Succession (Scotland) Act 2016

2016 asp 7

Testamentary documents and special destinations

1 Effect of divorce, dissolution or annulment on will

(1) This section applies where—

(a) a person ("the testator") by a will—

(i) confers a benefit or power of appointment on a person, or

(ii) appoints a person as a trustee or executor,

(b) that person ("P") is, or becomes, the testator's spouse or civil partner,

(c) the marriage or civil partnership is terminated, and

(d) the testator then dies.

(2) P is to be treated as having died before the testator for the purposes of the will except for the purposes of any appointment of P or another person as a guardian.

(3) Subsection (2) does not apply if the will expressly provides that P is to—

(a) have the benefit or power of appointment, or

(b) be so appointed as a trustee or executor,

even if the marriage or civil partnership is terminated.

(4) For the purposes of this section, a marriage is terminated in the event of divorce or annulment and a civil partnership is terminated in the event of dissolution or annulment.

(5) In this section, references to "divorce", "dissolution" and "annulment" are to divorce, dissolution or annulment—

(a) obtained from a court of civil jurisdiction in the United Kingdom, the Channel Islands or the Isle of Man, or

(b) if not so obtained, the validity of which is recognised in Scotland.

2 Effect of divorce, dissolution or annulment on special destination

(1) This section applies where—

(a) property is held in the name of—

(i) a person ("A") and A's spouse or civil partner ("B") and the survivor of them,

(ii) A, B and another person or other persons and the survivor or survivors of them,

(iii) A with a special destination, on A's death, in favour of B,

(b) A and B's marriage or civil partnership is terminated, and

(c) A then dies.

(2) In relation to the succession to the property mentioned in subsection (1)(a) on A's death, B is to be treated as having died before A.

(3) Subsection (2) does not apply if the document under which the property is held expressly provides that succession to the property is to be unaffected by A and B's marriage or civil partnership being terminated.

(4) If a person has in good faith and for value (whether by purchase or otherwise) acquired title to the property, that title is not to be challengeable on the ground that, by virtue of subsection (2), the property falls to A's estate.

(5) For the purposes of this section, a marriage is terminated in the event of divorce or annulment and a civil partnership is terminated in the event of dissolution or annulment.

(6) In this section, references to "divorce", "dissolution" and "annulment" are to divorce, dissolution or annulment—

(a) obtained from a court of civil jurisdiction in the United Kingdom, the Channel Islands or the Isle of Man, or

(b) if not so obtained, the validity of which is recognised in Scotland.

3 Rectification of will

(1) This section applies where—

(a) a person ("the testator") dies domiciled in Scotland, leaving a will,

(b) the will was drafted not by the testator but on the testator's instructions,

(c) after the date of death, a person applies to the court for rectification of the will, and

(d) the court is satisfied that the will fails to express accurately what was instructed.

(2) The court may order that the will be rectified in such manner as it may specify so as to give effect to the testator's instructions.

(3) For the purposes of subsections (1)(d) and (2), the court may have regard to evidence extrinsic to the will.

(4) A will rectified by virtue of this section has effect as if so rectified when executed (but see sections 4(7) and 24).

(5) In this section, "the court" means—

(a) the Court of Session, or

(b) a relevant sheriff.

(6) In subsection (5)(b), "a relevant sheriff" means—

(a) a sheriff—

(i) of the sheriffdom in which the testator was habitually resident at the date of death, or

(ii) if subsection (7) applies, of the sheriffdom of Lothian and Borders sitting at Edinburgh, or

(b) a sheriff of the sheriffdom in which the testator's executor obtains confirmation.

(7) This subsection applies if at the date of death—

(a) the testator was not habitually resident in a particular part of Scotland, or

(b) the particular part of Scotland in which the testator was habitually resident is not known or is uncertain.

4 Rectification of will: supplementary

(1) Subject to subsection (2), an application under section 3(1)(c) must be made within the period of 6 months commencing—

(a) in a case where confirmation is obtained in respect of the testator's estate, on the date of its being obtained, or

(b) in any other case, on the date of the testator's death.

(2) The court may, on cause shown, consider an application which is made outwith that period of 6 months.

(3) An order made by virtue of section 3(2) may be registered in—

(a) the Books of Council and Session, or

(b) the sheriff court books,

if the will to which the order relates is registered (either before or when the order is registered) in the books in question.

(4) Subsections (5) and (6) apply if the court is satisfied, on an application, that—

(a) execution by a person of a particular document is reasonably necessary to give effect to the rectified will, and

(b) the person—

(i) is refusing to execute the document, or

(ii) is unable, or otherwise failing, to execute the document.

(5) The court may make an order—

(a) dispensing with the execution of the document by the person, and

(b) directing a clerk of session, or as the case may be the sheriff clerk, to execute the document.

(6) A document executed by a clerk of session or the sheriff clerk in accordance with an order under subsection (5) has the same force and effect as if it had been executed by the person.

(7) A trustee or executor is not personally liable for distributing property in good faith in accordance with a will which, by virtue of section 3, is rectified after the distribution.

(8) In this section, "the court" has the same meaning as in section 3.

5 Revocation of will not to revive earlier revoked will

(1) This section applies where—

(a) a will, or part of a will, is expressly or impliedly revoked by a subsequent will, and

(b) the subsequent will, or part of it, is revoked.

(2) The revocation of the subsequent will, or part of it, does not revive the earlier will or (as the case may be) the revoked part of the earlier will.

6 Death before legacy vests: entitlement of issue

(1) This section applies where—

(a) a person ("the testator") by a will bequeaths a legacy to—

(i) a direct descendant of the testator, or

(ii) more than one person where both or (as the case may be) all of those persons are direct descendants of the testator, and

(b) the person to whom the legacy is bequeathed or, if it is bequeathed to more than one person, a person to whom it is bequeathed—

(i) is alive when the will is executed, but

(ii) fails to survive the date of vesting of the legacy.

(2) Any issue of the deceased legatee alive when the legacy would, but for the legatee's death, have vested in the legatee is entitled to receive the legacy unless it is clear from the terms of the will that the testator intended otherwise.

(3) Without prejudice to the generality of subsection (2), it is to be regarded as clear from the terms of the will that the testator intended otherwise if the will provides expressly that the legacy is bequeathed—

(a) to the deceased legatee and another person (or other persons) and to the survivor (or survivors) of them, or

(b) to the deceased legatee, whom failing to another person (or other persons).

(4) Where the legacy is bequeathed to more than one direct descendant, the share of it which the deceased legatee's issue is entitled to receive is the share which the deceased legatee would have received if alive.

(5) Any distribution made by virtue of this section between or among two or more of the deceased legatee's issue is to be made in the same way as if it were a distribution between or among them of the whole or part of an intestate estate.

(6) In this section—

"intestate estate" means an estate, or any part of an estate, which is not disposed of by will,

"issue" means issue however remote.

7 Liferent: vesting of fee other than on death

(1) This section applies where a liferent terminates other than on the death of the liferenter.

(2) If the fee has not vested in the fiar by the date of termination of the liferent, the fee vests in the fiar on that date unless—

(a) the document creating the liferent expressly provides otherwise, or

(b) there is an obligation requiring otherwise.

8 Destinations in wills and certain trusts: conditional institution

(1) This section applies where—

(a) a destination of property in favour of a person ("A") whom failing another person ("B") is contained in a will or in a trust taking effect during the lifetime of the truster, and

(b) the property vests in A.

(2) B loses all rights to the property under the destination unless—

(a) the will or trust expressly provides otherwise, or

(b) it is clear from the terms of the will or trust that the testator or truster intended otherwise.

Survivorship

9 Uncertainty of survivorship treated as failure to survive

(1) Where two persons die simultaneously or in circumstances in which it is uncertain who survived whom, each is to be treated as having failed to survive the other for all purposes affecting title or succession to property.

(2) Where a person mentioned in subsection (1) ("the testator") by a will confers a benefit on a person on the condition that the other person mentioned in subsection (1) dies before the testator, the condition that the person dies before the testator (however it is expressed) is to be read as a condition that the person fails to survive the testator.

(3) This section is subject to section 10.

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

(1) This section applies, instead of section 9, for the purposes of determining rights of succession or title to property where—

(a) property is to pass, or be transferred, to—

(i) the estate of whichever member of a group of persons dies first (or the estates of whichever members die first),

(ii) whichever member of a group of persons survives the other members (or whichever members survive the other members), or

(iii) the members of a group of persons equally or the survivor (or survivors) of them,

(b) two (or more) of the members of the group die simultaneously or in circumstances in which the order of death is uncertain,

(c) had the deaths not been simultaneous or (as the case may be) had the order of death been certain, the property would have passed, or been transferred, to one (or more) of the persons mentioned in paragraph (b), and

(d) apart from this section, no provision has been made to deal with that situation.

(2) The property is to be divided equally between (or among) the estates of the persons mentioned in subsection (1)(b).

(3) For the purposes of this section, a "group of persons" may consist of two persons or more than two persons.

(4) This section does not apply if the property is to pass under a will and the persons mentioned in subsection (1)(b) and the testator die simultaneously or in circumstances in which the order of death is uncertain.

11 Testamentary requirement of survival for a particular period

Where—

(a) a provision in a will requires that a person survives the testator for a specified period in order to receive a benefit under the will, and

(b) the person survives the testator but dies in circumstances in which it is uncertain whether the person survived for the specified period,

the person is to be treated as having failed to survive the testator for the specified period.

Forfeiture

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

(1) This section applies where, under the forfeiture rule, a person ("the offender") has forfeited—

(a) rights of succession to the estate of the deceased,

(b) a beneficial interest in trust property which (but for the forfeiture) the offender would have acquired in consequence of the deceased's death,

(c) title to property which (but for the forfeiture) the offender would have acquired in consequence of the deceased's death by virtue of a special destination.

(2) In subsection (1)(b), "trust property" means property which, before the deceased's death, was held in trust for any person.

(3) The offender is to be treated as having died before the deceased—

(a) for the purposes of the rights of succession to the deceased's estate,

(b) in relation to the beneficial interest mentioned in subsection (1)(b),

(c) in relation to the title to property mentioned in subsection (1)(c),

(as the case may be).

(4) For the avoidance of doubt, references in this section to rights of succession to the estate of the deceased include references to—

(a) a claim to jus relicti, jus relictae or legitim out of that estate,

(b) an entitlement from that estate conferred by section 8 or 9 of the Succession (Scotland) Act 1964.

(5) In this section, "the deceased" means the person as a result of whose death the forfeiture arose.

13 Protection for persons acquiring in good faith and for value

(1) This section applies where a person acquires title to property in good faith and for value (whether by purchase or otherwise).

(2) The title is not challengeable on the ground that it was acquired (directly or indirectly) from a person who in relation to the property has incurred forfeiture under the forfeiture rule.

14 Power of sheriff to order sheriff clerk to execute document

(1) This section applies where a relevant sheriff is satisfied, on an application, that—
- (a) execution by a person of a particular document is reasonably necessary to give effect to a forfeiture under the forfeiture rule, and
- (b) the person—
  - (i) is refusing to execute the document, or
  - (ii) is unable, or otherwise failing, to execute the document.

(2) The sheriff may make an order—
- (a) dispensing with the execution of the document by the person, and
- (b) directing the sheriff clerk to execute the document.

(3) A document executed by the sheriff clerk in accordance with an order under subsection (2) has the same force and effect as if it had been executed by the person.

(4) In subsection (1), "a relevant sheriff" means—
- (a) if the deceased died domiciled in Scotland, a sheriff—
  - (i) of the sheriffdom in which the deceased was habitually resident at the date of death, or
  - (ii) if subsection (5) applies, of the sheriffdom of Lothian and Borders sitting at Edinburgh,
- (b) if the deceased died domiciled other than in Scotland but at the date of death owned immoveable property situated in Scotland, a sheriff of the sheriffdom in which the immoveable property is situated,
- (c) in any case, a sheriff of the sheriffdom in which the deceased's executor obtains confirmation.

(5) This subsection applies if at the date of death—
- (a) the deceased was not habitually resident in a particular part of Scotland, or
- (b) the particular part of Scotland in which the deceased was habitually resident is not known or is uncertain.

(6) In this section, "the deceased" means the person as a result of whose death the forfeiture arose.

15 Total relief from forfeiture rule

(1) Section 2 of the Forfeiture Act 1982 is amended as follows.

(2) In subsection (1), after "modifying" insert "or excluding".

(3) In subsection (2)—
- (a) after "modifying" insert "or excluding",

(b) after “modified” insert “or excluded”.

(4) In subsection (3), after “modifying” insert “or excluding”.

(5) In subsection (5)—

(a) after “modify” insert “or exclude”,

(b) in paragraph (a), for “(but not all)” substitute “or all”,

(c) in paragraph (b), after “in respect of” insert “all or any”.

(6) In subsection (6), after “section” insert “modifying the effect of the forfeiture rule”.

16 Time limit for applying for relief from forfeiture rule

(1) Section 2 of the Forfeiture Act 1982 is amended as follows.

(2) In subsection (3), for “period of three months beginning with his conviction” substitute “relevant period”.

(3) After subsection (3), insert—

“(3A) In subsection (3) above, the “relevant period” is the period of 6 months beginning with—

(a) the end of the period allowed for bringing an appeal against the conviction, or

(b) if such an appeal is brought, the conclusion of proceedings on the appeal.”.

17 Repeal of the Parricide Act

(1) The Parricide Act 1594 is repealed.

(2) For the avoidance of doubt, 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 other cases of unlawful killing.

Estate administration

18 Confirmation of executors: no requirement to find caution in relation to small intestate estate

(1) The Small Intestate Estates Act is amended as follows—

(a) in section 3, for “on caution being found by the applicant according to the practice of the commissary court” substitute “without requiring the applicant to find caution”,

(b) in the form of confirmation in Schedule B, the words “, and that has [or have] likewise found caution for acts and intromissions as executor [or executors]” are repealed.

(2) As well as in relation to applications under section 3 of the Small Intestate Estates Act made after this section comes into force, the amendments made by subsection (1) apply in relation to applications under that section of that Act made before this section comes into force which are not by then determined.

(3) In this section, "the Small Intestate Estates Act" means the Intestates Widows and Children (Scotland) Act 1875.

(4) In section 2 of the Confirmation of Executors (Scotland) Act 1823—

(a) after paragraph (b), insert—

"See also section 3 of the Intestates Widows and Children (Scotland) Act 1875.",

(b) for "all other cases" substitute "cases where caution is required to be found".

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

(1) In section 2 of the Confirmation of Executors (Scotland) Act 1823, in paragraph (b) after "spouse" insert "or civil partner".

(2) The Scottish Ministers may by regulations make provision modifying section 2 of the Confirmation of Executors (Scotland) Act 1823 to the effect that cases additional to those for the time being set out there are cases in which caution is not to be required to be found.

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

The Scottish Ministers may by regulations make provision to the effect that persons appointed as executors dative are not in any circumstances to be required to find caution before confirmation is granted.

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

(1) The Scottish Ministers may by regulations make provision to the effect that courts are not to appoint persons as executors dative unless particular conditions are met.

(2) Such conditions may, in particular, include—

(a) the court being satisfied that the person is suitable for appointment,

(b) the court being provided with particular information about—

(i) the person seeking appointment,

(ii) the estate in respect of which the appointment is to be made.

(3) Regulations under this section may make provision in relation to—

(a) all appointments of persons as executors dative, or

(b) appointments of persons of particular descriptions as executors dative.

(4) Regulations under this section making provision to the effect that the courts are not to appoint persons as executors dative unless satisfied that they are suitable for appointment may include provision enabling or requiring a court—

(a) to have regard to particular factors, or consider particular information, in determining whether a person is suitable for appointment,

(b) to be satisfied that a person is suitable for appointment if particular conditions are met,

(c) to impose particular conditions which must be satisfied before the court may be satisfied that a person is suitable for appointment.

(5) Regulations under this section may make different provision in relation to appointments of persons of different descriptions as executors dative.

22 Sections 19, 20 and 21: regulations

(1) This section applies in relation to regulations under section 19, 20 or 21.

(2) The regulations may include such supplementary, incidental, consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate.

(3) The regulations may modify any enactment (including, in the case of regulations under section 20, this Act).

(4) The regulations are subject to the affirmative procedure.

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

In the Trusts (Scotland) Act 1921, after section 29 insert—

"**29A Errors in distribution: circumstances in which trustee not personally liable**

(1) A trustee is not personally liable for any error in the distribution of any property, or the income of property, vested in the person as trustee if—
  (a) the error was caused by the trustee not knowing (either or both)—
    (i) of the existence, or non-existence, of a person,
    (ii) of a person's relationship, or lack of relationship, to another person, and
  (b) the distribution takes place—
    (i) in good faith and after such enquiries as any reasonable and prudent trustee would have made in the circumstances of the case, or
    (ii) in accordance with an order of the court.

(2) Subsection (1) does not affect any right which a person entitled to the property or income concerned has to recover it from another person.

(3) Subsection (2) is without prejudice to section 24 of the Succession (Scotland) Act 2016.

(4) This section applies only in relation to a distribution which takes place on or after the day on which section 23 of the Succession (Scotland) Act 2016 comes into force".

24 Protection of persons acquiring title

(1) This section applies where a person, in good faith and for value (whether by purchase or otherwise)—
  (a) acquires property which has vested, by virtue of confirmation, in an executor, and

(b) acquires title to that property directly or indirectly—

(i) from the executor, or

(ii) from a person ("A") who derived title directly from the executor.

(2) It is not a ground of challenge to the title—

(a) that the confirmation is reducible or has been reduced,

(b) that the property was distributed in accordance with a will which, by virtue of section 3, has been rectified after distribution, or

(c) where the title was acquired from A, that it should not have been transferred to A.

Other reforms

25 Gifts made in contemplation of death

(1) The customary mode of making a conditional gift in contemplation of death known as making a donation mortis causa is abolished.

(2) Subsection (1) does not prevent the making of a conditional gift other than in that customary mode.

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

Any right at common law to claim an allowance in respect of the expense of mournings from the estate of a deceased person is abolished.

27 Additional ground of jurisdiction: executor confirmed in Scotland

(1) The Civil Jurisdiction and Judgments Act 1982 is amended as follows.

(2) In rule 2 of Schedule 8, after paragraph (g) insert—

"(ga) in the person's capacity as an executor (where confirmation has been obtained in Scotland)—

(i) in the Court of Session, or

(ii) before a sheriff of the sheriffdom in which confirmation was obtained.".

General

28 Interpretation

(1) In this Act (unless the context otherwise requires)—

a reference to the "estate" of a deceased person is a reference to the whole estate belonging to the person at the time of death but does not include property passing on the person's death to another person by virtue of a special destination,

"property" includes any interest in property.

(2) In this Act, the "forfeiture rule" has the same meaning as in the Forfeiture Act 1982.

(3) In this Act, a "will" means any document of a testamentary nature and includes a reference to—

(a) a testamentary trust disposition and settlement,
(b) a codicil.

29 Consequential provision

(1) The rule of law known as the conditio si institutus sine liberis decesserit ceases to have effect.

(2) The schedule (which modifies provisions for the purposes of or in consequence of this Act) has effect.

30 Ancillary provision

(1) The Scottish Ministers may by regulations make such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision of this Act.

(2) Regulations under this section may—
(a) modify this Act or any other enactment,
(b) make different provision for different purposes.

(3) Regulations under this section—
(a) are subject to the affirmative procedure if they contain provision which adds to, or replaces or omits any part of, the text of this or any other Act,
(b) otherwise, are subject to the negative procedure.

31 Commencement

(1) Sections 18 to 22, 30 and 32, and this section, come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

(3) Regulations under subsection (2) may—
(a) make different provision for different purposes,
(b) include transitional, transitory or saving provision.

32 Short title

The short title of this Act is the Succession (Scotland) Act 2016.