should not have been transferred to the person from whom they acquired title.

47. Section 24 makes clear that where the judicial factor enters into dealings with a third party, they do so with the full rights and responsibilities which the factory estate would have, were the factory estate to enter into such dealings. This means that judicial factors (in their capacity as judicial factors and not as individuals) are liable for any payment or obligation which the factory estate is due to the third party, and are entitled to receive any payment or enforce any obligation which the third party is due to the factory estate.

48. Section 25 applies where a person is, or ought to be, aware that a judicial factor is acting in the capacity of judicial factor, and the person enters into a contract with the judicial factor on that basis. Subsection (2)(a) offers judicial factors protection by ensuring that when they enter into contracts on behalf of the factory estate, the person with whom they have entered into the contract, or any third party, may enforce their rights only against the factory estate and not against the judicial factor. Subsection (2)(b) has the effect that any court action raised in relation to the contract may only be raised by, or against, the judicial factor as judicial factor, and not as an individual.

49. Section 26 provides for the expenses of any court proceedings which the judicial factor enters into on behalf of the factory estate to be paid by the factory estate. This applies regardless of whether the judicial factor raises the court proceedings, or is defending a claim against the estate.

50. Section 27 makes provision in relation to claims for damages which arise as a result of any actions of the judicial factor or any person appointed or employed by the judicial factor in relation to the factory estate. This includes claims for both delictual liability (civil legal wrongs) and unjustified enrichment (where one party has benefitted without legal justification at the expense of another person). Subsection (2) requires that any claim be raised against the judicial factor in the capacity of judicial factor. Subsection (3) provides that any damages awarded as a result of a claim, including any expenses awarded against the judicial factor, must be paid from the factory estate, unless the damages arose as a result of a breach of duty by the judicial factor and the court considers that the judicial factor should be held personally liable.

51. Section 28 relates to the prescription (or legal time limit) of obligations which are due to or by a factory estate. Subsection (1) makes clear that the appointment of a judicial factor does not affect the prescriptive period (or time limit) of any such obligations, which will

continue as though no judicial factor had been appointed. Subsection (2) excludes from that provision any obligations which are owed by the judicial factor to the factory estate, providing that in relation to such obligations, the prescriptive period is paused for the duration of the judicial factor's appointment.

52. Section 29 applies where the factory estate forms part of a trust, and the judicial factor wishes to exercise a function which the judicial factor would ordinarily be entitled to exercise in relation to the estate, but considers that the terms or purposes of the trust do not allow for the exercise of the function.

53. The process by which the judicial factor must apply for consent, and the Accountant might grant it, is set out in subsections (2) to (5). Subsection (2) requires the judicial factor, in applying for consent, to notify any persons which rules of court require to be notified that the judicial factor intends to exercise the function. Subsection (3) requires the Accountant to be satisfied, before granting consent, that the exercise of the function would be in the interest of everyone with an interest in the trust estate, that the judicial factor has complied with all of the requirements of the application process, including those set out in rules of court, and that if any objection to the application has been made, that the objection does not justify refusing the application. If the Accountant determines that the requirement to give notice under subsection (2) has been complied with only in so far as reasonably practicable, for example a party has not been notified because their address cannot be established, then subsection (3)(b)(i) gives the Accountant flexibility to treat this requirement as satisfied. Subsection (4) allows the Accountant to give consent subject to conditions. Subsection (5) makes provision for the procedure for the notification which must be made under subsection (2). Such notification must be done in the manner specified in rules of court, and set out what the exercise of the function would involve and how the person being notified can object to the application to exercise the function. Subsection (6) prohibits the judicial factor from exercising the function unless the Accountant has consented to the function being exercised. Subsection (7) provides that where the judicial factor has applied for and obtained consent, the judicial factor cannot be treated as having acted at variance with the trust.

Part 4 – Distribution of factory estate, termination, recall, and discharge of judicial factor

54. Section 30 sets out the basic procedure for the distribution of the factory estate on the basis of a scheme formulated by the judicial factor. This will apply where the judicial factor is of the view that either the purpose for the appointment of a judicial factor has been fulfilled or has ceased to exist, or that there are not sufficient funds in the factory estate to meet the cost of the judicial factory continuing. By virtue of subsection (1)(b), this section also applies in relation to a scheme for the distribution of the factory estate under section 22, where the estate is the object of dispute.

55. Section 30(2) requires the judicial factor to send a copy of the proposed distribution scheme, together with an up to date inventory of the factory estate, to the Accountant for approval. Subsection (3) provides for the Accountant to either approve the scheme, subject to any modifications which the Accountant requires, or reject it. If the Accountant approves the scheme, then subsection (4) requires the judicial factor to intimate the scheme to OSCR, where the estate is that of a charity, and to every person who has an interest in the estate, sending to each such person a copy of the scheme and the inventory. Subsection (5) provides that where the estate is that of a charity, the judicial factor must give notice to the general public that a scheme for distribution has been approved. Subsection (6) gives the Accountant the power to

determine that the requirements to notify interested persons, or to advertise to the general public, do not apply in a particular case. Subsection (7) allows those persons to submit to the Accountant an objection to the scheme within 21 days of receipt of intimation under subsection (4). Subsection (8) provides that if no objection is received, or if any objections are received but then withdrawn, the judicial factor is under a duty to distribute the estate in accordance with the scheme.

56. Where an objection is made to the scheme, subsection (9) requires the Accountant to refer the matter to the court which appointed the judicial factor, and to notify the judicial factor and the other relevant parties that the referral has been made. Subsection (10) obliges the court to which a referral is made under subsection (9) to require the person who submitted the objection to lodge caution for the expenses of the court, except where the court considers that it would not be in the interests of justice to do so. Subsection (11) requires the court to give the judicial factor, the person who submitted the objection, and any other interested person, the chance to present the arguments in favour of the scheme or the objection to it. After hearing those arguments, the court may reject the objection and direct that the estate be distributed in accordance with the scheme. Alternatively, the court may instruct the judicial factor to distribute the estate in a different way, or make a different order which the court considers appropriate. Subsection (12) makes clear that a scheme for distribution under this section may relate to part only of an estate.

57. Section 31 sets out the process by which a person with an interest in the distribution of a factory estate can apply to the court for distribution. Subsection (2) sets out the notification requirements which a person who lodges such an application must comply with – subsection (3) gives the court the power to determine that this requirement does not apply in a particular case. Subsection (4) sets out the parties to whom the court is required to give the opportunity to make representations about the application and why it should or should not be granted. Subsection (5) sets out the options which are available to the court after hearing those representations – the court can either instruct the judicial factor to distribute the estate as the court directs, or the court can refuse the application, in which case no distribution will take place and the judicial factory will continue.

58. Subsection (6) sets out further conditions which apply if the application is made to the court by a person other than the judicial factor. The court must be satisfied that the applicant has tried to persuade the judicial factor to prepare and submit a scheme for distribution of the factory estate to the Accountant under section 30, and that the judicial factor has not done so and does not intend to do so. Alternatively, the court must be satisfied that the judicial factor has previously submitted a scheme to the Accountant under section 30, but that scheme has been rejected by the Accountant.

59. Subsection (7) sets out further requirements which apply if the applicant under subsection (1) is the judicial factor. Before instructing any distribution of the estate, the court must be satisfied that the judicial factor has prepared and submitted a scheme for the distribution of the estate under section 30, and that scheme has been rejected by the Accountant.

60. Subsection (8) obliges the court to require the applicant to find caution for the expenses of court proceedings under this section, unless the applicant is the judicial factor, or the court considers that it would not be in the interests of justice to impose such a requirement.

Termination, recall and discharge after distribution

61. Section 32 makes provision for the termination of the judicial factory, the recall of the judicial factor's appointment, and the discharge of the judicial factor, where the factory estate has been distributed in accordance with section 30(8) or (11) or section 31(5)(a).

62. Subsection (2) places the judicial factor under a duty to apply to the Accountant for termination, recall and discharge, and subsection (3) requires the application to be accompanied by the final accounts for the factory estate. Section (4) requires the Accountant to audit the final accounts and grant the termination, recall and discharge, unless subsection (5) applies. Subsection (5) applies if, having audited the accounts, the Accountant is of the view that there has or may have been misconduct or failure by the judicial factor. If the Accountant is of that view, section 41 will apply. Section 41 makes provision for the Accountant to take action where the Accountant believes that there has been, or might have been, misconduct, a failure to discharge duties, or a failure to comply with an instruction by the judicial factor.

63. Subsection (6) requires the Accountant to send a copy of the certificate of termination, recall and discharge, if granted, for recording in the Register of Inhibitions.

64. Section 33 sets out the process where a judicial factor dies or ceases to carry out the functions of judicial factor and no application has been lodged with the court for the appointment of a replacement judicial factor.

65. Subsection (2) applies where the judicial factor dies. The Accountant must determine whether the purpose for which a judicial factor was appointed still exists and, if it does, apply to the court for the appointment of a replacement judicial factor.

66. Subsection (3) applies where the judicial factor ceases to carry out the functions of judicial factor. The Accountant must apply to the court for the recall of the original judicial factor and the appointment of a replacement judicial factor.

67. Subsection (4) makes provision for a situation where a judicial factor has died or ceased to perform their duties, no application has been lodged for the appointment of a replacement judicial factor, and the Accountant is of the view that the purpose for which the judicial factor was appointed no longer exists but that the factory requires to be formally wound up. In that case, a duty is placed on the Accountant to apply to the court for the appointment of a judicial factor, for the specific purpose of bringing the judicial factory to an end.

68. Subsection (5) sets out duties that apply to a replacement judicial factor appointed as a result of an application made under subsection (2), (3) or (4). Paragraph (a) requires the factory accounts pertaining to the period of appointment of the original judicial factor to be brought up to date, and paragraph (b) requires those accounts to be closed with effect from the date of appointment of the replacement judicial factor. Paragraph (c) requires the replacement judicial factor to apply to the Accountant for the discharge of the original judicial factor, if the replacement judicial factor considers it to be appropriate to do so. Subsection (6) provides for the Accountant to grant an application for discharge of the original judicial factor made under subsection (5)(c) if the Accountant is satisfied that it would be appropriate to discharge the original judicial factor.

69. Subsection (7) provides for the expenses of applications under subsection (2), (3) or (4) to be paid from the factory estate, but gives the court discretion to direct otherwise.

70. Section 34 makes provision for the recall and discharge of judicial factors, in circumstances other than where the purpose for which the judicial factor was appointed has been fulfilled or there are not sufficient funds in the factory estate to meet the ongoing costs of the judicial factory.

71. Subsection (1) allows the court to recall and discharge a judicial factor on an application being made to the court by the judicial factor. Subsection (2) provides for the court to recall a judicial factor on an application being made by a person other than the judicial factor.

72. Subsections (3) to (7) set out more detail around the procedure that applies in relation to applications under subsection (1) by the judicial factor for recall and discharge, and to applications under subsection (2) by another party for recall of the judicial factor. Subsection (3) requires that applications also request the appointment of a replacement judicial factor, and subsection (4) requires that the appointment of a replacement judicial factor takes place at the same time as the original judicial factor is recalled. Subsection (5) sets out the requirements for intimation of an application made under subsection (1) or (2), while subsection (6) gives the court the power to determine that such requirements do not apply in a particular case. Subsection (7) provides that when the court grants the application to recall the judicial factor, the judicial factor must send the Accountant the accounts relating to the factory estate.

73. Subsection (8)(a) allows the judicial factor to apply to the court for discharge in the event recall is granted following an application made by another person under subsection (2). Subsection (8)(b) makes provision for applications under subsection (2). Subsection (8)(b)(i) requires the court to be satisfied that a person making an application under subsection (2) has an interest in the factory estate, and subsection (8)(b)(ii) requires the court to require the person making the application to find caution for the court expenses, unless that requirement would not be in the interests of justice.

74. Subsection (9) places an obligation on the Accountant to review the accounts for the factory estate when the court has granted a recall under subsection (1) or subsection (2). The Accountant must send to the court a report setting out the results of the audit and the Accountant's view as to whether, if an application has been made for the judicial factor to be discharged, the judicial factor should be discharged. Subsection (10) requires the court to consider the report from the Accountant and make any further inquiry it considers necessary before granting any application for discharge under this section.

Inventory and balance sheet

75. Section 35(1) applies in any circumstances where a replacement judicial factor has been appointed under section 33(2), (3)(b) or (4), or where a replacement judicial factor has been appointed under section 34(4) provided that the original judicial factor has not been discharged. The new judicial factor and the Accountant are required to agree the inventory and balance sheet for the estate, with effect from the date of appointment of the new judicial factor.

76. Subsection (2) applies if a replacement judicial factor has been appointed under section 34(4) and the outgoing judicial factor has been discharged. A new inventory and balance sheet do not need to be agreed, and the new judicial factor can proceed on the basis of the final inventory and balance sheet of the outgoing judicial factor.

Termination of judicial factory where insufficient funds

77. Section 36 makes provision for situations where the Accountant considers that, were the judicial factor to formulate a scheme for the distribution of the estate under section 30(1), there would not be sufficient funds in the factory estate to meet the cost of that formulation or the associated process of the judicial factor seeking approval of the scheme and thereafter distributing the factory estate.

78. Subsection (2)(a) requires the Accountant to direct the judicial factor to distribute the factory estate in the manner specified by the Accountant. Subsection (2)(b) to (c) require the Accountant to terminate the judicial factory, and recall and discharge the judicial factor. Subsection (3) provides for recording of the termination, recall and discharge in the Register of Inhibitions and subsection (4) provides that any fee for recording is to be paid from the factory estate. Subsection (5) creates an exception to subsection (2), by providing that if the Accountant is of the view that there has been, or may have been, misconduct or failure by the judicial factor, then subsection (2) will not apply, and section 41 will apply instead.

Ending of judicial factor's accountability on discharge

79. Section 37 sets out more detail about the legal effect of the discharge of a judicial factor. Subsection (1) provides that when the court issues an interlocutor containing an order for discharge, or the judicial factor is discharged by the Accountant, then the judicial factor is no longer legally accountable for anything done by the judicial factor in relation to any part of the factory estate in their capacity as judicial factor. Subsection (2) makes clear that if the judicial factor has incurred any criminal liability in the course of their actings as judicial factor, both civil liability, to the extent tied to the activities relating to that criminal liability, and the criminal liability continue following the judicial factor's discharge. The Accountant will not be able to take action against a judicial factor under section 41 once a judicial factor has been discharged.

Part 5 – Accountant of Court

Accountant of Court and Depute Accountant

80. Section 38 makes provision for the appointment of the Accountant of Court. The power to appoint the Accountant is already vested in the Scottish Courts and Tribunals Service (SCTS) under section 25 of the Administration of Justice (Scotland) Act 1933. Subsection (1) requires that the person appointed to the office of Accountant by SCTS must be appropriately qualified or experienced in law and accounting. Subsection (2) places a duty on the Scottish Ministers to periodically review that criteria and, if appropriate, change it by regulations, subject to the affirmative procedure.

81. Subsection (4) prevents the Accountant from holding any other office, unless express provision is made elsewhere in legislation in relation to a particular office which allows the Accountant to hold that office in addition to the office of Accountant. Subsection (5) makes provision for the SCTS to pay the Accountant for performing the role of Accountant and makes clear that payment from SCTS is the only payment that the Accountant is entitled to for carrying out the role of Accountant.

82. Subsection (6) requires the Accountant to charge fees for the Accountant's activities under the Act, and subsection (7) makes clear that those fees must cover any outlays which the Accountant reasonably incurs in carrying out those activities, and are to be paid from the factory estate. The exception to this is fees charged under section 46, which relates to the

Accountant complying with requests to provide information or allow access to documents to persons with an interest in the factory estate. In those cases, the fee is to be paid by the person making the request. Subsection (8) requires the Accountant to account, in the manner directed by SCTS, for any sums received by the Accountant other than remuneration. Subsection (9) allows the Accountant to waive the right to recover any fee that the Accountant considers that they are unlikely to be able to recover.

83. Section 39(1) establishes a power for SCTS to appoint a Depute Accountant on terms and conditions determined by SCTS. In practice, a Depute Accountant is already appointed by SCTS, and this provision creates a statutory basis for that appointment. Subsection (2) applies the same requirements to any person appointed to the role as apply to persons appointed to the role of the Accountant – they must be appropriately qualified in law and accounting, while subsection (3) places the same duty on the Scottish Ministers to review the criteria, and the power to change it by regulations, subject to the affirmative procedure, if appropriate. Subsection (5) provides that the role of the Depute Accountant is to carry out the role of Accountant when the Accountant is unable to do so, and makes clear that during any such period the Depute Accountant is to act and be treated as if they were the Accountant.

84. Section 40(1) sets out the general function of the Accountant, which is to supervise the performance by all judicial factors of the functions conferred on those judicial factors, however the functions were conferred. The Accountant must also seek to ensure that judicial factors perform their functions in accordance with any applicable legal requirements and guidance. Subsection (2) allows the Accountant to issue instructions to a particular judicial factor as to how that judicial factor is to carry out their functions.

Misconduct or failure of judicial factor

85. Section 41 makes provision for the Accountant to take actions where the Accountant has reason to believe that there is, or has been, misconduct, failure to discharge duties, or failure to comply with an instruction from the Accountant, on the part of a judicial factor. Such belief on the part of the Accountant may, for example, arise as a result of a report being made to the Accountant by a third party in relation to the conduct of the judicial factor.

86. Subsection (2) requires the Accountant to make investigations and allow the judicial factor to make representations about the suspected misconduct or failure. Subsections (3) and (4) provide that if, following that process, the Accountant is of the view that there has been serious misconduct or material failure, the Accountant is required to report that misconduct or failure to the court, and to any professional body of which the judicial factor is a member, or another body which has responsibility for dealing with complaints made in relation to members of that professional body. For example, if the judicial factor is a Scottish solicitor, the Accountant would be required to report the matter to the Scottish Legal Complaints Commission. The Accountant has discretion to determine what constitutes serious misconduct or material failure in the case of a particular judicial factor but this may include, for example, failing to comply with an instruction of the Accountant under section 40(2) without good reason.

87. Subsections (5) and (6) set out what happens when a matter is reported to the court under subsection (4). The court is required to allow the judicial factor the opportunity to make representations on the matter, and thereafter the court is empowered to dispose of the matter in any manner that the court considers appropriate. Subsection (6)(a) makes clear that a disposal by the court is final, meaning that there is no right of appeal against the court's decision by either the Accountant or the judicial factor. Paragraph (b) provides that any right any person

has to seek legal recovery of loss they have suffered as a result of the misconduct or failure of the judicial factor is retained, and that right is not affected by disposal by the court under this section.

88. Section 41 will cease to apply in relation to judicial factors when they are discharged.

Power of the Accountant to require information

89. Subsection 42(1) gives the Accountant the power to serve notice on any person requesting that the person supply information which the Accountant reasonably considers relevant to the Accountant's functions. This might be, for example, banks with whom a judicial factor has interacted in relation to the factory estate, where the Accountant has reason to believe there may have been misconduct on the part of the judicial factor. Subsection (2) places a requirement on persons receiving notice under subsection (1) to comply with the notice, unless, as set out in subsection (3), they are a reserved body by virtue of paragraph 3 of Part III of schedule 5 of the Scotland Act 1998, a Minister of the Crown, a department of the Government of the United Kingdom, or a public body operating wholly in relation to a reserved matter in accordance with the Scotland Act 1998. Such persons may choose to supply the information requested, but are not required to do so.

90. Subsection (4) provides that if the information can be obtained by the Accountant under any other enactment, a person who receives notice sent under subsection (1) can, instead of supplying the information, direct the judicial factor to the other means by which the Accountant can obtain the information. Subsection (5) makes clear that, while this section does not authorise a person to charge a fee for supplying information in compliance with a notice sent under subsection (1), if another enactment authorises the charging of a fee for supplying that information then that fee may be charged. Subsections (6) and (7) make clear that this section does not override the provisions of data protection legislation as defined in the Data Protection Act 2018, meaning that a person is not required to supply information where to do so would be in breach of a provision of that legislation – but the provisions of the Act are relevant in determining whether or not that is the case.

Audit by Accountant

91. Section 43 requires the Accountant to audit any accounts received from a judicial factor under a provision of the Act in accordance with the procedure set out in this section. Subsection (2) gives the Accountant the power to examine further information, and to send the accounts to an external accountant for auditing if the Accountant considers that it is necessary, or would be beneficial, to do so. If the Accountant does send the accounts to an external auditor, subsection (3) places the Accountant under a duty to supervise that external audit, and provides that the Accountant is still the person who is ultimately responsible for the accuracy of the audit. Under subsection (4), the Accountant is required to send a copy of the report on the audit to the judicial factor whose accounts have been audited. Subsection (5) requires the Accountant, or external auditor, to give the judicial factor an opportunity to explain anything in the accounts which requires explanation, and to explain any correction made to the accounts in the course of the audit, to the judicial factor. Subsection (6) requires the costs of any external audit to be paid from the factory estate.

92. Section 44 sets out the process which will apply when any objection or appeal is made by the judicial factor in relation to an audit carried out in accordance with section 43. The effect of subsection (1) is that, other than by the process set out in this section, the results of the audit are not open to challenge. Subsection (2) gives the judicial factor 21 days from the day on

which they receive the report on the audit to send a written objection to the Accountant. Subsection (3) requires the Accountant to consider any objection received, after which the Accountant can either amend the results of the audit based on the objection, or dismiss the objection. In the event that the Accountant dismisses the objection, subsection (4) allows the judicial factor to require the Accountant to refer the objection to the court. Subsection (5) makes clear that there is no right of appeal in respect of a decision made by the court following such referral.

Annual review

93. Section 45(1) places the Accountant under an obligation to publish an annual review detailing the Accountant's activities in relation to the relevant judicial factories, for the reporting year to which the report relates. The meaning of "relevant judicial factories" is set out in subsection (5), and it covers every judicial factory which is in place during the relevant reporting year. This means that judicial factories which existed at any time during, or for any portion of, the reporting year must be included within the scope of the report, whether or not they were in place at the time the reporting year started, or were still in place at the time the reporting year ended.

94. Subsection (2) gives the Scottish Ministers a power to make regulations setting out further detail about the reporting requirement. The regulations are subject to the negative procedure. Such detail must include how the review must be published, the information it must contain, and the timing of the reporting year. Subsection (3) allows the Accountant to include in each review further information which is not specified in the regulations made by the Scottish Ministers under subsection (2).

Inspection of records held by Accountant

95. Section 46 places the Accountant under an obligation to make certain documents relating to a factory estate available for inspection, or to provide copies of the documents, to a person with an interest in the factory estate who requests such copies or inspection. The documents are defined in subsection (4) as being the management plan, the inventory, the balance sheet, the annual accounts, and the audit report in relation to the relevant estate.

96. Subsection (1) requires the person to submit a request to the Accountant, and demonstrate a reason for requiring the copies or to inspect the documents. Subsection (2) requires the Accountant to charge the person making the request a fee for inspecting the documents or for the copies, while subsection (3) provides that any copies supplied under this section have the same evidential status as the original documents, meaning the person receiving the copies can rely on them in the same way as they could rely on the original documents, such as in court proceedings.

Inconsistency in judgement or practice

97. Section 47 requires the Accountant to submit a report to the Lord President of the Court of Session if the Accountant is of the view that the sheriff courts in Scotland are not consistent in their dealings in relation to judicial factors or factories. The Accountant must propose a rule of practice in relation to the inconsistency identified, and the Lord President may take such action as the Lord President considers appropriate – which may include adopting the rule proposed by the Accountant.

Right of judicial factor to require determination as regards decision of Accountant

98. Section 48 gives judicial factors a right to apply to the court which appointed them for a determination in relation to any decision that the Accountant has made in relation to the judicial factory. Essentially this is a right for the judicial factor to appeal such decisions to the court. Subsection (2) restricts the decisions in relation to which the judicial factor can make an application, by excluding decisions to dismiss an objection made in relation to an audit, under section 44(3), since section 44(4) already gives the judicial factor power to require the Accountant to refer such objections to the court. Decisions that the Accountant makes in relation to the amount or frequency of remuneration of the judicial factor are also excluded, since judicial factors already have a right of appeal by virtue of section 11(6). Subsection (3) provides that there is no right of appeal, by either the judicial factor or the Accountant, in respect of any decision made by the court following a referral made under this section.

Part 6 – Miscellaneous and general

99. Section 49 abolishes the office of curator bonis. A curator bonis was a person appointed by the court to manage the estate of a child, in the place of the child's legal guardian or the estate of a person lacking capacity to manage it. The office of curator bonis fell within the definition of a judicial factor in terms of the Judicial Factors Act 1849. The Adults with Incapacity (Scotland) Act 2000 abolished the role with reference to adults with incapacity, and removed reference to curators bonis in relation to judicial factors in the legislation. However, it remained competent for a court to appoint a curator bonis in relation to a young person, and the effect of the changes made by the 2000 Act was that any such curator bonis would not be subject to the supervision of the Accountant. The Act therefore abolishes the office to ensure that no curator bonis can be appointed, and that a court will be required to appoint a judicial factor, who will be subject to the supervision of the Accountant, instead.

100. Section 50 provides for the provisions of the Act to apply in relation to judicial factors appointed other than under the Act, including by virtue of the *nobile officium*, which is the Court of Session's common law power to exercise its discretion.

101. Section 51 sets out that the Scottish Ministers may, by regulations, make ancillary provision for the purposes of, or in connection with or for giving full effect to the Act.

102. Section 52(1) introduces schedule 2, which contains modifications to certain enactments. Note in particular the following modifications.

- Paragraph 1 modifies the Trusts (Scotland) Act 1921 to remove judicial factors from the ambit of that Act.
- Paragraphs 2 to 8 make consequential modifications to various Acts to reflect the replacement of historic legislation in relation to judicial factors by the Act.
- Paragraph 9 modifies the Bankruptcy (Scotland) Act 2016 to prevent property held by a debtor in the capacity of judicial factor from vesting in a trustee in sequestration, and to make provision for cases where a judicial factor is appointed to an insolvent estate. It also makes a number of consequential amendments.

103. Section 52(2) introduces schedule 3, which repeals certain enactments to the extent mentioned in the second column of that schedule. The Judicial Factors Act 1849 and the Judicial Factors (Scotland) Acts 1880 and 1889 are repealed in their entirety and will be replaced by the Act. The other repeals are consequential on these repeals.

104. Section 53 is the interpretation section. It contains definitions of certain terms used in the Act.

105. Section 54 sets out when the provisions of the Act will come into force (i.e. have legal effect). Most provisions will be brought into force by regulations as determined by the Scottish Ministers. These regulations will be laid before the Scottish Parliament but will not otherwise be subject to any parliamentary procedure. However, this section, section 51 (ancillary provision) and section 55 (the short title) come into force on the day after Royal Assent.

106. Section 55 provides for the short title (i.e. the Judicial Factors (Scotland) Act 2025), which is the name by which the Act may be cited in formal proceedings.

PARLIAMENTARY HISTORY

107. The following is a list of the proceedings in the Scottish Parliament on the Bill for the Act and significant documents connected to the Bill published by the Parliament during the Bill's parliamentary passage.

PROCEEDINGS AND REPORTS	REFERENCE
INTRODUCTION	
Bill as Introduced (05 December 2023)	SP Bill 40 (Session 6 (2023))
Explanatory Notes	SP Bill 40 – EN (Session 6 (2023))
Policy Memorandum	SP Bill 40 – PM (Session 6 (2023))
Financial Memorandum	SP Bill 40 – FM (Session 6 (2023))
Delegated Powers Memorandum	SP Bill 40 – DPM (Session 6 (2023))
Statements on Legislative Competence	SP Bill 40 – LC (Session 6 (2023))
STAGE 1	
Delegated Powers and Law Reform Committee (lead committee)	
Consideration in private (19 December 2023)	Minutes of proceedings (DPLR/S6/23/35)
Consideration in private (30 January 2024)	Minutes of proceedings

PROCEEDINGS AND REPORTS	REFERENCE
Consideration in private (6 February 2024)	Minutes of proceedings
Consideration in private (26 March 2024)	Minutes of proceedings
Evidence session (16 April 2024)	Official Report (cols. 3 to 23)
Evidence session (23 April 2024)	Official Report (cols. 2 to 42)
Evidence session (30 April 2024)	Official Report (cols. 7 to 46)
Evidence session (7 May 2024)	Official Report (cols. 5 to 30)
Consideration in private (11 June 2024)	Minutes of proceedings
Report on delegated powers provisions in the Judicial Factors (Scotland) Bill at Stage 1 (7 February 2024)	SP Paper 523, 11th Report, 2024 (Session 6)
Stage 1 report (14 June 2024)	SP Paper 620, 43rd Report, 2024 (Session 6)
Whole Parliament	
Stage 1 debate (19 September 2024)	Official Report (cols. 86 to 109)
STAGE 2	
Marshalled list of amendments for Stage 2	SP Bill 40 – ML (Session 6 (2024))
Groupings of amendments for Stage 2	SP Bill 40 – G (Session 6 (2024))
Meeting on amendments (16 November 2024)	Official Report (cols. 7 to 20)
Bill as amended at Stage 2	SP Bill 40A (Session 6 (2024))
Revised Explanatory Notes	SP Bill 40A – EN (Session 6 (2024))
Supplementary Financial Memorandum	SP Bill 40A – FM (Session 6 (2024))
Supplementary Delegated Powers Memorandum	SP Bill 40A – DPM (Session 6 (2024))
Consideration in private (3 December 2024)	Minutes of proceedings
Report on delegated powers in the Judicial Factors (Scotland) Bill as amended at Stage 2 (3 December 2024)	SP Paper 700, 72nd Report, 2024 (Session 6)

PROCEEDINGS AND REPORTS	REFERENCE
STAGE 3	
Marshalled list of amendments for Stage 3	SP Bill 40A – ML (Session 6 (2024))
Groupings of amendments for Stage 3	SP Bill 40A – G (Session 6 (2024))
Consideration of amendments and debate (10 December 2024)	Official Report (cols. 22 to 34)
Bill as passed (10 December 2024)	SP Bill 40B (Session 6 (2024))
ROYAL ASSENT	
Royal Assent (27 January 2025)	2025 asp 3

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