

EXPLANATORY NOTES

Succession (Scotland) Act 2016 (asp 7)

£6.00

These notes relate to the Succession (Scotland) Act 2016 (asp 7)
which received Royal Assent on 3 March 2016

SUCCESSION (SCOTLAND) ACT 2016

EXPLANATORY NOTES

INTRODUCTION

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

2. The 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.

OVERVIEW

3. The law of succession regulates how property passes on a person's death. It has been subject to substantive review by the Scottish Law Commission ("the Commission") and it has published 2 wide ranging reports in 1990 (Scottish Law Commission no.124; January 1990) and 2009 (Scottish Law Commission no.215; January 2009). The Commission's 2009 recommendations cover both a fundamental overhaul of the major elements of the law of succession – intestate succession, protection from disinheritance and cohabitation – as well as a range of other recommendations relating to the law of succession. A number of these other recommendations were carried forward from the earlier Report on succession published in 1990.

4. This Act will therefore modernise and clarify some technical aspects of the law relating to succession and will address a number of anomalies within the current legislative framework so that the law in this area is fairer, clearer and more consistent. The Act has 32 sections and a schedule which cover the following key areas—

- testamentary documents and special destinations - this includes reforms which relate to the rectification of wills; the effect of divorce, dissolution or annulment on a will or special destination; and the revival of a revoked will;
- survivorship – the provision of new rules where there is uncertainty about the order of death;
- forfeiture – updating the rules in respect of forfeiture;
- estate Administration – putting in place protections for trustees and executors in certain circumstances and for persons acquiring title in good faith;
- other reforms – abolishing *donations mortis causa* and the right to claim the expense of mournings; and introducing a new ground of jurisdiction for executors confirmed in Scotland.

COMMENTARY ON SECTIONS

Testamentary documents and special destinations

Section 1 – Effect of divorce, dissolution or annulment on a will

5. Under the existing law, provision in a will in favour of the spouse or civil partner of the testator (the person making the will) stands even where the relationship comes to a legal end (that is, by divorce, dissolution or annulment). This section reverses that position. So testamentary provisions in favour of a former spouse or former civil partner or appointing a former spouse or former civil partner as a trustee or executor, are effectively revoked by the legal end to the relationship. Subsection (1) as read with subsection (2) provides that the former spouse or civil partner is to be treated as having died before the testator for the purposes of the will in any case where the will confers a benefit or power of appointment on the former spouse or former civil partner or appoints that person as a trustee or executor. In other words, so long as the will contains any provision as set out in subsection 1(a)(i) or (ii) and the other conditions in subsection (1) are met then the former spouse or civil partner is treated as having died before the testator in relation to any aspect of the will. This is subject to one exception set out in subsection (2). The former spouse or civil partner will not be treated as having died before the testator for the purposes of a provision in the will that appoints the former spouse or civil partner or another person as a guardian. If a provision in the will appoints the former spouse or civil partner as a guardian, that provision will have effect despite the subsequent divorce, dissolution or annulment. If a provision in the will appoints another person as guardian in the event that the former spouse or civil partner dies before the testator, that other person will not be appointed as guardian since the former spouse or civil partner will not be treated as having died before the testator for the purposes of that provision.

6. Subsection (3) is an important qualification to the new rule. It means that the new rule does not apply where the will provides that the former spouse or civil partner is to continue to benefit or hold appointment even where there has been a divorce, dissolution or annulment. So the person making the will can, at the time of doing so, give effect to a desire for that situation to apply.

7. The section applies to same sex marriages and opposite sex marriages without distinction.

8. This provision applies only where the deceased dies after the divorce, dissolution or annulment has been obtained and where the divorce, dissolution or annulment is obtained from a court of civil jurisdiction in the United Kingdom, the Channel Islands or the Isle of Man or is otherwise recognised in Scotland (subsection (5)).

Section 2 – Effect of divorce, dissolution or annulment on a special destination

9. This section makes similar provision to section 1 but in relation to what is known as a special destination of property. Special destinations, also sometimes known as survivorship destinations, are conditions that commonly appear in the title of property held by more than one person, usually spouses, which provide that on the death of one of the spouses their title automatically passes to the survivor. A special destination might also

apply where property such as business premises is held in the name of a couple and a number of other people. Consequently even if one party executed a will leaving their interest to a third party, such a term would be ineffective and the property would still transfer to the survivor on death.

10. This section provides that a special destination of property in favour of a former spouse or former civil partner is revoked by the legal end to the relationship, provided the death of the testator occurs after the legal termination of the marriage or civil partnership. This is given effect to in subsection (2) which treats the former spouse or former civil partner as having died before the testator where the criteria in subsection (1) are met. Section 2(3), like section 1(3) explained above, enables provision to be made which disapplies the new rule.

11. As recommended in the Commission's Report No. 124, 1990[1] and Commission's Report No. 219, 2009[2], this section re-enacts section 19 of the Family Law (Scotland) Act 2006 and section 124A of the Civil Partnership Act 2004 (which are repealed by the schedule to the Act) and extends their effect to moveable as well as heritable property.

12. Subsection (4) protects the title of a third party who acquires property in good faith and for value from the former surviving spouse unaware of the divorce, dissolution or annulment.

13. This section applies only where the divorce, dissolution or annulment is obtained from a court of civil jurisdiction in the United Kingdom, the Channel Islands or the Isle of Man or is otherwise recognised in Scotland (subsection (6)).

Section 3 – Rectification of will

14. This section enables the Court of Session or the relevant sheriff court to rectify a will prepared by someone other than the testator where the court is satisfied that the will failed to give effect to the testator's instructions. Rectification is confined to situations in which a person other than the testator prepared the will on the testator's instructions (subsection (1)(b)) and where a person applies to the court for rectification of that will (subsection(1)(c)). Rectification is only competent where the court is satisfied that the will fails to express accurately what was instructed (subsection (1)(d)) and there must therefore be instructions with which to compare the executed will. Those instructions need not necessarily be in writing. In reaching a decision on whether or not a will requires to be rectified, the court may take account of evidence which is extrinsic to the will (subsection (3)). Rectification under this section may only take place where the deceased died domiciled in Scotland (subsection)(1)(a)).

15. These provisions would for example cover: the situation where instructions have been incorrectly transposed by a third party drafter, whether or not the drafter was a solicitor; or wills made 'online' where a third party is taking instructions to produce the will. In any situation it would need to be clear to the court, based on evidence, that the

[1] Recommendation 17(a)(iv), para 4.45, SLC Report on Succession No. 124, January 1990
[2] Recommendation 61, para 6.66, SLC Report on Succession No. 219, April 2009

will fails to express the testator's instructions. The intention of the provision is that the power to rectify a will should be confined to cases where the will has been prepared by someone other than the testator where a comparison can be made between the testator's instructions, supported by relevant evidence, and the will itself. The critical factor in the application of the provision is the involvement of another person. If a testator draws up their own will – whether on paper or online this section would not apply.

16. The process for seeking rectification of a will is by application and the normal rules of standing will apply, meaning that the court must be satisfied that the applicant, on cause shown, has sufficient interest in the application.

17. Subsections 5, 6 and 7 provide that the Court of Session, a sheriff of the sheriffdom in which the testator was habitually resident at the time of death, or, if the testator was not habitually resident in a part of Scotland at the date of death, or if it is unknown or uncertain the part of Scotland in which the deceased was habitually resident, a sheriff at Edinburgh, has jurisdiction to rectify the will on receipt of the application. In addition, a sheriff in the sheriffdom where confirmation was obtained will have jurisdiction to rectify a will on receipt of an application. Under section 3 of the Confirmation of Executors (Scotland) Act 1858, confirmation is based on where the testator was domiciled. In most cases a person will be domiciled where they are habitually resident but this is not always the case. Subsection (6)(b) would enable jurisdiction in a case where the testator was habitually resident in one sheriffdom but was domiciled in another sheriffdom

18. Subsection (4) provides that while the rectification will take effect from the date that the will was executed, regard should be had to sections 4(7) and section 24 of the Act. Section 4(7) protects executors and trustees from being held personally liable for distributing property in good faith, in accordance with a will which is subsequently rectified. Section 19 provides that where a beneficiary has sold property conveyed to him or her by the deceased's executor under the unrectified will, subsequent rectification will not prejudice the title of whoever acquired the property in good faith and for value. Title is also protected if acquired directly from the executor.

Section 4 – Rectification of will: supplementary

19. This section provides that an application made under section 3(1)(c) for rectification of a will must be made within 6 months from the date of confirmation, if applicable, or the date of death if not (subsection (1)). Confirmation is a legal document from the court giving the executor(s) authority to uplift any money or other property belonging to a deceased person from the holder (such as the bank), and to administer and distribute it according to law. The court has discretion to waive the time limit on cause shown (subsection (2)).

20. Subsection (3) provides that where the court makes an order requiring a will to be rectified, the order will be registered in either the Books of Council and Session or the sheriff court books, depending on where the will is registered.

21. Subsections (4) and (5) provide that where execution of a document is necessary to give effect to a rectified will and the person who requires to execute the document is unable or unwilling to do so, then the court may dispense with this requirement and direct a clerk of session or a sheriff clerk to execute the document. In the above circumstances, subsection (6) provides that such a document executed by a clerk of session or the sheriff clerk will have the same force and effect as if it had been executed by that person who is unable or unwilling to execute the document.

22. As noted above, subsection (7) provides that where a trustee or executor has distributed property in good faith in accordance with a will which is subsequently rectified after the distribution, they will not be held personally liable for that distribution where subsequent rectification of the will means that the property should not have been distributed in that way.

Section 5 – Revocation of will not to revive earlier revoked will

23. Under the current law, a will which is revoked by a subsequent will, revives if the subsequent will is itself revoked. This section changes the law so that in these circumstances the revocation of the subsequent will, or part of it, does not revive the earlier will or the revoked part of the earlier will. This does not prevent the person who made the will from reviving the will by other means – such as re-executing it or making a new will in the same terms as the one which was revoked.

Section 6 – Death before legacy vests: entitlement of issue

24. This section replaces the *conditio si institutus sine liberis decesserit.* This rule provides that where by a will a testator leaves a legacy to a direct descendant or a group of direct descendants and a direct descendant who is to receive that legacy dies between the will being made and receiving that legacy that direct descendant's issue would 'step into the shoes' of the individual and inherit the legacy unless the will expressly provides for an alternative beneficiary to inherit the legacy. As per the current common law rule, an alternative legatee will be favoured over the direct descendants of a direct descendant who has failed to survive the date of vesting of the legacy but a residual legatee will not be favoured over those direct descendants.

25. In legal terms "the issue" are considered to be that person's children or other lineal descendants such as grandchildren and great grandchildren.

26. In their 1990 report the Commission considered that it was difficult to determine whether the old rule was to apply where it involved a nephew or niece as this would depend on whether a testator treated them as a parent would treat a child which was not always easy to ascertain. The class of beneficiaries to whom this section applies is therefore now limited only where a legacy is left to one direct descendant of the testator or a group of people, all of whom are direct descendants (subsection (1)(a)).

27. Separately, it was previously unclear whether the rule should be displaced if the bequest contained a survivorship clause or a provision that another person was to take the legacy if the specified legatee did not survive the testator. Those are two ways in which a

testator may recognise the possibility of a beneficiary dying before the date of payment and which regulates how the property will pass. For example, where there are two beneficiaries A and B and B dies before they date of payment then A would inherit B's share – this is known as survivorship. On the other hand if the testator sets out that A should inherit, whom failing B (known as a destination over) then B will only inherit if A predeceases the date of payment.

28. Subsection (2) therefore makes it clear that this provision will not apply where there is any clear provision in the will which indicates that the testator intended otherwise. The fact that a legacy is left to a direct descendant A with residuary provision to other direct descendants would not on its own be sufficient to suggest that the legacy was specific to A. Subsection (3) sets out two particular types of situation in which the will is to be read as providing to the contrary: firstly where will contains a clause (survivorship clause) regulating what should happen to the legacy if the legatee dies before the date of payment and secondly where the will contains a clause (a destination over) which names the original legatee and then a further legatee to whom the property may pass in the original legatee's place (to A, whom failing B).

29. Subsection (4) provides that the issue (children and direct descendants) of the relevant beneficiary get the share which that beneficiary would have got had the beneficiary survived to receive the legacy. Under the existing law, the issue get only the original share which the beneficiary would have got in terms of the will. This is best illustrated with an example. Say D leaves an estate to 3 children E, F and G. If E, F and G all survive to the vesting of the legacy, they take a third share each. If F predeceases without issue, E and G take half each (on a rule of succession law called 'accretion'). But if F predeceases without issue and E predeceases leaving a child the current law provides that there is no accretion in favour of E's child. E's child will only take the original third share that E would have got at the time the will was executed, not what E would have taken if he or she had survived to the date of vesting (i.e. E's original third share plus half of the third which would have gone to F). The third share which would have gone to F had F survived goes to G, who therefore ends up with two-thirds. Under this new section, E's child stands in the shoes of E at the point of the legacy vesting rather than at the point of the will being made. So E's issue takes a half share (i.e. E's own third share plus half of the third which would have gone to F).

30. Subsection (5) provides that where two or more of the descendant's issue are to inherit their share under this section, the rules of intestacy will apply (the legal rules that apply if a person dies without making a will). Subsection (6) defines "intestate estate" and "issue" for the purposes of this section.

Section 7 – Liferent: vesting of fee other than on death

31. A liferent is where a beneficiary has the right to receive for the duration of their lifetime, the benefits of an asset. Where a legacy is given without limitation of time, it is referred to as having been given in fee. For example a parent may leave a property in liferent to their spouse or civil partner but in fee to their child. So the spouse may live in the property and enjoy the property but they never own it and may not dispose of it. In

these circumstances the child is known as the fiar, or the person in whom the fee vests subject to a liferent. The parent is known as the liferenter.

32. In some cases, the fee does not vest until the death of the liferenter. An example is where the identity of the fiar is dependent on who is alive at the point when the liferenter dies. Problems can arise here where there is early termination of the liferent – for example, where the liferenter renounces the liferent. One such problem is what to do with the income from the property which arises during the life of the liferenter after the point of renunciation or termination. Section 7 removes some of the difficulties where the liferent terminates but the fee does not vest in the fiar. This section allows the fee to vest in the fiar where the liferent terminates but the liferenter has not died.

33. Subsection (1) provides that this section applies when a liferent is terminated otherwise than on the death of the liferenter or where the liferent does not operate because of the effect of divorce, dissolution or annulment on a will or because of the application of forfeiture.

34. Subsection (2) provides that the fee will vest in the fiar on the date of termination of the liferent unless the document creating the liferent expressly provides otherwise or there is an obligation which requires that it should not operate in this way. For example, if a liferent is created by a document, the document itself may provide that the fee is to vest on the death of the liferenter even if the liferent terminates early. If a liferent is created orally, the granter of the liferent may specify at the time of its creation that the fee is to vest on the death of the liferenter even if the liferent terminates early. In both of those situations, the fee would vest on the death of the liferenter as the granter of the liferent intended. The section applies to liferents created by *inter vivos* or testamentary documents.

Section 8 – Destinations in wills and certain trusts: conditional institution

35. Where property is the subject of a destination (that is, a provision in a will or trust for its transfer to "person A, whom failing person B"), there are currently different presumptions about how the property will pass depending on the type of property in question. So where property may be transferred to person A, whom failing person B, by way of a destination in a will or a trust taking effect during a truster's lifetime and the property is heritable it will be presumed that B is a substitute. This means that if A dies still owning the property it will then still pass to B by virtue of the destination. On the other hand, where the property is moveable, if A inherits the property then any right that B had falls at that point. This presumption is known as a "conditional institution". This section creates a new rule that provides that where any kind of property goes to A, B loses all rights to take the property under the destination in the will or trust. The effect is that B is a "conditional institute" and not a "substitute" even where the property is heritable.

36. Subsection (2) provides that this presumption does not apply where it is clear from the will or trust that a different result is intended.

Survivorship

Section 9 – Uncertainty of survivorship treated as failure to survive

37. This section applies where two persons die simultaneously or in circumstances where it is uncertain who survived whom. It replaces the current rules of survivorship in section 31 of the Succession (Scotland) Act 1964. Under the current rules of survivorship, if the people who die were spouses or civil partners, it is presumed that neither survived the other. If they were not spouses or civil partners, it is presumed, in most cases, that the younger survived the elder. This section changes the current rules. It provides that, where two persons have died simultaneously or in circumstances where it is uncertain who survived whom, neither is to be treated as having survived the other. This section applies both on testacy and intestacy and applies for all purposes affecting title or section to property (other than where the particular rule in section 10 applies).

38. Subsection (2) provides that where a benefit is conferred on a third party on condition that another person died before the testator and that person dies in a common calamity with the testator, that condition will be treated as a condition that the person failed to survive the testator to enable the legacy to pass to the third party through the application of subsection (1).

39. This section does not change the law on the standard of proof for establishing whether deaths occurred in a particular order. It was established in the case of *Lamb v Lord Advocate* (1964 SC 110) that this was the civil standard of the balance of probabilities. So the order of deaths is uncertain if it is not possible to prove, on a balance of probabilities, a particular order.

Section 10 – Equal division of property if order of beneficiaries' deaths uncertain

40. This section applies instead of section 9 where a will provides that property is to pass or be transferred (whatever the means of transfer or passing, for example, whether by a written or oral obligation or trust provisions) to one member of a group of people depending on the order of death and members of the group are involved in a common calamity. All members of the group are potential beneficiaries and have equal status in the sense that it is the testator's intention that any of them could benefit from the legacy. Section 10(1)(a) sets out the different ways in which provision might be framed to allow property to pass or be transferred to members of a group depending on the order of death as envisaged by paragraph 6.60 of the Commission's Report.

41. In those circumstances, the property is to be divided equally among the estates of the members of the group who die in the common calamity (subsection (2)). For example, a life assurance policy on the joint lives of a married couple payable to the estate of the first person to die will benefit the two estates equally if it is uncertain which death was first.

42. This section applies only where no other provision has been made to deal with the situation in question (subsection (1)(d)). Where the document regulating the devolution of the property in these circumstances provides for a different rule of division, that will override the statutory equal division rule (subsection (1)(d)).

43. Subsection (4) provides that where the testator is amongst those who die simultaneously or in an uncertain order, then section 9 and not section 10 will apply. This ensures that any legacies vest in the estates of living family members/legatees rather than in the estates of deceased beneficiaries who have not survived the testator.

Section 11– Testamentary requirement of survival for a particular period

44. Although it continues to be competent for people to specify in their wills a period that a successor has to survive in order to take the testamentary provisions, this section provides for the situation where there is uncertainty as to whether the successor survived the testator for the specified period. Where a testator makes a bequest which is subject to the condition that the beneficiary survives the testator for a specified period, and in the circumstances it is uncertain whether the beneficiary did survive the testator for that period, they are to be treated as having failed to survive the testator.

Forfeiture

Section 12 – Person forfeiting to be treated as having failed to survive victim

45. The forfeiture rule is a rule of public policy which, in certain circumstances, precludes a person who has unlawfully killed another from acquiring a benefit in consequence of that killing. This section provides that in circumstances where a person has forfeited their rights of succession, including prior and legal rights, to the estate of the deceased, their beneficial interest in trust property, or their title to property by virtue of a special destination, they are to be treated as having died before the deceased. This addresses a situation highlighted in a case (called *Hunter's Executors, Petitioners,* 1992 SC 474) in which a man murdered his second wife. Her will provided for her estate to go to her husband and if he predeceased her and there was no issue of the second marriage, it was to be divided between his son by his first wife and her own sister. While the murderer clearly forfeited his own benefit under the will, the court was not prepared to go so far as to say that this meant that he had predeceased his second wife. Accordingly, the estate fell into intestacy and passed to the second wife's sister and parents.

Section 13 – Protection for persons acquiring in good faith and for value

46. This section protects the title of a person who acquires property in good faith and for value, whether by purchase or otherwise, whose title would otherwise be challengeable by virtue of the forfeiture rule. For example where a third party has bought a house from a person who had inherited it from their spouse and that person is then convicted of murdering their spouse.

Section 14 – Power of sheriff to order sheriff clerk to execute document

47. This section relates to circumstances where forfeiture occurs following distribution of the estate. In this situation, those in possession of the property are no longer entitled to it and are under a duty to return the property to the estate. To do so they require to sign the necessary documents to give effect to a forfeiture and should they not do so this section will take effect. This section provides powers for a relevant sheriff (as defined at subsection (4)), on application, to dispense with the execution of any document necessary to give effect to a forfeiture and to direct the sheriff clerk to execute the document in question (subsection (2)).

48. Subsection (3) provides that a document executed by the sheriff clerk under authority from a relevant sheriff is to have the same force and effect as if the person who was under a duty to execute it had done so.

49. The process for applying to the sheriff to have the document executed by the sheriff clerk or to dispense with the execution is by application and the normal rules of standing will apply. This means that the court must be satisfied that the applicant, on cause shown, has sufficient interest in the application.

50. Subsection (4) sets out which sheriff will have jurisdiction. If the deceased died domiciled in Scotland (domicile being the rule of law that sets out where a person's home is regarded for certain legal purposes) it will be a sheriff of the sheriffdom where the deceased lived or if that is not clear it will be a sheriff of the sheriffdom of Lothian and Borders sitting in Edinburgh. If the deceased was not domiciled in Scotland but owned immoveable property in Scotland it will be a sheriff of the sheriffdom where that property is situated. In addition, a sheriff of the sheriffdom in which confirmation was obtained will always have jurisdiction.

Section 15 – total relief from forfeiture rule

51. The Forfeiture Act 1982 enables a person to apply to the court for "relief" from the forfeiture rule. Relief means that the effect of forfeiture rule is modified and the killer is enabled to inherit a proportion of the victim's estate. This section reverses the decision in *Cross, Petr* 1987 SLT 384 in which it was held that the court could not go so far as to disapply the effect of the rule in a given case entirely. So the court granted relief in respect of all of the heritable property and 99% of the moveable property. As relief is entirely at the discretion of the court, the Commission recommended that the court should be able to grant total relief in the rare case where they deem it appropriate. This section therefore amends section 2 of the Forfeiture Act 1982 to provide courts with the power to grant total relief.

Section 16 – Time limit for applying for relief from forfeiture rule

52. This section amends section 2 of the Forfeiture Act 1982 to extend the period of time within which proceedings for relief from the forfeiture rule may be from 3 months from the conviction to 6 months from the conviction. It provides that the 6 month period will only start to run once the period within which an appeal against conviction may be brought has expired or on the conclusion of any appeal proceedings brought.

Section 17 – Repeal of the Parricide Act

53. The Parricide Act 1594 – an Act of the Parliament of Scotland - makes provision for anyone killing a parent or grandparent to be disinherited. This section repeals the Parricide Act 1594, as recommended by the Commission, on the basis that it deals with a limited class of victims, disinherits the killer's issue, appears to only apply to the victim's heritable property and was ignored by the court in the case of *Cross, Petr 1987 SLT 384*. Subsection (1) provides that the Parricide Act 1594 is repealed. Subsection (2) clarifies that the forfeiture rule applies in relation to cases where a person has unlawfully killed the person's parent or grandparent as it applies in relation to any other cases of unlawful killing.

Estate Administration

Section 18 - Confirmation of executors: no requirement to find caution in relation to small intestate estates

54. Currently all executors dative, except spouses whose prior rights exhaust an estate, are required to find caution. Caution is a guarantee that the executor – dative will perform his or her duties and not embezzle the estate.

55. Subsection (1) amends the Intestates Widows and Children (Scotland) Act 1875 to remove the requirement for an executor-dative to find caution in estates subject to the 'small estates' confirmation process. A "small estate" is one whose gross value, without deducting debts and funeral expenses, does not exceed £36,000. This figure is subject to change from time to time.

56. Subsection (2) provides that the changes in subsection (1) to section 3 of the Intestate Widows and Children (Scotland) Act 1875 apply to applications under that Act which have been made before the section comes into force but have not been determined at that point.

Section 19 - Confirmation of executors: general exceptions to requirement to find caution

57. Subsection (1) amends the Confirmation of Executors (Scotland) Act 1823 to extend the exemption for spouses from the requirement to obtain caution in certain circumstances to civil partners**.**

58. Subsection (2) provides powers to Scottish Ministers to make Regulations to add other categories of person to those who do not require to find caution.

Section 20 - Confirmation of executors: power of Ministers to abolish requirement for executors dative to find caution

59. This section provides powers to Scottish Ministers to make Regulations to abolish the requirement for executors dative to find caution.

Section 21 - Power of Ministers to make provision requiring conditions to be met before courts appoint persons as executors dative

60. Subsection (1) provides powers to Scottish Ministers to make Regulations so that courts are not to appoint executors dative unless particular conditions are met.

61. Subsection (2) sets out that these conditions might include the court being satisfied that the person is suitable for appointment; and that the court is to be provided with particular information about the person seeking appointment or about the estate.

62. Subsection (3) sets out that these Regulations may apply to all executor dative appointments or to appointments of persons of particular descriptions as executors-dative.

63. Subsection (4) sets out that the Regulations may set out factors or information which courts should have regard to in determining if the person is suitable for appointment; that the court should be satisfied that the individual is suitable if certain conditions are met; or to require the court to impose conditions which must be satisfied before a person is suitable for appointment.

64. Subsection (5) sets out that the Regulations may make different provision in relation to the appointment of different categories of person as executors dative.

Section 22 - Sections 19, 20 and 21: regulations

65. Subsections (1) and (2) provide that Regulations made in exercise of the powers under sections 19, 20 and 21 may include supplementary, incidental, consequential, transitional, transitory or saving provision considered appropriate by the Scottish Ministers.

66. Subsection (3) provides that these Regulations may modify enactments.

67. Subsection (4) provides that these Regulations will be subject to the affirmative procedure.

Section 23 – Errors in distribution: protection of trustees and executors in certain circumstances

68. This section amends the Trusts (Scotland) Act 1921 by inserting a new section which brings together in one place the protections available to trustees and executors where they distribute an estate in ignorance of certain facts which would affect the proper distribution of the estate. These facts generally relate to making a distribution in ignorance of the existence of either an adoption order or of a child whose parents are not, or have not been married to each other. Subsection (1)(b) of the new section provides that in order for the trustee not to be personally liable, the distribution requires to be made in good faith after having made reasonable enquiries, or, in accordance with an order of the court. What amounts to 'reasonable enquiries' will be dictated by the particular circumstances of each case. There is no express requirement to advertise for beneficiaries and it is envisaged that whether this is appropriate will depend on the circumstances and is a matter for the discretion of the executors tasked with distributing the estate.

69. This change does not affect the right of a person under the law of unjustified enrichment to seek restitution in respect of property forming part of the estate from persons to whom it has been distributed in error as provided for in subsection (2). Subsection (3) clarifies that the right to get recompense in relation to an unlawful distribution does not enable a person to get property back from a good faith purchaser as set out in subsection (3). Subsection (4) makes it clear that this section applies only to distributions which occur after the section comes into force (i.e. it does not catch distributions which have already occurred).

70. The protections are currently provided for in section 24(2) of the Succession (Scotland) Act 1964 and section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 which are repealed and replaced by this section.

Section 24 – Protection of person acquiring title

71. This section re-enacts in wider terms, section 17 of the Succession (Scotland) Act 1964, which protects those who purchase heritable property which is or was vested in the deceased's executor by virtue of confirmation. In their 1990 report the Commission took the view that section 17 was deficient because purchasers of items other than heritage or goods, such as shares or book debts were not protected, and second that onerous acquirers of goods otherwise than by purchase (for example by exchange with another beneficiary or foregoing a claim) were not protected.

72. The existing common law protects a person who acquires property in good faith and for value, from someone whose title is voidable, regardless of the type of property. The 1990 report also noted that section 17 may cover cases that would be outwith the scope of this rule. For these reasons the Commission recommended that section 17 be repealed and re-enacted. This section gives effect to this recommendation by providing a more complete statutory protection which protects those who acquire property in good faith and for value directly or indirectly from the executor or a person (such as a legatee) who derived it directly from the executor.

73. Subsection (2) makes express provision about factors which cannot be relied on as grounds of challenge. These factors are: where the court has overturned (reduced) the confirmation; where the will has been subject to rectification after the property has been distributed; and where the title was not necessarily 'good' title.

Section 25 – Gifts made in contemplation of death

74. A donation *mortis causa* is a gift with the following characteristics: it is made by the donor in anticipation of their death; it is made on the understanding that when the donor dies the recipient keeps the gift but that if the donor survives it should be returned to them; the donor can change their mind at any point and ask for the gift to be returned; and if the recipient dies first then the gift is returned to the donor.

75. This special form of gift is counted as part of the donor's estate for the purposes of any claim for legal rights in the event of intestacy. It is also liable for the donor's debts on death in the event that the rest of the donor's estate is insufficient to meet them.

76. This section abolishes this special form of gift as a distinct legal entity. It does not prevent people from continuing to make gifts on such express conditions as they wish to impose and which the recipient is prepared to accept. An individual may even make a gift, subject to the same conditions, in similar circumstances (i.e. in contemplation of death) but as noted above, the only change in the law is that the conditions are no longer automatic.

Section 26 – Abolition of right to claim in respect of expense of mournings

77. This section abolishes the common law right to claim the expense of mournings – the right of a widow and family to claim an allowance for the cost of special mourning clothes from the estate of the deceased.

Section 27 – Additional ground of jurisdiction: executor confirmed in Scotland

78. As a matter of principle the Scottish courts should have jurisdiction whenever Scots law is the applicable law to the succession issue in question. At present there is a jurisdictional gap where the deceased's executor is not domiciled in Scotland. Unless the will creates an express trust it may be that none of the provisions in Schedule 8 of the Civil Jurisdiction and Judgements Act 1982 which deals with the jurisdiction of the Scottish courts will apply. As a result, those raising actions against executors in connection with the administration of a Scottish estate may have to do so in the courts of the country in which the executors are domiciled.

79. This section amends rule 2 of Schedule 8 of the Civil Jurisdiction and Judgments Act 1982 so that a person wishing to raise an action in respect of the administration of a Scottish estate by an executor who is not domiciled in Scotland may do so in the Scottish courts if the executor obtained the legal documentation necessary to authorise the making and receiving of payments on the estate known as confirmation, in Scotland. 'Confirmation' is a legal document from the court giving the executor(s) authority to uplift

any money or other property belonging to a deceased person from the holder (such as the bank), and to administer and distribute it according to law.

General

Section 28- Interpretation

80. Subsection (1) of section 28 defines the terms "estate" and "property" for the purposes of the Act. The term 'property' means both heritable and moveable property. The definitions apply unless the context requires otherwise.

81. Subsection (2) provides that, for the purposes of the Act, 'forfeiture rule' has the same meaning as in the Forfeiture Act 1982. In that Act, the "forfeiture rule" means the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing.

82. Subsection (3) defines the term "will" for the purposes of the Act.

Section 29 – Consequential provision

83. Subsection (1) abolishes the conditio si institutus sine liberis decesserit in consequence of section 6.

84. Subsection (2) introduces the schedule which modifies certain provisions for the purposes of or in consequence of the Act.

Section 30 - Ancillary Provision

85. Section 30 provides that the Scottish Ministers may by regulations make such ancillary provision as they consider appropriate for the purposes of or in connection with the Act or for the purposes of giving full effect to the Act.

Section 31 – Commencement

86. Section 31 provides that this section and sections 18-22 and 30 and 32 come into force the day after Royal Assent. The Scottish Ministers may make commencement regulations bringing the remaining provisions of the Act into force on a day they specify in the regulations. Commencement regulations may include transitional, transitory or saving provision and may make different provision for different purposes.

Section 32 – Short Title

87. This section sets out the short title of the Act.

Schedule

88. Paragraphs 1(1) to (4) of the schedule makes various modifications to sections 5(1), 6(1) and 11 of the Succession (Scotland) Act 1964 in consequence of section 9 of the Act. The amendments replace the references to "predecease" in those sections with "failed to survive" so that these provisions are in line with and get the benefit of the new survivorship provision in section 9 of the Act. Paragraph 1(5)(c) also repeals section 31 of the Succession (Scotland) Act 1964 in consequence of its replacement by section 9 of the Act

89. Paragraph 1(5)(a) repeals section 17 of the Succession (Scotland) Act 1965 in consequence of its replacement by section 24 of the Act.

90. Paragraph 1(5)(b) repeals section 24(2) of the Succession (Scotland) Act 1964. Paragraph 2 repeals section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968. Both of these provisions are repealed in consequence of their replacement by section 23 of the Act

91. Paragraphs 3 and 4 repeal section 124A of the Civil Partnership Act 2004 and section 19 of the Family Law (Scotland) Act 2006. These provisions are replaced by section 2 of the Act.

PARLIAMENTARY HISTORY

92. The following table sets out, for each stage of the proceedings in the Scottish Parliament on the Bill for the Act, the dates on which the proceedings at that stage took place, and the references to the official report of those proceedings. It also shows the dates on which Committee Reports and other papers to the Act were published, and references to those reports and papers.

Proceedings and reports	***Reference***
Bill as introduced -	http://www.scottish.parliament.uk/S4_Bills/Succession%20(Scotland)%20Bill/b75s4-introd.pdf
Spice briefing	http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_15-48_Succession_Scotland_Bill.pdf
Stage 1	
Delegated Powers and Law Reform Committee	
8 September 2015 (evidence)	http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10069
15 September 2015 (evidence)	http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10089
22 September 2015 (evidence)	http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10103

Proceedings and reports	***Reference***
29 September 2015 (evidence)	http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10122
10 November 2015 (delegated powers)	http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10195
Stage 1 Report	http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/Reports/DPLRS042015R64.pdf
Finance Committee	
24 June 2015	
Consideration by the Parliament	
Stage 1 Debate 11 November 2015 (cols. 18-36)	http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10192&i=93926
Stage 2	
Delegated Powers and Law Reform Committee	
8 December 2015	http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10265
Bill as amended at Stage 2	http://www.scottish.parliament.uk/S4_Bills/Succession%20(Scotland)%20Bill/SPBill75AS042015.pdf
Spice Briefing - prior to Stage 3	http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_16-10_Succession_Scotland_Bill_Stage_3.pdf
Stage 3	
Delegated Powers and Law Reform Committee	
26 January 2016 (evidence)	http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10334
Consideration by the Parliament	
Stage 3 – 28 January 2016 Amendments cols. 37-43 Debate cols. 44-62	http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10337&i=95148
Bill as passed	http://www.scottish.parliament.uk/S4_Bills/Succession%20(Scotland)%20Bill/SPBill75BS042016.pdf
Royal Assent - 3 March 2016	http://www.legislation.gov.uk/asp/2016/7/contents/enacted

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Printed in the UK by The Stationery Office Limited under the authority and superintendence of Carol Tullo, the Queen's Printer for Scotland.



Published by TSO (The Stationery Office), part of Williams Lea,
and available from:

Online
www.tsoshop.co.uk

Mail, Telephone, Fax & E-mail
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TSO@Blackwell and other Accredited Agents

ISBN 978-0-10-590280-5

